
Actio Communi Dividundo

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Abstract

The research article titled "Actio Communi Dividundo" delves into the intricate legal dynamics surrounding the sale-purchase of immovable property, particularly concerning land rights. In the event that the buyer is bound by marriage relationship, the rights to the land are the so-called joint rights (gono-gini) of a pair of husband/wife. However, regarding to the registration of their rights, PPAT generally does not register both husband and wife as the holders of the right or is registered only on the name of one holder of the right, without having to obtain consent from the other right holder. As a result, not all the name of the right holders is registered as the right holders. This situation is certainly detrimental to the party whose her name is not registered as the holder of the right, especially in the event of a divorce and the party who his name is registered are not willing to voluntarily share such joint property. This paper aims to show whether the practice of joint land (gono-gini) registration only on the name of one party without consent of the other party has been pursuant or instead contravene to legal principles. The method has been used is normative legal research, and it was found that the practice of registering joint land only on the name of one right holder without any consent of the other right holder is contrary to the principle that every legal act regarding to joint property must obtain the consent from the entire rights holders; a principle which historically based upon the Roman civil law tradition as contained in the *Corpus Iuris Civilis* and its transformation into *Actio Communi Dividundo*.

Keywords: Co-Ownership, Joint Rights, Registration of Joint Land.

I. INTRODUCTION

The concept of land registration holds a pivotal role in establishing legal certainty within property rights Marzuki, Peter Mahmud, (2009). This assertion stems from the notion that the pursuit of certainty inherently assumes the existence of a subject possessing the right to a particular entity, such as land. Therefore, the central premise behind land registration is to affirm the legal subject as the rightful holder of the subject matter, fostering a sense of unequivocal legitimacy.

The misunderstanding that often occurs, if not always and is still being practiced today, is joint land registration (gono-gini) in which the acquisition of rights is carried out through a sale-purchase legal relationship. Public officials authorized to make Sale and Purchase Deeds (AJB) in this case the Land Deed Making Officer (PPAT), namely in the context of land registration, generally apply that it is sufficient to register the acquisition of joint land (gono-gini) only in the name of one of the rights holders, generally the husband, who acts as the purchaser from the start – without the need for permission (spous letter) from the other party (the wife), and that only in the case of transferring land rights, for example selling, the consent of both husband and wife is required. As a consequence, land which is actually a joint property (gono-gini) is ultimately not registered in the names of all rights holders.

It is not clear what legal reasons underlie this practice because this is clearly contrary to the principle that legal actions against joint property must obtain the consent of all parties, as well as contradicting the

idea of legal certainty which is precisely what the legal institution for land registration wants to achieve. This practice actually or potentially harms those whose names are not registered as co-ownership holders, especially when their marriage is declared broken up due to divorce and the party whose name is registered refuses to voluntarily share the assets (land). together.

For example, A (husband) during his marriage to B (wife) bought a piece of land in his own name by way of credit. Before the credit is paid off, the marriage between A and B is declared broken due to divorce. After the installments are paid off, the name of the certificate must be returned. The legal question that arises is whether from the buyer's side, only name A has the right to be registered? or include B? Practice shows that only name A is registered as the new owner, while name B is not registered, especially for reasons of privity of contract, and that B can claim his rights through adjudication (lawsuit) to court, for example a lawsuit for the division of joint property (gono-gini).

This research delves into the intricacies of the aforementioned legal practice, chiefly advocating against it. The primary argument rests on the assertion that the right to gono-gini land constitutes a human right, encompassing legal actions beyond mere land rights transfer. Furthermore, the process of acquiring gono-gini land adheres to established legal mechanisms and principles that unequivocally mandate the registration of all rights holders. The profound function of land certificates as irrefutable evidence of rights and the consequential implications for the burden of proof and litigation risk underscore the urgency of this discourse. Finally, the tenets of legal principles and norms encapsulated within the doctrine of "Actio Communi Dividundo" further bolster this research's stance against the aforementioned practice.

In essence, this exploration delves into the complex interplay between land registration, co-ownership, legal rights, and the principles that guide them, endeavoring to illuminate the multifaceted challenges and implications arising from the current practice of joint land registration.

II. METHOD

The research methodology employed in this study is primarily grounded in legal research, chosen due to the absence of explicit legal provisions governing joint land registration (gono-gini) within the realm of land registration regulations. Specifically, the laws and regulations pertinent to this subject matter lack a definitive mandate that necessitates the involvement of both husband and wife as joint land rights holders in the registration process. This is particularly relevant in cases where the joint land rights are acquired through the legal framework of sale and purchase, undertaken by either the husband or the wife.

