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Resolving Land Sale Disputes through Legal Advocacy: A Normative Study of Judicial Reasoning in Plural Legal Systems

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Abstract

The transfer of land rights is a classic problem, but the legal basis that validates its validity remains ambiguous to date. Although Government Regulation Number 24 of 1997 concerning Land Registration emphasizes that the transfer of land rights is executed using a PPAT deed, judges sometimes have varying legal considerations when deciding the issue of the validity of the transfer of land rights. The validation of these considerations is sometimes also based on the *Burgerlijk Wetboek*, or sometimes based on Customary/Adat Law. Based on the Morality-Positivism theory, this article will explore how judges should decide a case that falls into the category of "hard cases" regarding the issue of the transfer of land rights in Indonesia, including the legal sources that are used as references. The research method in this article is the normative legal research method. Based on the Dworkin's theory (law as integrity)

and seeing positive law still with moral judgment in it (moral-positivism), judges in deciding cases can use discretion in deciding hard cases. However, in a theoretical context, judges do not have absolute discretion or absolute freedom (independence) in deciding cases. The freedom of judges is within the limits of a circle, which Ronald Dworkin called the metaphor of the hole in the doughnut. Therefore, the judge's decision must not be separated from the spirit and principles of the Basic Agrarian Law. With the Morality of Law, judges cannot decide cases with policy (inclusive positivist), but can only base their decisions on the principles to maintain coherence

Keywords

Land Sale, Judicial Reasoning, Plural Legal System

A. Introduction

Transfer of land rights ownership in Indonesia is a classic problem, but it always finds ambiguity regarding the legal source and the implementation. Nowadays, Indonesia does have regulations regarding land registration in Government Regulation Number 24 of 1997 concerning Land Registration, but this regulation does not focus specifically on the transfer of land rights. If we look at history, the issue of land rights transfer did not first occur when Law Number 5 of 1960 concerning Basic Agrarian Law was enacted, but instead began during the Dutch colonization of Indonesia. At that time, with the principle of concordance (asas konkordansi), the Dutch government enforced Dutch law in the archipelago. All types and fields of law were formally and legally regulated by Dutch positive law at that time. This is similar to Dutch colonies such as Suriname, which enforced Dutch land rights concepts such as eigendom, erpracht, and others. However, this legal force did not have many significant effects and implications in other Dutch colonies. Besides, in Indonesia, the Netherlands had colonized several countries in Africa and the Americas.[1]

[1] Roy J Geraci, *The Dutch Atlantic and American Life: Beginnings of America in Colonial New Netherland*, 2021, 25.

As time goes by, the Dutch no longer enforced the implementation of their laws in the archipelago, possibly because they realized that the indigenous people in the archipelago had their own laws that were strong and rooted in society, or possibly because Dutch legal policy had another purpose at that time. Finally, based on Article 131 IS (Indische Staatregeling (IS) in 1926, the Dutch East Indies Government at the same time also enforced customary law (Adat Law) and Dutch Civil Law by classifying the population in the archipelago into three groups. Each group has different laws, either regulated in Dutch Civil Law or their customary law.[2]

Pluralism of legal enforcement, especially in the civil law, adds to the complexity (pluralism) of legal regulation in the archipelago. Even for land, it is not only looking at the legal subject who carries out legal acts, one must also look at the legal object (type of land rights). In civil law, they are generally seen as the legal subject who carries out legal acts without considering the object, specifically related to the land; they must also look at the status of the legal object.

> The status of land did not depend on the personal status of the person who owned or occupied it. Therefore, land, as well as population-group could give rise to an interpersonal law problem. Even when the parties to a transaction involving land were from the same group, an interpersonal agrarian law problem could arise. [3]

After the Indonesian nation became independent, new land laws were enacted that separated themselves from the provisions in the Dutch Civil Code/ Burgerlij Wetboek, with the aim of legal unification[4] or the removal of pluralism in land law in Indonesia. However, the issue of

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[2] M Yazid Fathoni, "Peran Hukum Adat Sebagai Pondasi Hukum Pertanahan Nasional Dalam Menghadapi Revolusi Industri 4.0," *Refleksi Hukum: Jurnal Ilmu Hukum* 5, no. 2 (2021): 219–36, https://doi.org/10.24246/jrh.2021.v5.i2.p219-236.

[3] Sudargo Gautama, *Indonesia Business Law* (Citra Aditya Bakti, 1995). P. 34

[4] I Nyoman Putu Budiartha, "The Legal Pluralism in Law Education in Indonesia," *Journal of Advanced Research in Law and Economics* (Craiova) 11, no. 3(49) (2020): 771–74, https://doi.org/10.14505/jarle.v11.3(49).09.

legal pluralism continues[5], especially in the validation of land rights sale and purchase agreements in Indonesia. This can be seen, for example, in various basic models of judges' legal considerations in assessing the validity of a land sale and purchase agreement, both against the legal sources, between the Burgerlijk Wetboek, Customary Law, or Government Regulation Number 24 of 1997 concerning Land Registration, or based on various perceptions regarding each of these legal regulations.

This is the basis for the need for a new model of judicial decision-making that can be based on Dworkin's theory, so that the variety between one court decision and another does not have a difference in the legal sources and the legal concepts, although the possible results of the decision are different, because they are based on the facts of the trial presented. Judges do have independence and discretion in making decisions, in the sense that they cannot be intervened in formulating their decisions, but not in their legal reasoning, and the process, procedures, or ethics in making decisions,[6] their discretion will not be absolute (absolute discretion or absolute independence). So far, the decisions made seem as if judges are free to choose the legal sources and the concept of transfer of rights that they want to apply.

