

Legal consequences of encroachment on land ownership rights following transfer via land swap

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Abstract

Article 1365 of the Indonesian Civil Code stipulates that any unlawful act causing loss to another person obliges the party whose fault caused said loss to provide compensation. One such unlawful act involves the encroachment upon land owned by another party in the City of Banda Aceh. Therefore, this study aims to explain the legal consequences of encroaching upon land ownership rights following a transfer via land swap (“tukar guling”), as well as the legal protections available to the landowner whose property has been encroached upon.

Keywords: Legal consequences, encroachment on land ownership rights, land swap

Introduction

The relationship between humans and land is profound, as land serves as the place where humans live out and sustain their lives. Land plays a vital role in the life and livelihood of the nation ^[1]. This underscores the necessity of optimal land regulation to achieve the State's objective of ensuring the welfare and prosperity of the people, as mandated by Article 33 (3) of the 1945 Constitution. This article stipulates that the earth, water, and natural resources contained therein are controlled by the State and utilized for the greatest possible prosperity of the people. This provision serves as the robust legal foundation for State control over land (specifically land within the narrow legal definition of agrarian law), with the State acting as the holder of the State's Right of Control.

As the holder of the State's Right of Control, the State may grant land rights to holders in accordance with Article 4 of the Basic Agrarian Law (UUPA)—as stipulated in Law No. 5 of 1960—which states that land rights may be granted by the State to individuals or legal entities, pursuant to the State's authority as the holder of the right of control. This results in the existence of various land rights, such as the right of ownership (“hak milik”), the right to build (“hak guna bangunan”), and other land rights as enumerated in Article 16(1) of the UUPA.

To provide legal certainty and protection, the State issues a certificate to the land rights holder as proof of their right to the land. Article 1, point 20 of Government Regulation (PP) No. 24 of 1997 defines a certificate as the document serving as proof of rights—as referred to in Article 19 (2) letter c of the UUPA—covering land rights and security rights (“hak tanggungan”) that have been recorded in the respective land registers. Consequently, the certificate serves as a document proving the right and acts as strong evidence ^[2].

The UUPA regulates legal certainty regarding land ownership rights. Article 19 (1) of the UUPA explains that “to ensure legal certainty, the government shall conduct land registration throughout the territory of the Republic of Indonesia in accordance with provisions set forth in government regulations.” The objective of land registration is to create a situation wherein, following the registration of a land right, the government issues a land certificate as proof of ownership for the applicant ^[3].

Land possesses high economic value; consequently, land-related issues frequently become a source of recurring conflict within society. Even minor actions, such as shifting land boundaries, can constitute criminal offenses closely linked to land disputes. Fundamentally, a person who has acquired land possesses a document confirming the placement of boundary markers as proof of ownership regarding the extent of that land. Land measurement is carried out by officials from the National Land Agency (BPN) based on a request submitted by the landowner. The outcome of this measurement is the establishment of certainty regarding the boundaries of the land held by the owner, thereby granting them the right to utilize the land. One example of a land-related issue is land encroachment ^[4].

Land encroachment is nothing new in Indonesia; various incidents occur in daily life, including the encroachment upon and damage to land owned by others—whether intentional or unintentional. Instances of individuals or groups encroaching on land belonging to others are frequent across various regions of the country. In reality, land encroachment is difficult to avoid in Indonesia, particularly in modern metropolitan areas where vacant land is increasingly scarce, yet newcomers continue to arrive seeking to improve their fortunes—often without secure housing or local family ties. This situation drives the widespread encroachment of state-owned land as well as land held by private individuals or corporations ^[5].