To comprehensively address the complexities of the research question, a range of analytical approaches have been adopted, namely:

1. **Conceptual Approach:** This approach delves into the foundational conceptual framework underlying joint land registration, scrutinizing its inherent principles and the inherent rights of the parties involved.
2. **Statute Approach:** By meticulously examining relevant statutes, the study investigates whether there are any specific provisions explicitly mandating or exempting the requirement for joint land registration, especially in cases of sale and purchase transactions conducted by one party.
3. **Case Approach:** Through the examination of pertinent legal cases, the research discerns any established precedents or judicial interpretations that could shed light on the matter of joint land registration and its implications.
4. **Historical Approach:** Investigating historical legal developments, particularly within the context of land registration, aids in understanding how the practice of joint land registration has evolved and whether it aligns with historical legal principles.

Incorporating a meticulous selection of legal materials, both primary and secondary, this research seeks to methodically analyze and synthesize these resources. The analysis is rooted in the normative framework, which characterizes legal research. The methodological process involves coherent and

systematic processing of these materials, culminating in a comprehensive analysis. This analysis, framed within legal norms, guides the study's conclusions and assertions. The amalgamation of these diverse analytical approaches facilitates a holistic exploration of the complex interplay between joint land registration practices, legal statutes, historical underpinnings, and relevant case law. Ultimately, this methodological approach endeavors to provide a well-rounded understanding of the intricate dynamics surrounding the joint land registration process and its alignment with legal principles.

III. RESULTS AND DISCUSSION

3.1 Land Rights As (HAM)

The PPAT's obligation to register all holders of land rights on gono-gini is basically an obligation derived from the obligation to respect the right of property Locke, John, (1698). as natural rights. The right to joint land including in marriage (gono-gini) is a constitutional right of every citizen that must be respected and protected. The provisions of Article 28H paragraph (4) of the 1945 Constitution state: "Every person has the right to have private property rights and these property rights may not be taken over arbitrarily by anyone" Wignyosoebroto, Soetandyo, (2014). Everyone's right to property is a right that must be respected and protected. The provisions of Article 28 G paragraph (1) of the 1945 Constitution states: "Every person has the right to protection of himself/herself, family, honor, dignity and property under his control, and has the right to feel safe and protected from threats of fear to do or not do something." something that is a human right."

The assertion that the right to joint property in marriage (gono-gini) as a right to property is nothing but a natural right or original right has also been further affirmed by the Constitutional Court through its decision Number 64/PUU-X/2012 dated 28 February 2013 which states that: "...the right to property which is joint property during marriage is an asset that must be protected and may not be taken arbitrarily by anyone."

Based on the idea of the right to property (land) as a natural right or original right mentioned above, as well as its transformation as a constitutional right of citizens as regulated both in Article 28 H paragraph 4, Article 28 G paragraph (1) of the 1945 Constitution and the affirmation by the Constitutional Court above, the state through the land registration legal institution is obliged to respect these rights, namely by registering all right-holders in the event that the object of the rights to be registered is common land including based on mutual titles, namely as a legal consequence of marriage.

In the field of land registration, the existence of rights to property as a natural right causes erroneous legal statements intended to say that the state, in this case the government through public institutions authorized to carry out land registration, is the entity granting the rights, but only in the context of recognizing, respecting, and protecting rights (to land) that already exist, namely as Human Rights (HAM). The non-registration of a person's name as a subject with rights over land thus does not reduce or even negate their rights. Once again, the issue of land registration is a matter of legal certainty.

3.2 Accepting the Transfer of Rights as a Legal Action

As with transferring land rights, for example selling, receiving the transfer of land rights based on the title of sale and purchase is a legal act Isnaeni, H. Moch., (2015). Legal action is any action that is regulated and that creates a relationship and legal consequences The legal stipulation that buying and selling takes place through two stages, namely the agreement stage and the stage of transferring (leveraging) land rights as the object of the agreement is a key reason that accepting the transfer of land rights, for example through the mechanism of transferring the name of a land certificate, is an act Formally (not essentially), this legal action actually determines the aspect of legal certainty regarding the transfer of rights over land that has been traded, even though the mechanism for transferring rights according to BW and Customary Law differ from one another.