The research method in this study is normative legal research. The research method in this study is normative legal research. Legal materials of the study consist of primary legal sources (statutes, court decisions) or secondary legal materials (doctrinal writings, legal theories). The legal approach method uses a statutory approach by analyzing relevant statutory provisions concerning land transfer under Indonesian law. Other approaches in this study include an analytical approach and a case approach. The statutory approach is carried out by examining the Basic Agrarian Law, Government Regulation No. 24 of 1997, related to the transfer of land rights. An analytical approach, analyzing statutes and theories, and examining the consistency, regularity, and relationships between norms for the transfer of land rights. The case study approach

[5] Suci Flambonita, "The Concept of Legal Pluralism in Indonesia in the New Social Movement," *Jurnal Analisa Sosiologi* 10, no. 3 (2021), https://doi.org/DOI: https://doi.org/10.20961/jas.v10i0.45939.

[6] Hayyan ul Haq, *Transformasi Legal Positivism Dalam Pengembanan Hukum Teoritik*, (Mataram), 2024, 1–36.

presents case examples and how they should be resolved. This research also incorporates a theoretical approach using Ronald Dworkin's interpretivist framework to assess judicial reasoning in resolving the legal issues of pluralism in the transfer of land rights. In resolving the problem of pluralism in the transfer of land rights, by using related regulations, using Dworkin's theory, through the integrity of law, the underlying moral principles are sought based on the regulations (moral-positivism) and then as a reference in resolving concrete cases.

B. Transformation of Pure Legal Positivism towards Legal Positivism and Morality

Legal Positivism is often the object of criticism in the legal academic discussion today because it is considered rigid and focuses on certainty in viewing legal norms and the implementation of legal norms.[7] First, this article will elaborate on the evolutionary journey and dynamics of legal positivism[8]in the development of legal philosophy, starting from the first generation, traditional legal positivists, to the last generation of legal positivism this century. The development of the early generation is classical legal positivism as a criticism of the natural law that dominated at that time.

Positivism is inseparable from the development of philosophical theory. Theory is one of the important parts in stimulating the development of legal science. The development of legal theory is inseparable from the perspective of academics or theorists in viewing legal development. The last interesting debate at the end of this century in the field of legal theory is the theoretical debate between HLA Hart

[7] Arnaldo Bastos Santos Neto and Luana Renostro Heinen, "Positivism and Obedience in Herbert Hart," *Seqüência; Estudos Jurídicos e Políticos* (Santa Catarina) 31, no. 61 (2010): 127–127, https://doi.org/10.5007/2177-7055.2010v31n61p127.

[8] Yana Trynova et al., "Bioethics as a Trigger of Natural Law Evolution," *Revista de Gestão Social e Ambiental* (São Paulo) 17, no. 3 (2023): 1–13, https://doi.org/10.24857/rgsa.v17n3-028.

and Ronald Dworkin.[9] Dworkin criticized Hart's view, which was too focused on "rules" and ignored the role of "principles" in law.

In the classical view, from John Austin's perspective, in the early generation of positivism, the law is only an order from the government/state or sovereign authority. This classical positivist view also clearly separates law and morals. John Austin's view is later refined by H.L.A Hart (1907-1992). Hart, in his book "The Concept of Law," criticized the classical legal positivism approach.[10]

Hart introduced concepts such as the rule of recognition and primary and secondary norms. According to Hart, a legal system consists of primary rules (which regulate people's behavior) and secondary rules (which regulate the formation, change, and application of primary rules). The rule of recognition is a secondary rule that determines the criteria for the validity of law in a legal system. This rule can include moral principles.[11]

The Hart era began to accept morals as the basis for normative law. Therefore, with the Hart era, two positivist models are known: the first, inclusive positivism, and the second, exclusive positivism. In inclusive legal positivism, law can explicitly combine moral norms, while the exclusive approach tends to see law as an order from a government that is not related to Morality.

Hart is one of the figures who entered positivism with his writing "The Concept of Law" in 1961.[12] In this writing, he criticized Lon Fuller's writing, one of which criticized the matter of Morals and Law.[13]

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[9] Sergey N Kasatki, "Eliminability of 'Open Texture' of Law: Three Observations of R. Dworkin," *Legal Concept = Pravovaya Paradigma* (Volgograd) 18, no. 1 (2019), https://doi.org/10.15688/lc.jvolsu.2019.1.12.

[10] Herbert Lionel Adolphus Hart, *The Concept of Law* (oxford university press, 2012). p. 67

[11] Hayyan ul Haq, *Transformasi Legal Positivism Dalam Pengembanan Hukum Teoritik*. p. 13

[12] Jeanne L Schroeder, "His Master's Voice: H.L.A. Hart and Lacanian Discourse Theory," *Law and Critique* (Dordrecht) 18, no. 1 (2007): 117–42, https://doi.org/10.1007/s10978-006-9005-z.

[13] Mark Bennett, "Leaving the Hart-Fuller Debate and Reclaiming Fuller: Form, Agency, and Morality in Kristen Rundle's Forms Liberate," *Victoria University of Wellington Law Review* 44, no. 3/4 (2013): 461–85, https://doi.org/10.26686/vuwlr.v44i3/4.4990.