Article 385, item 1, of the Criminal Code (KUHP) addresses land encroachment, stipulating that “Any person who, with the intent to unlawfully benefit themselves or another, sells, exchanges, or encumbers with a “credietverband” (credit lien) a certified land right, or a building, structure, plantation, or crop on uncertified land—knowing full well that the right to said property belongs wholly or partially to another person—shall be liable to imprisonment for a maximum term of four years.” Meanwhile, Article 2 of Law No.51 of 1960 concerning the Prohibition of Land Use Without the Permission of the Rightful Holder or Their Proxy establishes that the use of land without the permission of the rightful holder or their authorized proxy is prohibited. Stronger measures to protect property and prevent land encroachment need to be implemented. These include

improved land administration, enhanced security and surveillance, and stricter law enforcement regarding property rights violations. Public education and awareness concerning property rights and relevant legal procedures are also crucial for reducing instances of land encroachment within the community. In conclusion, land encroachment constitutes a serious violation of property rights and can be addressed through civil litigation initiated by the aggrieved owner. In civil proceedings, the aggrieved owner must present strong evidence and adhere to applicable legal procedures. It is crucial to seek assistance from a legal expert experienced in land encroachment cases to protect legitimate land ownership rights and secure justice in court [6].

Acts involving the transfer of land rights can also lead to physical land encroachment; one such instance arises from land swaps (*tukar guling*). A land swap is a process used to transfer land ownership between parties—whether individuals or institutions—to serve mutual interests or development purposes. This process frequently involves customary land (*tanah adat*), which is subject to a different legal status and regulatory framework than privately owned land. Consequently, a land swap requires a clear legal basis to prevent future legal disputes. In Indonesia, the legal basis for land swaps is derived from various prevailing laws and regulations [7].

The issue of fairness in land swaps and the adequacy of the replacement assets remains a subject of debate; if the exchanged assets are commensurate, fairness can be achieved, whereas a lack of equivalence leads to problems and an absence of fairness. Fundamentally, a land swap is a transaction between the party initiating the exchange and the party receiving it [8]. Land exchanges are governed by Article 26 (1) of UUPA, which stipulates that sales, exchanges, grants, testamentary bequests, customary transfers, and other acts intended to transfer ownership—as well as their supervision—shall be regulated by government regulation. One instance of land encroachment is found in Case Number 56/Pdt.G/2023/PN Bna, the details of which are as follows:

The Plaintiffs own a plot of land in Lamdom Village (Montai Hamlet, Lueng Bata District, Banda Aceh City) measuring 280 square meters, as evidenced by a “Sporadik” Letter (a statement of physical possession of a land parcel) issued by the Head of Lamdom Village on June 16, 2021, and corroborated by a Certificate of Customary Ownership Rights dated June 13, 2023. In 2013, an agreement was reached between the Defendants and the Plaintiffs' late father to open or widen the *Lorong Emong Lusong* (Emong Lusong Lane) by a width of 2 meters, extending up to the front of the land owned by Defendant II.

In 2014, Defendant II requested the Plaintiffs' father to execute a land swap involving a northern plot measuring approximately 2.50 square meters. Subsequently, a dispute arose after Defendant II sold the land to Defendant I; on June 10, 2023, Defendant I demolished the boundaries of said land. Thereafter, a portion of the Plaintiffs' land—measuring approximately 3 x 10 square meters—was encroached upon and incorporated into Defendant I's property without any prior confirmation or consultation with the Plaintiffs.

Defendant I deliberately dismantled the land boundaries established by the Plaintiffs following the land swap, thereby causing loss to the Plaintiffs. Defendant's actions

constitute an unlawful act. Article 1365 of the Indonesian Civil Code (KUHPerdara) stipulates: "Every unlawful act that causes loss to another person obliges the person whose fault caused the loss to compensate for said loss."

The focus of this issue concerns the legal consequences arising from the encroachment on land rights following the execution of a land swap agreement. A legal consequence is an effect prescribed by law resulting from a legal event or an act performed by a legal subject [9]. Therefore, further case study is required regarding the aforementioned issue of the "Legal Consequences of Encroachment on Land Ownership Rights Following Transfer via Land Swap."

Research Methods

In terms of its type, this study is classified as empirical juridical research—also known as field research—which examines applicable legal provisions alongside actual occurrences within society [10]. Empirical juridical research is legal research concerning the application or implementation of normative legal provisions *in action* regarding specific legal events occurring within society [11]. In other words, it is a study conducted on actual conditions or real-world situations within society, aimed at identifying and uncovering necessary facts and data; once the required data has been gathered, the process proceeds to problem identification and, ultimately, to problem resolution [12].