Once again, the legal act of land registration is thus subject to the principle that the state through the institution authorized to carry out land registration is not the entity granting the rights, but only registers existing rights. Whereas in certain situations the state is given the authority to determine the granting of land rights, however this is only a derivative. Land rights are part of property rights as part of original rights or

natural rights, so that they are part of human rights. The legal institution for land registration is in fact an instrument of the state to respect the right of every citizen to property as part of human rights. Therefore, insofar as based on certain legal titles a person is declared by law as the holder of land rights, then in the context of land registration, the state is obliged to register every person legally entitled to land.

Likewise, in the event that the holder of ownership rights to land turns out to be more than one person or joint ownership rights (co-ownership) including joint ownership rights based on different titles. Shared land ownership rights based on gono-gini titles are not free property rights (*vrije mede eigendom*), but bonded property rights Prawirohamidjojo, R. Soetojo, (2008). As a legal act, the registration of gono-gini land cannot be carried out only by one of the right-holders, but by all right-holders. Therefore the state is obliged to register the rights to this joint land in the names of all rights holders, in this case the husband and wife and/or ex-husband and wife. The legal principle is "all rights holders must be registered". Presumably this principle has been transformed into Article 36 paragraph (1) of Law no. 1 of 1974 concerning Marriage which states: "Legal actions against joint property are carried out based on the agreement of both parties."

Provisions of Article 36 paragraph (1) of Law no. 1 of 1974 thus at the same time excludes the application of the privity of contract principle in contract law. So even though the purchase of land was initially made only by and on behalf of one party, for example the husband, the registration of the rights must not only include the name of the husband or ex-husband, but must also include the name of the wife or ex-wife. Likewise, in the event that a marriage is declared dissolved due to divorce before registration is carried out, the joint land registration must include the name of the ex-wife as one of the holders of land rights, unless the party whose name does not wish to be registered gives consent to the other party to register land on his own behalf. together.

One thing that was also stated regarding the legal act of accepting the transfer of ownership rights to joint land through the legal relationship of a sale and purchase agreement was regarding the time of transfer of property rights. Jurisprudence dictates differently on this matter. On the one hand, there is jurisprudence which states that the transfer of ownership rights to land only occurs after registration with the competent authority, but on the other hand, there is also jurisprudence which states that the transfer of ownership rights to land has occurred at the time the sale and purchase agreement was made. However, since the enactment of the UUPA, the opinion stating that the transfer of ownership rights to land only occurs after registration is carried out by an authorized official, however, is no longer relevant to be used as a reference regarding the transfer of ownership rights to land. It is said that because the transfer of property rights based on the UUPA is a transfer of property rights based on customary law, based on which the transfer of ownership rights to land has occurred at the time the sale and purchase agreement was closed. This is in line with the nature and character of customary law, namely cash and light. As long as these two conditions have been met, the ownership right to the land has been transferred from the seller to the buyer.

As a legal action, the legal consequence that those whose names are registered are acknowledged, respected and protected as holders of land rights *contrario* also means that those whose names are not registered are not recognized, respected and protected as holders of land rights. Such legal consequences are only just if the registration of common land rights must be registered in the name of all holders of land rights without exception. Registration of land rights through buying and selling which at the time of the sale and purchase is carried out by one husband/wife pair, the registration of the rights must be done on behalf of all husbands and wives or ex-husbands and wives, even though one husband/wife is not a party to the contract/sales agreement. So including when receiving the transfer of land rights from the seller, this acceptance must have been made by the husband and wife because the legal status of the object of sale and purchase is arbitrary. The notion that understands that the registration of arbitrary land purchased by one of the parties from the husband/wife pair can only be registered on behalf of the husband/wife who has previously acted as a party to the sale-purchase agreement is a view that understands that the only legal relationship between people and land is a legal relationship born out of an agreement, a wrong view because in the context of contract law, a contract or agreement is one of the causes of an agreement, apart from the law. So the legal basis for land registration gono-gini is not only based on the legal consequences of the contract in the narrow sense, but also in the broad sense. The existence of Article 36 paragraph (1) of Law no. 1 of 1974 causes husband/wife couples to be imperatively bound to register joint land also in the common

name, as a legal action. And given that the context for the registration of rights is the registration of new rights holders, from the buyer's point of view, the party receiving the transfer of rights must be carried out by all married couples, or in the case of a divorce, by the former husband and wife partners.