On the one hand, Fuller developed his thoughts by criticizing Hart's Positivism in 1964, with his book The Morality of Law.

Hart's thinking basically tries to criticize the predecessors of positivism. Hart introduced concepts such as primary norms, secondary norms, and the rule of recognition. Hart acknowledged that morality has a very important role in law, and morals should exist in his ideal legal system, but the relationship between morals and law is not contingent, nor is it absolute. Although ideally there is morality, Hart does not place morality as the main requirement for the validity of law. Morality is important in law, but not the main requirement in determining its validity.

Hart's perspective brings the idea of the nature of law that must be separated from morals, which is to provide clarity to the law itself. Hart likens the law used by the Nazis, because it does not conform to morals, the law used by the Nazis cannot be seen as not a law. The Nazi law has fulfilled the elements of modern law, such as the existence of a set of rules that are enacted, legislators, courts, and so on. The reality and existence of this law cannot be denied, and cannot revoke its status as the law, even though morally this is actually not right and very bad to follow.

Hart's thoughts were later criticized and updated by Ronald Dworkin (1931-2013). In Hart's thoughts, law interacts with morality, but Dworkin has the understanding that law not only interacts with morality but also has unity with morality. Dworkin, through Interpretive Theory, argues that every legal product must be implemented through a moral approach.[14] Positive law must have moral integrity. This integrity may not fully guarantee the achievement of justice, but it will guarantee the realization of moral values in a product or implementation of law, even though justice should be done at all times[15]. The importance of morality in law, Dworkin is often

[14] Dian Latifiani and Raden Muhammad Arvy Ilyasa, "The Position of Moral Values in Law," *Diponegoro Law Review* 6, no. 1 (2021): 51–61, https://doi.org/10.14710/dilrev.6.1.2021.51-61.

[15] Olusola Babatunde Adegbite, "Law Enforcement, Military Discipline, and the Notion of Military Justice: Building a Case for the Constitutional Rights of Service Personnel in Nigeria," *Journal of Indonesian Legal Studies* 4, no. 1 (2019): 21–44, https://doi.org/10.15294/jils.v4i01.28967.

considered a natural lawyer disciple, because he centralizes morals and criticizes positivism in resolving difficult cases (hard cases).[16]

Dworkin first expressed his disagreement with the legal model of Hart. This is because he considers law not only to be about rules but also includes what Dworkin calls non-rule standards. When the court decides a hard case, it will be based on moral standards and political considerations in making decisions. Every decision taken must have good coherence with the rules.

Judges in deciding a case must implement what has been determined in the legislation; they should not create a new rule that has not been regulated. This ideal in practice is sometimes difficult to implement because they sometimes face unclear, contradictory, and sometimes pluralistic laws, such as in developing countries. Nevertheless, judges still hold and refer to the legislation made by the state, like a legislature that resolves problems with the rules it has made by itself.

> "Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly. But when they do, they should act as deputy to the legislature, enacting the law that they suppose the legislature would enact if seized of the problem."[17]

Law, according to Dworkin's thinking, consists not only of rules but also of principles.[18] When the rules are implemented, in Hart's view, judges in hard cases can decide based on policy; this is different from Dworkin's view, in which, in hard cases, judges must still decide or resolve the problem based on principle. Legislators or governments have the right to make policy, but not judges. So, what is the difference

[16] Muhammad Mustafa Rashid, "King, Fuller and Dworkin on Natural Law and Hard Cases," *Journal of Economic and Social Thought* (Istanbul) 7, no. 2 (2020): 55–59, https://doi.org/10.1453/jest.v7i2.2071.

[17] Ronald Dworkin, *Taking Rights Seriously* (A&C Black, 2013). p. 112

[18] Ronald Dworkin, "The Forum of Principle," in *Readings in the Philosophy of Law* (Routledge, 2013). P. 47

between policy and principle? Policy does not require consistency, but principles require consistency

Ronald Dworkin developed his legal theory by emphasizing the importance of the relationship between law and morality. Dworkin, like natural law and modern legal positivists, rejects the idea that power alone makes people obey the law. On the one hand, the obligation of citizens to obey the legal authority can be realized as a people's moral obligation. Dworkin's legal philosophy makes the following intellectual claims regarding laws.

Dworkin's thinking about law as integrity[19]or the idea of integrity in law requires internal consistency of the rule system and certain principles in the formation of law. For example, we can say that a person can have integrity if their actions are under certain principles. We also respect someone even though we do not agree with their thoughts. These metaphors are likened by Dworkin to law. Some people may not agree with the rule of law because it is considered unfair, but in general, society will respect it because it has integrity

The integrity of the law is very dependent on the legislators and the judges. If the legislator and the judges in forming the legislation or deciding a legal case do so arbitrarily, ignoring the principles that must be followed in forming the legislation or in giving a verdict on a case, then that is where the law begins to lose its integrity and moral authority.

Dworkin emphasizes the structured scientific picture of law as integrity. Dworkin chooses integrity as the priority and goal in law, not justice. Justice, according to Dworkin, is more interpreted as the result of law that can be defended morally or what he calls morally defensible outcomes. In addition, with the existence of integrity in law, society is assumed to be equal in law, and legal integrity can raise morality in law.

C. Problems of land sale and purchase agreements and the Supreme Court's efforts to overcome pluralism in

[19] Matthieu Queloz, "The Dworkin–Williams Debate: Liberty, Conceptual Integrity, and Tragic Conflict in Politics," *Philosophy and Phenomenological Research* 109, no. 1 (2024): 3–29, https://doi.org/10.1111/phpr.13002.

validating land sale and purchase agreements in Indonesia

Land sale and purchase agreements are classic issues that often become problematic from time to time when viewed from the perspective of the regulation and consistency of court decisions. In general, a sale and purchase agreement is viewed for its validity not only from the perspective of existing law but also from the good faith of the parties. In civil law disputes with the object of "land" that have been carried out previously, court practice from 1956 to the present has shown strong protection for the position of buyers in good faith, as long as the buyer meets the formal requirements for the transfer of land rights, for example, purchasing through a PPAT[20]. So, by the buyer obtaining land rights or making a sale and purchase agreement through a PPAT, it can be concluded that the buyer has a good faith, on the condition that the buyer is indeed not aware of any legal defects in the transfer of rights.

In its development, the Supreme Court has issued several circulars to accommodate customary law sales and purchase agreements as a basis for determining buyers in good faith. The Supreme Court Circular or SEMA is basically not a statutory regulation and is not included in the hierarchy of statutory regulations as regulated in Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation. However, its existence is considered binding and has legal force.

The Supreme Court, through the agreement of the Civil Law Chamber Plenary, as stated in the Circular of the Supreme Court (SEMA) No. 7/2012. In point IX, it is formulated that:

a. Protection must be given to buyers who have good intentions, even if it is later discovered that the seller is a person who is not entitled to the object of the sale and purchase of land.
b. The original owner can only file a lawsuit for damages against the seller who is not entitled.

[20] Fima Dewi Kusmara and Jeane Neltje Saly, "PPAT Liability for Deeds That Are Null And Void Because They Do Not Meet the Legal Requirements of the Agreement Based on The Civil Code.," *Interdiciplinary Journal & Hummanity (INJURITY)* 2, no. 12 (2023), https://doi.org/10.58631/injurity.v2i12.156.

Civil Chamber Plenary in the Circular of the Supreme Court (SEMA Number 4 of 2016 changed SEMA No. 5 of 2014)

a. the sale and purchase of the land object with the procedures and valid documents as determined by the regulations, namely;
    1) Purchase of land through a public auction, or;
    2) Purchase of land before the Land Deed Making Officer (PPAT) (under the provisions of Government Regulation Number 24 of 1997), or;
    3) Purchase of customary/unregistered land carried out under customary law, namely:
        (a) Conducted in cash and publicly (before/with the knowledge of the local Village Head/Lurah)
        (b) Preceded by research on the status of the land object of the sale and purchase, the research shows that the land object of the sale and purchase belongs to the seller
    4) The purchase is made at a reasonable price
b. implementing a caution principle by examining the relationship to the object of the land, including:
    1) The seller is the person who has the right/ to the land that is the object of the sale and purchase, under the proof of ownership, or;
    2) The land/object being traded is not in confiscated status, or;
    3) For certified land, information has been obtained from the BPN and the history of the legal relationship between the land and the certificate holder.

The causes of land sale and purchase disputes vary, but there is a general tendency for the parties, especially buyers, to ignore the legal certainty aspect of land sales and purchases. Land sales and purchases in society are generally carried out only based on trust, which, in formal legal terms, is a very "fragile or weak" concept. The concept in customary law assumes that the transfer of land rights through sales and purchases can be carried out transparently and in cash.

This perception leads to a different understanding from the provisions of the Civil Code, a sale and purchase agreement does not require a delivery (levering). Registration is a new legal institution for Indonesian society that emerged after Indonesian independence. One of the benefits of land registration is to provide legal certainty to buyers.

Because of this certainty, parties with bad faith sometimes take advantage to cheat so that they can harm other parties who are legally entitled.

Land registration adopted the Overschrbvingsordonnantie (Stb.. 1834, No. 27), a colonial legal product that requires every transfer of land rights to be registered through the cadastre. This is because Dutch Civil Law distinguishes between a sale and purchase agreement and a delivery/levering agreement. A sale and purchase agreement does not immediately transfer land rights from the seller to the buyer, but the transfer must be carried out by changing the ownership name from the seller to the buyer through the cadastre. Meanwhile, the concept of customary law does not distinguish between a sale and purchase agreement and the transfer of ownership. In the concept of customary law, when a sale and purchase have been carried out publicly and in cash, then immediately, the rights to the land are transferred from the seller to the buyer.

At this context, Harsono, emphaszied that land registration adopted the Overschrbvingsordonnantie (Stb. 1834, No. 27), a colonial/Dutch legal product that requires every transfer of land rights to be registered through the cadastre. This is because Dutch Civil Law distinguishes between a sale and purchase agreement and a transfer of ownership. A sale and purchase agreement does not immediately transfer ownership from the seller to the buyer, but the transfer of rights must be carried out by changing the ownership from the seller to the buyer through the cadastre. Meanwhile, the concept of customary law does not distinguish between a sale and purchase agreement and the transfer of ownership. In the concept of customary law, when a sale and purchase have been carried out openly and in cash, then immediately, the rights to the land are transferred from the seller to the buyer.[21]

However, there is another perspective, the land registration process through the PPAT deed and its registration is not something that causes the transfer of land rights through sale and purchase. This is because the sale and purchase agreement is sometimes interpreted as a

[21] Boedi Harsono, *Hukum Agraria Indonesia "Sejarah Pembentukan Undang-Undang Pokok Agraria Isi Dan Pelaksanaannya"* (Djembatan, 2020). p. 46

land sale and purchase under Customary Law, considering that the Agrarian Law is based on Customary Law.