3.3 Acquisition of Joint Property Takes Place "By Law"

The right to joint property is a right obtained "by law" based on the Law (Wet). As long as the husband/wife obtains property during the marriage where there is no marriage agreement, then based on the provisions of Article 35 paragraph (1) of Law no. 1 of 1974, the legal status of these assets is joint property (gono-gini). Yusril Ihza Mahendra said that the right to own assets based on the provisions of Article 35 paragraph (1) of Law No. 1 of 1974 is "pseudo-owned". The author disagrees with this identification because the term "false property rights" refers to rights that are not real (fictional), or as if they still require other conditions so that these rights can truly be called legal rights in general. The law does recognize and accept fiction as a legal concept or construction, for example a legal entity, but the "legal sense" of the word "fiction" nevertheless feels that it distances the rightful party from realizing their rights. The right to joint property is a right obtained "by law" so that the legal status is the same as rights in general, a legal right that must be realized concretely.

Provisions of Article 35 paragraph (1) of Law no. 1 of 1974 is the title of the rights that underlie a person's ownership of joint property, including common land, and the ownership of this right is ownership that takes place by law (*ipso iure*) or by the law itself. In the event that the property is land, the PPAT as the general official making the land deed must respect and protect this right by registering all holders of land rights, especially to guarantee that the land to be registered is land with common rights of all holders, or that no party has the right to become unregistered.

Registration of joint land only by one of the holders of land rights is only possible if a clear permit or approval has been obtained from those rights holders whose names do not wish to be registered as one of the rights holders, although this is not recommended because it reduces legal certainty for those whose names are not registered as rights holders. Therefore, from the purchaser's side, the preparation of the Sale and Purchase Deed (AJB) must involve and register all holders of common land rights (gono-gini), and in the case of gono-gini land not being registered by all rights holders, obtaining permission or approval from the party whose name will not be registered is imperative and even absolute (*conditio sine qua non*).

In fact, the only legal meaning of the statement that "acquisition of joint property takes place by law based on the provisions of Article 36 paragraph (1) of Law No. 1 of 1974" is that the acquisition does not require court intervention. In this sense, the court's involvement in the audit process can be understood only for the benefit of "due process of law" which does not determine an object as a common object. Consistent with Article 36 paragraph (1) of Law no. 1 of 1974 mentioned above, the determination of an object as joint property or not has been determined clearly and unequivocally by the provisions of the legislation mentioned above, that is, insofar as it is acquired during a marriage—in which there is no marriage agreement—by law it becomes joint property. Other matters in the court adjudication process are merely matters of proof.

3.4 Gono-Gini Land Registration Mechanism According to Legislation

The principle that all holders of joint land rights must be registered can also be seen from the provisions of laws and regulations, both in the field of marriage and in the field of land registration, more specifically those related to the duties and responsibilities of the PPAT in making a Sale and Purchase Deed (AJB). Article 36 paragraph (1) Law no. 1 of 1974 states: "Regarding joint property, husband or wife can act with the agreement of both parties." Legal actions are actions that are regulated and/or have legal consequences. Based on this provision, including as a legal action is a legal action to accept the transfer of land rights, not just an act of transferring land rights, for example selling, granting, charging as collateral, inbreng, renting, lending, etc. It is said so because the act or deed of accepting the transfer of land rights is an act that is regulated and/or has legal consequences.

The legal consequences of legal actions in accepting the transfer of land rights are legal consequences determined by one of the most basic elements of rights, namely the subject of rights. The legal facts regarding who is the subject of the right who receives the transfer of rights in the legal relationship of buying and

selling land will determine who is the subject of the right who has the right to the land that has been purchased, and in the context of land registration it also determines who is the subject of the right whose name must be registered as the holder of the rights to the land that has been purchased. However, law as a system requires that the principle of privity of contract in contract law must be seen as a whole in relation to the law as a whole, including in its form as legislation, in case of law.

The legal norms contained in Article 36 paragraph (1) of Law no. 1 of 1974 is an order that every legal action on joint property must be carried out with the consent of all right-holders, or a contrario prohibits any legal action on joint property if it is only carried out by one of the right-holders without the consent of the other right-holders. In line with the provisions of Article 36 paragraph (1) of Law no. 1 of 1974 concerning Marriage mentioned above, the laws and regulations in the field of land registration also adhere to the principle that for jointly owned land, those who must be registered are all holders of joint land rights, or if the joint land is to be registered only in the name of one of the holders rights, not in the name of all right-holders, the registration mechanism must obtain approval from other right-holders. Similarly, legal actions accept the transfer of rights to joint land, this legal action must obtain the approval of all holders of land rights to be registered. This can be seen from several statutory provisions as follows:

Article 39 paragraph (1) letter g PP No. 24 of 1997 states: "PPAT refuses to make a deed if other conditions are not met or the prohibitions specified in the relevant laws and regulations are violated." Based on this provision, the PPAT in making the Deed of Sale and Purchase (AJB) in the context of land registration must pay attention to the provisions of laws and regulations including Article 36 paragraph (1) of Law No. 1 of 1974 which requires that legal actions against joint property must be carried out with the consent of all right-holders or prohibit legal actions against joint property from being carried out without the consent of all holders of joint land rights. Given the legal norms contained in Article 36 paragraph (1) of Law no. 1 of 1974 stipulates that, as a legal action, including accepting the transfer of land rights, all husbands and wives who hold joint land rights who wish to register must do so.

Likewise Article 104 paragraph (1) of the Minister of Agrarian Affairs/Head of BPN No. 3 of 1997 states: "For the registration of the transfer of rights to land or ownership rights to an apartment unit due to the transfer of rights as evidenced by a PPAT deed, there is no need for other documents than those referred to in Article 103 paragraph (1) or paragraph (2), unless this is required by a government regulation or higher regulation." Based on this provision, the PPAT is obliged to pay attention to higher laws and regulations, including in this case the provisions of Article 36 paragraph (1) of Law no. 1 of 1974 which clearly requires that registration of joint assets must be carried out by all right-holders, including all right-holders who receive the transfer of rights.

To guarantee that all holders of common land rights are registered as rights holders, the PPAT is obliged to seriously identify that the object of sale and purchase (land) to be registered is shared land (*gono-gini*). Guidelines for filling out the Sale and Purchase Deed (AJB) as stipulated in Part I (General) Appendix 16 of the Minister of Agrarian Affairs/Head of BPN No. 3 of 1997 states: "Although according to Article 31 paragraph (2) Law No. 1/1974 concerning Marriage, each party, both husband and wife, has the right (capable) to take legal action, but PPAT should pay close attention if the object of sale and purchase is property of the husband and wife. According to the provisions in Article 36 paragraph (1) of the Law, each husband or wife has the right to sign it, but requires mutual approval. This approval can be given in writing and attached to the deed kept by the PPAT or orally by facing the PPAT."

For the same purpose, namely to guarantee that all holders of joint land rights must be registered, the PPAT before making the Deed of Sale and Purchase is not enough just to match the data contained in the certificate with the lists in the Land Office," but also to take actions other actions required for this purpose. The elucidation of Article 39 paragraph (1) PP No. 24 of 1997 states: "...The PPAT deed must be drawn up in such a way that it can be used as a strong basis for registration of the transfer of rights and the encumbrance of the rights concerned. Therefore, the PPAT is responsible for examining the requirements for the validity of the legal action in question, by, among other things, matching the data contained in the certificate with the lists in the Land Office." The words "among other things" in the explanation of the above provisions clearly implies the notion that in order to guarantee that all holders of joint land rights (*gono-*

gini) must be registered, the PPAT is therefore not sufficient simply to match the data contained in the certificate with the lists in the Land Office in question. PPAT.

More specifically, the affirmation that the act of matching the data contained in the certificate with the lists in the land office is an action that is not sufficient to guarantee all rights holders whose names are registered in the certificate can be seen from the Circular Letter (SE) of the State Minister for Agrarian Affairs/Head BPN No: 640-1198 dated 1 April 1999 concerning Submission of Regulation of the State Minister for Agrarian Affairs/Head of BPN No: 4 of 1999 concerning Implementation Regulations of PP 37 of 1998 concerning Regulations for PPAT Positions. Number 4 of this Circular Letter that has been sent to PPATs throughout Indonesia states: "Regarding the clarity of legal action aspects in the PPAT deed, considering that the PPAT deed will be used as authentic evidence regarding legal actions resulting in changes to land registration juridical data, the PPAT is responsible on the clarity of the legal action, namely: (a) regarding the truth of the incident contained in the deed (for example regarding the type of legal action intended by the parties, regarding the payment made in buying and selling, and so on), (b) regarding the object legal actions, both physical data and juridical data, (c) Regarding the identity of the appearers who are the parties to the legal action. In the event that the PPAT does not know personally about these matters, he can seek testimony from witnesses required in making deed as stipulated in Article 18 paragraph (3)." So the PPAT before making the Deed of Sale and Purchase (AJB) in the context of land registration is obliged to know the material truth of the right object in this case the land to be registered.