Government Regulation Number 24 of 1997 concerning Land Registration basically states that, according to Article 37, it does not provide any more opportunities for the transfer of land rights by non-PPAT deed; all transfers of rights should be carried out with a deed made by the PPAT. This is certainly different from Government Regulation Number 10 of 1961, which provides opportunities for the transfer of land rights through buying and selling carried out in the head of the village and authorized by the National Land Agency, and different from land acquisition for public purposes.[22]

Deeds to transfer rights, grant new rights, mortgage land, or borrow money with collateral for land rights that have not been recorded are made by an Official (PPAT) if, in an exception from the provisions in Article 22 paragraph (1) sub. A certificate from the Head of the Land Registration Office stating that the land rights do not yet have a certificate or a temporary certificate. In sub-districts outside the city where the Head of the Land Registration Office is located, the certificate from the Head of the Land Registration Office can be replaced with a statement transferring, granting, or mortgaging the rights, which is confirmed by the Village Head and a member of the Village Government. (Article 25 of Government Regulation Number 10 of 1961).

Although Government Regulation Number 24 of 1997 has been enacted, the practice of buying and selling land underhandedly or with a non-PPAT deed still occurs in society. It is interesting to show the opinions of several judges regarding the agreement to buy and sell land underhand or without using a PPAT Deed.

According to the socio-legal research by Widodo Dwi Putro in his book entitled Legal Protection for Buyers with Good Faith in Land Sale and Purchase Pluralism, the following are some of the opinions of the

[22] Iwan Permadi et al., "Resolving Disputes Arising from Land Acquisition for Public Purposes Involving Indigenous Peoples in the Nusantara Capital Region," *Journal of Law and Legal Reform* 5, no. 2 (2024): 705–48, https://doi.org/10.15294/jllr.v5i2.731.

judges in his research regarding land sale and purchase agreements by underhanded or without using a PPAT deed, as follows:[23]

1. The first opinion categorizes the buyer in an underhand sale and purchase agreement as having good intentions, if the sale and purchase of land owned but not yet registered is carried out under the provisions of customary law, namely, fulfilling the elements of real, cash, and transparent. Regarding this, some judges believe that the validity of the sale and purchase is not solely because it is carried out before the PPAT. Or, in other words, the sale and purchase through the PPAT is not a determinant of whether the sale and purchase is valid or not, but rather fulfills the formal procedure for changing the ownership. So, underhand sales and purchases are also considered valid, as long as they are carried out transparently and in cash.
2. The second opinion, basically, underhand sales and purchases must fulfill the elements of real, cash, and transparent, but these elements are still considered insufficient, so that, in order for the buyer to be protected, he must control the land after the sale and purchase.
3. The third opinion, the judge sees the law on underhand sales and purchase agreements as temporary, or transitional, and the law on future sales and purchases should no longer be through an underhand agreement but through an authorized official, namely the PPAT. Following the third opinion above,

The PPAT Deed with a land title certificate will be a historical record of a land, who owns it, how it was obtained, who the previous owner was, when it was owned, whether the land is mortgaged, its location, boundaries, and area. Therefore, its function will be more towards the sake of legal certainty. This means that from the evidence perspective, it has a perfect evidentiary value related to Civil Procedural Law. Whoever can show the evidence, then the position of the buyer or certificate holder is a better position than the land owner, as long as it is not proven otherwise. The party that denies the land certificate or land ownership has the burden of proof otherwise. The spirit of

[23] Widodo Dwi Putro et al, *Perlindungan Hukum Bagi Pembeli Yang Beritikad Baik Dalam Pluralisme Jual Beli Tanah*, 1st ed. (Van Vollen Institute-Universiteit Leiden, 2020). P. 82

customary law, with the fulfillment of the element of "transparent" in land sales, must be maintained, but "transparent" at this time, with the enactment of Government Regulation Number 24 of 1997, must be interpreted by an authorized official, in this case, before the PPAT. Therefore, in the future, the PPAT should be made or be the only institution authorized to make deeds and validate a land sale and purchase agreement.

In practice, land sale and purchases in Indonesia shows various types of implementation. Although Government Regulation Number 10 of 1961 concerning Land Registration and changed by Government Regulation Number 24 of 1997 concerning Land Registration, which replaced Government Regulation Number 10 of 1961, emphasizes that the transfer of land rights through sale and purchase must use a PPAT Deed.