In fact, it is regulated that the receipt of a certificate from the competent institution to the holder of joint land rights must obtain the approval of all right-holders in the event that the receipt of the certificate is not carried out by all right-holders. Article 31 paragraph (4) PP No. 24 of 1997 states: "Regarding land rights or ownership rights to flats owned jointly by several people or legal entities, a certificate is issued, which is received by one of the joint right holders upon a written appointment by other joint right holders. Although the elucidation of this article states that "In the case of land rights and ownership rights on flats belonging to a man who is married or a woman who is married, a written appointment letter is not required", this explanation only concerns the receipt of land certificates, the substance of which must contain the names of all right holders. on aquo land.

Some of the provisions of the laws and regulations mentioned above clearly indicate that the making of a Sale and Purchase Deed (AJB) by PPAT in the framework of taah registration may not only be based on formal truth, but must be based on all material truth. PPAT's neglect of these provisions however is a violation of the law along with all the legal consequences. Article 62 PP No. 24 of 1997 states: "PPATs who in carrying out their duties ignore the provisions as referred to in Article 38, Article 39 and Article 40 as well as the provisions and instructions given by the Minister or appointed Officer are subject to administrative action in the form of a written warning until dismissal from his position as PPAT , without reducing the possibility of being sued for compensation by the parties who suffer losses resulting from the neglect of these provisions."

Determining whether the PPAT has followed the rules of the game, as well as determining whether or not there has been a legal violation committed by the PPAT does not necessarily require the existence of an explicit legal provision, for example stipulating that the PPAT must or is obliged to present and/or include the names of all rights holders. on land/houses going around, because only formalists mistakenly follow the view that: "what is not prohibited (explicitly) means it is permissible". Chaotic and various religious conflicts, among and especially the contributions of the formalist PPAT.

3.5 Certificate as Proof of Land Rights

The legal practice of not registering all holders of common land rights is a legal practice that radically contradicts the function of land certificates as proof of rights in the event that the registration is carried out only in the name of one of the rights holders. The statement that the land purchased during the marriage is joint land/gono-gini for the husband and wife is clearly contradictory to the statement of the formalists who state that the holders of land rights are those whose names are stated in the certificate.

The guarantee of legal certainty regarding land rights is a guarantee of legal certainty through the mechanism of land registration as evidenced by the issuance of land certificates to whom the legal subject

whose name is registered as the holder of land rights. Acontrario, this also means that a legal subject whose name is not registered as a right holder, and therefore his name is not listed in the land certificate, legally cannot be recognized as a legal subject who also has rights over land.

The legal status of a land certificate as an authentic deed which formally has perfect evidentiary power thereby increasingly provides perfect legitimacy to legal subjects whose names are listed on the land certificate, namely that those whose names are listed in the certificate are the sole holders of rights to a parcel of land. On the other hand, other rights holders whose names are not listed in the certificate are more perfect to be legitimized as non-right holders.

The provisions of Article 128 BW indeed state that joint property is still joint property regardless of being registered in the name of anyone the aquo joint property. However, this provision is not sufficient to negate the existence of a radical contradiction between the concept of joint property (gono-gini) and the function of land certificates as proof of land rights. The statement that a land is shared land regardless of being registered in the name of whoever the land is however radically contradicts the statement that a land certificate is authentic juridical evidence which only recognizes as the holder of rights only those whose names are listed in the land certificate concerned.

Even though legal subjects or parties whose names are not listed in the land certificate through an adjudication mechanism have the right to prove that a certificate is not valid, such is the case with Supreme Court Decision No. 327 K/Sip/1976 dated 2-11-1976, but the latter rights clearly do not reduce the legal status of land certificates as proof of rights only for those whose names are listed in the certificate. Such practice only creates a burden of proof that should not be borne by those whose names are not included in the certificate because the registration of mixed-occupied land must be registered from the start in the name of all holders of mixed-race land rights.

3.6 Burden of Proof of Rights and Adjudication Risk

The formalist argument that a party whose name is not registered can fight for their rights through an adjudication mechanism (lawsuit) is an "irresponsible" simplification to justify "correct" legal practices which actually triggers agrarian conflicts. Lawsuits or "claims" are clearly not evidence of land rights, and what is certain to happen is "transfer of adjudication inefficiency risks" for those whose names are not registered; "This is clearly unfair in terms of the whole mechanism regarding the realization of rights".

The existence of a division of material and formal law shows that the law does not only consist of language statements about rights, but also about the realization of rights, namely that those who are declared entitled by law are also guaranteed to be able to enjoy these legal rights concretely. For those who are entitled to land but whose names are not registered as rights holders, then in order to realize this right, he must prove that he is one of the rights holders. And for this purpose, he must file a lawsuit in court, especially if those whose names have been registered as rights holders are not willing to voluntarily divide the assets.

Legal practices that since registration do not register all the names of holders of land rights are practices that place a burden on those whose names are not registered as rights holders to claim or prove rights. This is of course unfair especially because it transfers the risk of inefficiency to those whose names are not registered. However, as Posner once said, justice is not without cost (Posner, Richard A., 1959). Sharing various kinds of costs must be incurred for the benefit of demanding rights that should have been right from the start—or can be enjoyed directly. These costs are generally not costs that are granted by the court to be converted as losses that must be replaced, for example on the grounds that litigation with the assistance of a lawyer is not an obligation, but a right. Presumably for these reasons the laws and regulations in the field of land registration stipulate that the PPAT in carrying out its duties is prohibited from triggering "land conflicts".

Furthermore, proving rights in the adjudication process requires valid evidence, especially certificates along with land warkah which are the object of dispute in court. For those whose names are not registered, it is certain that obtaining these pieces of evidence will not always be easy or even very difficult. As a party in the buying and selling process and not as a party to the sale and purchase agreement, the certificates and/or documents of evidence related to the sale and purchase are generally only controlled by those who are parties to the sale and purchase agreement, so asking these parties is certainly impossible.

Likewise, requesting it from the institution where the object of land rights is registered, for example through a mechanism for requesting public information from the Head of the Land Office, is of course very difficult, if not nearly impossible. It is said so because based on laws and regulations in the field of public information in the scope of land, certificates and land warkah is information that is determined as exempt information, namely because it contains personal information from those whose names have been registered as holders of rights over land rights. land. This is clearly a legal mess caused by the breathing interpretation of power, not service.

Moreover, even if the evidence, especially certificates and land warkahs, are successfully obtained, the lawsuit that has been filed with the court is of course not necessarily successful. There are thousands of "non-legal" reasons that cause lawsuits to be rejected or at least declared unacceptable by the Court. Not to mention the risk of protracted adjudication process until the decision has permanent legal force. In short, a lawsuit is not a means of proof of rights, but a legal remedy that departs from the premise that those who file a lawsuit are those who claim to have a right, and that they are always considered ineligible before they are able to prove otherwise. The principle that whoever postulates a right is also obliged to prove the right postulated, however, confirms this. Therefore, the argument stating that approval is only required in the case of a transfer of rights for all rights holders is an argument which from the outset is contrary to the principle that all rights holders must be registered.

Implicitly, the statement that the holder of joint land rights (*gono-gini*) has the right to prove his rights through a formal adjudication mechanism (claim mechanism) actually emphasizes that as long as he has not succeeded in proving his rights, the law views this legal subject as having no rights. A certificate is a state administrative decision whose validity is protected primarily by the principle (actually a policy) of *rechtmatigheid*, namely that it must be deemed valid or correct before being proven otherwise.

3.7 *Actio Communi Dividundo*

Faced with the legal practice of joint land registration (*gono-gini*) which allows the non-registration of all names of holders of joint land rights, the settlement of this problem, especially in the adjudication process, must be returned to the relevant legal principles and concepts, and that legal principles are not must wait for its transformation into a legal regulation or can be implemented directly (directly implemented). Courts are the last line of defense to rectify legal practices that are clearly very formalistic and violate the law.

The principle that common land must be registered in the name of all right-holders is very closely related to the right of joint-land title holders (*gono-gini*) to separate themselves from joint land ownership. In the history of his thought, the right to separate himself from common ownership is based on the paradigm of Roman Civil Law as contained in the *Corpus Iuris Civilis*, namely in its transformation into a doctrine called *Actio Communi Dividundo*, a doctrine with a concept that departs from the principle (*beginsel*) that property together: "in *communione vel societatem nemo compellitur invitus deteneri*"—No one is to be compelled to remain as co-owner or partner against his will" MacCormack, Geoffrey, (1994). our positive civil law today, for example Article 1066 of the Civil Code.

Based on this principle, "none of those who are also entitled to joint property may be forced to let the joint property remain in an undivided state against his will". The "core" norm contained in the principle of value requirements whose fundamental-monumental truths have certainly been deeply contemplated and tested over the long history of the nation is thus: "Everyone is obliged to seriously respect the values that underlie the institution. marriage law and all its legal consequences.