However, the obligation to use the PPAT deed is perhaps due to obstacles, so it is not utilized by the parties. In various cases, land sale and purchase agreements without using PPAT deeds tried to find their legal reasoning by the court, and became *Yurisprudensi* (judge-made law), which is then followed by subsequent decisions. But actually, the decision should be aimed at achieving a framework of legal justice, legal benefit, and legal certainty as the main purposes of law.[24]

Yurisprudensi (in Indonesia) can be interpreted as the decisions of judges or courts that are final and confirmed by the Supreme Court (MA) as a cassation court, or the decisions of the MA itself that are final. For judges, although their independence has been guaranteed by the principle of judicial freedom, in fact, there are three reasons for judges to follow the decisions of other/previous judges, namely: (1) because the previous judge's decision has power (*gezag*), especially decisions made by the supreme court or the Mahkamah Agung. This is also related to the psychological side of the judge, where the judge would obey the decision of the judge who has a higher position. (2) For practical reasons, namely, if there is a judge's decision that conflicts with the decision of a higher court, then the people can file a legal suit in another

[24] Widodo Dwi Putro and Adriaan W Bedner, "Ecological Sustainability from a Legal Philosophy Perspective," *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 595–595, https://doi.org/10.15294/jils.v8i2.71127.

case; hopefully, the judges follow the legal reasoning of the previous decision[25]

The National Legal Development Agency (BPHN) formulated that a decision is said to be permanent yurisprudensi if it has at least 5 (five) main elements, namely:[26]

1. A decision on a case has a legal regulation that is not yet clear.
2. The decision is final.
3. Has been repeatedly decided with the same decision and in the same case.
4. Has a sense of justice;
5. The decision is confirmed by the Supreme Court.

Apart from its position as a source of law, by looking at the role of yurisprudensi, it can be said that yurisprudensi essentially has various functions, namely:[27]

1. With the existence of the same decisions in similar cases, the same legal standards can be enforced, in cases where the law does not regulate or has not regulated the resolution of the case
2. With the existence of the same legal standards, a sense of legal certainty can be created in society.
3. With the creation of a sense of legal certainty and equality of law for the same case, the judge's decision will be predictable and transparent.
4. With the existence of legal standards, the possibility of disparities in various decisions of different judges in the same case can be prevented. Even if there are differences in decisions between one judge and another in the same case, this should not cause too great a disparity, and the standard

If we look at various yurisprudensi, apart from Law Number 5 of 1960 and Government Regulation Number 24 of 1997, some consider that the transfer of customary land rights is a determining factor in the transfer of land rights, which is based on real, cash, and transparent,

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[25] Enrico Simanjuntak, "Peran Yurisprudensi Dalam Sistem Hukum Di Indonesia," *Jurnal Konstitusi* 16, no. 1 (2019): 83–104, https://doi.org/10.31078/jk1615.

[26] Mahkamah Agung, "Naskah Akademis Tentang Pembentukan Hukum Melalui Yurisprudensi," *Jakarta: Mahkamah Agung*, 2005.

[27] Paulus Effendie Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum* (Badan Pembinaan Hukum Nasional, Departemen Kehakiman, 2000).

even though there is no one principle, definition, scope in the yurisprudensi regarding the real, cash, and transperency (*real, tunai, dan terang*)

D. Decision Formulation based on Ronald Dworkin's Theory

Hans Kelsen was an early positivist thinker from Austria who introduced the pure theory of law by separating legal science from other sciences. In Kelsen's Theory, he argued that a legal system is a hierarchical structure, it is like a "*pyramid of norms*," where the "*Grundnorm*" is the fundamental norm[28], serving as the ultimate grounds for all legal norms. Through this hierarchical system, higher rules will validate lower rules, and so on, continuously.

Besides Kalsen, the main figure of the early positivism is John Austin, who is famous for his introduction that considers law as an order or command from a sovereign backed by the threat of sanction.[29] In his view, Austin also separates law and morals. Law will have validity not from its moral side but because it is formed by a sovereign who holds the authority. Austin did not mention morals in validating a norm, but rather focused more on authority and sanctions. Therefore, Austin's idea is better known as his teaching on law as a sanction by state authority.

Austin believed that society would obey the law because there were sanctions in it. These thoughts were expressed in his work in The Province of Jurisprudence Determined. Austin's thoughts were later widely criticized by HLA Hart, who then used the concept of the rule of recognition in validating norms. With the rule of recognition, consciously or unconsciously, there is the possibility of moral elements entering into validating norms. Therefore, Hart is often included in the inclusive positivist school of thought, which does not strictly separate morals and law. Hart's view is more flexible and admits that there is

[28] KAAN Thilakarathna and G D P Madhushan, "Revolutionary Forces and the Grundnorm: A Critical Review of the Legality and The Recognition of New Constitutional Orders," *International Journal of Social, Policy and Law* 2, no. 3 (2021): 102–8, https://doi.org/10.8888/ijospl.v2i3.54.

[29] Thomas Adams, "Coercive Law," *Oxford Journal of Legal Studies* 42, no. 2 (2022): 661–79, https://doi.org/10.1093/ojls/gqab045.

indeed interaction between morals and law, although it does not determine and is not the main requirement in the formation of legal norms.

Hayyanul Haq revealed that Ronald Dworkin and Fuller are the fourth generation of development of discourse on contemporary legal positivism, after the first generation, Jeremy Bentham and John Austin, the second generation, HLA Hart, and the third generation, Joseph Raz. Dworkin and Fuller criticized Hart's view, arguing that his ideas with a moral framework were intended to improve the positivism developed by Hart. They criticized Hart's "aims" of legal practice. His ideas did not criticize the source of the norm but emphasized the morality of its formation and the morality of its application. Dworkin and Fuller perfected the performance of positivism from the validation of norms and their implementation in society, so that it is depicted how the law should be applied. The implementation is more about how these norms are used when facing concrete cases, especially through court decisions, even for hard cases.