In Scotland, the adoption of the *Actio Communi Dividundo* doctrine can be seen in the case of *Brock v Hamilton*. In this bankruptcy case, one of the two landowners located in Glasgow wanted a share of the common land. Unfortunately, according to Scottish law, as argued by the party to whom the demand for distribution is directed, the right to request distribution is only possible for movable property, not for immovable property, so it does not include land that cannot be physically divided. This argument was rejected by judge Rutherford by stating: "...the basic principle of Roman Law applicable to this case, namely that no one should be bound to remain indefinitely in *communione* with another or others as proprietors of a common property, entails not only the right at the instance of any one of the co-proprietors to a physical

division but also should such a division prove to be impracticable, the right to have the whole property sold and the price divided." The land registration process, if the ownership of land rights occurs through buying and selling, then the registration of the rights starts from the making of the Deed of Sale and Purchase (AJB) by the PPAT as an authorized public official, must pay attention to the existence of this principle in legal practice.

The object of the *Actio Communi Dividundo* is material rights (*zakelijke rechten*), namely rights to shared property that give direct power to an object *Apeldoorn, L.J. van, (1983)*. *Actio Communi Dividundo* refers to the method of obtaining an object (property) based on action rather than based on possession; "A chose in action includes all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession *Paton, G.W., (1951)*. Claims that a person has the right to escape from attachment to joint property especially through an adjudication forum does not mean that the existence of this forum is a reason to justify the practice of law not registering all rights holders over joint property, for example on the grounds that parties who feel they have rights to land as joint property can claim their rights through a court forum. On the contrary, a statement that holders of shared rights have the right to demand separation from joint property is a further consequence of the existence of a person's right to joint property which is based on Article 36 paragraph (1) of Law No. 1 of 1974 "for the sake of law".

If those authorized to carry out land registration, including the PPAT, are aware that the deed registration system is essentially a system for registering land rights, namely because the existence of that right causes proof of rights through deeds to be "legal", or that the validity of proof by deeds actually depends on whether a person has the right or not to have the right stated in the substance of the deed, then in the case of obtaining joint land rights (*gono-gini*) through buying and selling by one of the husbands/wives, the names of all rights holders must be stated in a deed from the start. In other words, the concretization of the principles contained in the *Actio Communi Dividundo* doctrine has to be realized since the process of registering land rights.

The PPAT in making the Deed of Sale and Purchase (AJB) in the context of land registration must pay attention to that the right to separate itself from the joint property first in an adjudication forum requires proof that the party requesting the separation must first be able to prove that he is one of the holders of joint land rights, which will be very difficult to do if the Deed of Sale and Purchase (AJB) does not include all rights holders in the context of joint land registration. Such illegal practice clearly understands law only as partial statements about rights, and at the same time ignores the purpose of rights, namely the realization of rights. There is no statement that is the most absurd and unjust other than stating that a person who by law clearly must be recognized, respected and protected as a rights holder must be burdened with proving his rights in court rather than registering his rights in a registrar's institution.

IV. CONCLUSION

Based on the description above it can be concluded as follows:

1. The right to land is the right of property as a natural right, and therefore it is a human right (HAM).
2. In the event that a joint land right is acquired by way of sale and purchase by one of the husband/wife, then the rights holders are the husband and wife based on the title of *Gono-Gini* law as stipulated under Article 36 paragraph (1) of Law no. 1 of 1974 concerning Marriage, the acquisition of rights based on legal titles takes place "by law".
3. Registration of common land rights is a legal act. In the context of buying and selling land, from the buyer side, including as a legal action is the transfer of title certificates, which in essence is a legal act of accepting the transfer of land rights, in addition to transferring rights. The legal action to accept the transfer of this right must be carried out by all husbands and wives as holders of joint land rights, even if the sale and purchase agreement is made by one of the husbands/wives as the buyer. The existence of Article 36 paragraph (1) of Law no. 1 of 1974 thus excludes the application of the principle of privity of contract as known in contract law.
4. Legal certainty to be realized through land registration legal institutions is legal certainty which is subject to the principle that all holders of rights to joint property must be registered. Therefore, the registration of joint land must include all the names of the holders of joint land rights (*gono-gini*).
5. The right of a husband and wife to be registered as holders of joint land rights is a derivation of the

principle contained in the Actio Communi Dividundo doctrine, namely that everyone has the right to separate themselves from shared rights. The realization of this right should have been realized since the registration of common land rights.

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