Related to this, in a land sale and purchase agreement, the judge in deciding the case will certainly find it a difficult case (hard case). As previously explained, the sale and purchase agreement has registration regulations in Law Number 5 of 1960 concerning Basic Agrarian Law, which are then further regulated in Government Regulation Number 24 of 1997 concerning Land Registration. Article 37 of the Government Regulation mandates that every transfer of land rights use a PPAT deed[30]for land registration.[31] On the other hand, sometimes the community cannot fulfill this provision, and chooses its own way to transfer land rights, sometimes even in a way outside the provisions of the Civil Code or with the provisions of Customary Law. The provisions in Customary Law are determined in several Circulars of the Supreme

[30] Riska Junita et al., "Critical Review of Officials Making Land Deeds Who Do Not Comply with the Procedure for Making Authentic Deeds of Land Sale and Purchase Agreements," *Journal of Law, Politic and Humanities* 4, no. 5 (2024): 1794–800, https://doi.org/10.38035/jlph.v4i5.696.

[31] Iskandar Syah et al., "Comparative Study of Land Registration Systems in Indonesia and Sweden: Review of Legal, Institutional, Procedural, and Technological Aspects," *Marcapada: Jurnal Kebijakan Pertanahan* 4, no. 2 (2025): 152–72, https://doi.org/10.31292/mj.v4i2.154.

Court, such as SEMA Number 7 of 2012, SEMA Number 5 of 2014, and SEMA Number 4 of 2016. This variety of transfer methods adds to the complexity of the pluralism of the regulation and implementation of land sale and purchase agreements in Indonesia.

Therefore, a judge's decision should not only interact with morality but also be in harmony with morality. In legal thinking, it is the embodiment of the unity of law and morality related to the operationalization in the methodology of legal thinking. Every judge's decision must be made and concluded through a moral approach. [32] Judges, when deciding on complex cases (hard cases), will be based on moral standards and political considerations (moral and political) in making decisions. Every decision taken must have good coherence with the main regulations. In the case of a land sale and purchase agreement, of course, it must be based on and coherent with Law Number 5 of 1960 and Government Regulation Number 24 of 1997.

Judges in deciding a land sale and purchase agreement case must implement the principles in Law Number 5 of 1960 and Government Regulation Number 24 of 1997; the judge's decision should not create a new rule that has actually been previously regulated or refer to other provisions that are actually no longer enforced. Judges should continue to hold and refer to the laws and regulations made by the state authority. Judges are like a legislative body; they can resolve problems with the principles, principles, and rules they make.

Law is not only made up of regulations but also of principles. When judges decide cases in hard cases, they should not decide based on policy but on principle; the law must refer to moral principles. Principles require consistency between the principles and the "*Underlying regulations*" or the foundational legal framework in making decisions. Judges should view the law as far as possible as a coherent structure. Therefore, judges must maintain coherence in law, which means that judges must interpret jurisprudence and laws in a way and with the aim of maintaining their coherence. When a judge decides a case of an agreement related to the sale and purchase of land, it should always be linked and connected to the principles in Law Number 5 of 1960 and Government Regulation Number 24 of 1997. This principle

[32] Latifiani and Ilyasa, "The Position of Moral Values in Law."

must be followed and used as a guide in deciding cases; if the coherence of principles or principles in land laws is not holding, this is where the law begins to lose its integrity and moral authority. As a result, society does not have a definite reference or guide for legal acts, nor for the legal consequences that can be predicted.

According to Hayyanul Haq[33], specifically in the context of adjudication systems, judges are required to find laws based on substantive justice; thus, we can review the judge's discretion or freedom (independence) in making decisions. The meaning of this independence applies when formulating his decision. He cannot be interfered with by anyone. But in a theoretical context, judges actually do not have absolute discretion or absolute freedom (independence) in deciding the consequences of a legal act.

Therefore, the formulation of the decision is the right and authority of the judge, but we can review, analyze, and examine the legal reasoning behind their decision. According to Dworkin, the judge in deciding the case has freedom, but the freedom is within limitations. Ronald Dworkin uses the metaphor of the hole in the doughnut; the judge is not fully bound by the law in making a decision, but does not stray completely and far from the legal principles in the legislation. This is considered important when the judge faces a difficult case (hard cases), they must use broader legal and moral principles. Through legal and moral principles, the judge can find the "right answer" by constructive interpretation. [34]

In the transfer of land rights, there are two principles, namely "*Nemo plus iuris transferre (ad alium) potest quam ipse habet*", this a a Latin legal maxim "*No one can transfer to another more rights than he has*". However, with the Basic Agrarian Law, through the principle of rectverwerking "release of rights" and good faith, for example in Article 32 of Government Regulation Number 24 of 1997, the strong principle in the transfer of national land rights is "good faith", so that the truth

[33] Hayyan ul Haq, *Transformasi Legal Positivism Dalam Pengembanan Hukum Teoritik*. P. 15

[34] Muhammad Munir, "Ronald Dworkin's Theory of Integrity, Constructive Interpretation, and the Right Answer Thesis: An Overview," *Constructive Interpretation, and the Right Answer Thesis: An Overview (May 2, 2022)*, ahead of print, 2022, https://doi.org///dx.doi.org/10.2139/ssrn.4098344.

sought by the judge is not only formal but also material truth. Thus, the judge can focus on exploring the faith of the parties in agreeing, in depth, not only referring to the formal truth presented by the parties, but also the material truth. Although in proving a civil case, there is a tendency that what is sought and realized is formal truth (formeel waarheid), meaning truth that is only based on evidence submitted to the court by the parties without having to be accompanied by the judge's conviction. The judge's belief or the judge's conviction in civil law is part of the material truth, even though it is limited, because it is still subject to formal truth (by strong and perfect evidence).

Good Faith must always be related to Law Number 5 of 1960,[35] the principle of customary law that is the basis of the UUPA. The good faith in question must be in line with the UUPA and the Circular of the Supreme Court. With these boundaries, there will no longer be a broad interpretation of verbal agreements, a broad and uncontrolled interpretation of freedom of contract, partial legal construction of the Civil Code, or an unmeasured or unlegal certainty interpretation of customary law. With the frame of the hole in the doughnut, the judge has freedoms, but these freedoms are still within a circle; the circle is limited by good faith in the principles of the UUPA and Government Regulation Number 24 of 1997.

The diversity of decisions in resolving the legal issue of the sale and purchase of land rights, for example, is evident in the Supreme Court's Decision Number 596 K/Pdt/2012. The conclusion of the Panel of Judges of the District Court is that the main issue is whether there were sale and purchase of the land object and whether the agreement made by the Plaintiff and the Defendant was valid. For the information: the land object has been registered and has a land title certificate. The agreement was made verbally. In their decision, the judge's reasoning began with the question of whether, between Lalu Sapaan and Baiq Wardah, there had been a sale and purchase agreement for the disputed object, and whether the agreement made was valid. The judge then considered evidence of a BNI 46 transfer of IDR

[35] Marina Satya, "Legal Protection of Land Right Holders Against The Establishment of The Rechtsverwerking Institution," *Jurnal Ilmu Hukum Kyadiren* 2, no. 2 (2021): 117–24, https://doi.org/10.46924/jihk.v2i2.138.

110,000,000. The panel of judges has the opinion that with the transfer of money, control of the disputed object, and taking hold of Certificate Number 579 in the name of Baiq Wardah by Lalu Sapaan, it can be used as a strong suspicion by the panel of judges that a sale and purchase agreement has been made, even though this is denied by the defendant. The judge uses the concept of levering (as in the Civil Code) because he considered that there was a transfer of the Ownership Certificate.

If we refer to Dworkin's theory, when a judge decides on a land sale and purchase agreement, the judge admittedly has discretion. But by the metaphor of the hole in the doughnut, the judge is not completely bound by the law in making a decision, but does not stray completely and far from the legal principles in the legislation. Judges cannot decide outside the provisions of the legislation (positivism). However, when facing a hard case, judges seek the moral principles (morality) of legislation.

The Indonesian Basic Agrarian Law is formed by the principles of customary law (Article 5), but on the other hand, it requires land registration (Article 19) in its transfer through a PPAT deed (principle of certainty on PP Number 24 of 1997). In the land case above, the land has been registered, which means not only following the principles of customary law (real, cash, and transparent), but also the principle of certainty for immovable land (Article 19 BAL and PP Number 24 of 1997). If the land is registered, it must follow the pattern of transfer of land rights registered through PPAT (principle of good faith, transparency, and legal certainty).

The facts of the case above are hard to connect to the principles in the Basic Agrarian Law to assess the validity of the transfer of land rights, both with the principles in customary law (real, cash, and transparent), especially since the land has been registered (principle of good faith, transparency, and legal certainty). Therefore, based on this, there has been no transfer of land rights, the agreement made is obligatory (only imposes rights and obligations), and has not transferred ownership. Even if the facts are true, the injured party can only sue for compensation, but land ownership must be considered as not having transferred from the first party.

From the beginning of the history of land regulation, for example, starting from the Civil Code, Customary Law, to the Basic Agrarian

Law, land has always been considered a very different object (not like a movable thing), so, its regulations are more specialized and explicitly characterized. The Indonesian Land Law (basic Agrarian Law or Government regulation Number 24 of 1997) seems general and abstract for the sale and purchase of land ownership. To provide better legal justice and legal certainty regarding the norm and its implementation, it is necessary to reform the regulations regarding the transfer of land rights, to provide greater legal certainty. This regulatory reform aims to improve judicial guidelines for the courts in assessing the validity of the transfer of land rights.

E. Conclusion

Indonesia has legal pluralism and the lack of uniformity in validating land sale and purchase agreements. However, when a judge decides on a land sale and purchase agreement, by Dworkin's theory, the judge has discretion. But by the metaphor of the hole in the doughnut, the judge is not fully bound by the law in making a decision, but does not stray completely and far from the legal principles in the legislation. Judges cannot decide outside the provisions of the legislation (positivism). When facing a hard case, judges seek the moral principles (morality) of legislation. The Indonesian Basic Agrarian Law is formed by the principles of customary law (Article 5), but on the other hand, it requires land registration (Article 19) in its transfer through a PPAT deed (principle of certainty on PP Number 24 of 1997). Based on these principles, when a transfer of land rights occurs, it must be distinguished whether the land is registered or not registered. If the land is unregistered, the validity of the agreement must be assessed using the principles of good faith in customary law (real, cash, and transparent). However, if the land is registered, it must follow the pattern of transfer of land rights registered through PPAT (principle of good faith, transparency, and legal certainty). To provide better legal justice and legal certainty regarding the norm and implementation, it is necessary to reform the regulations regarding the transfer of land rights. This regulatory reform aims to improve judicial guidelines for the courts in assessing the validity of the transfer of land rights.

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