The research will be conducted in the Banda Aceh area. This location was selected because it aligns with the proposed research topic. The study population consists of employees from the BPN office and the relevant parties involved. A purposive sampling technique is employed, meaning the sample is determined beforehand based on the specific subject of the study. From the population, a sample is selected—comprising both respondents and informants—that is representative of the population as a whole.

An informant is an individual—or individuals—who provides a researcher with information regarding all matters related to the research subject [13]. The informants for this study were the Head of the BPN for Aceh Province, a judge, and an academic.

This study employs qualitative data analysis, a research method that yields analytical-descriptive data—specifically, information expressed by respondents in writing or orally, as well as observable behaviors—which are examined and studied as a holistic entity. In practice, the data obtained are organized systematically and then analyzed qualitatively to clarify the issues under discussion.

Results and Discussion

Legal Consequences of Encroachment on Land Ownership Rights Following Transfer via Land Exchange

A legal consequence is the impact of an action as regulated by law; it is the outcome prescribed by law for a specific legal event or act performed by a legal subject [14]. According to Jazim Hamidi, the term "legal impact" or "legal consequence" implies an effect that is direct, significant, or explicit [15]. A legal consequence arises from an action taken to achieve a result desired by the legal actor. The consequence in question is one regulated by law, while the action performed is a "legal act"—that is, an act in accordance with applicable law [16].

As social beings, humans are constantly driven to act in ways that sustain interpersonal interactions; to preserve the

dignity and harmony of these relationships, rules are required to govern such conduct so that no party suffers detriment^[17].

A discussion of legal consequences begins with the concepts of legal relationships, legal events, and legal objects. According to Soedjono Dirdjosoworo in his book “Pengantar Ilmu Hukum” (Introduction to the Science of Law), legal consequences arise from legal relationships, which entail rights and obligations. A legal event is an occurrence capable of triggering legal consequences between parties involved in a legal relationship; such events exist across various legal domains, encompassing both public and private law^[18].

The fulfillment of land-related needs—specifically regarding land rights—gives rise to a legal relationship involving the transfer of such rights between one or more persons. The transfer of land rights from one person to another constitutes an obligation (*perikatan*). Under Article 1234 of the KUHPerdata, every obligation entails a duty to give something, to do something, or to refrain from doing something. Such obligations arise either from agreements or by operation of law; obligations arising by operation of law due to human conduct stem from either lawful acts or unlawful acts. Consequently, transfers of land rights frequently occur^[19].

The transfer of land rights refers to the lawful conveyance of land rights from an existing rights holder to a new rights holder, in accordance with statutory regulations. The legal basis governing the transfer of land rights can be found in Article 37 (1) of Government Regulation Number 24 of 1997 concerning Land Registration, which states that: “The transfer of land rights and ownership rights over condominium units—whether through sale and purchase, exchange, grant, capital contribution to a company, or other legal acts of transfer—may only be registered (with the exception of transfers via auction) if evidenced by a deed drawn up by a Land Deed Official (PPAT) authorized under the provisions of applicable laws and regulations.”

A land right is transferred or conveyed when it is moved or handed over from the existing right holder—acting as a legal subject—to another party, pursuant to a deliberate legal act intended to ensure that the other party acquires the land right in question. Such a transfer occurs intentionally through a legal act between the original right holder and a third party who becomes the recipient and, subsequently, the new right holder^[20].

Based on these provisions, the transfer of land rights can occur through sale and purchase, exchange, gifting (*hibah*), and testamentary gifting (*hibah wasiat*). These provisions define the transfer of land rights as a legal event or act resulting in the shift of rights from one legal subject to another, thereby causing the original holder to lose their authority over the land; however, land-related matters frequently give rise to disputes, one of which is the encroachment upon land ownership rights.

Land encroachment is a form of legal violation that frequently occurs in Indonesia, significantly impacting ownership rights, social stability, and legal certainty. Such encroachment not only harms the interests of the individual landowner but also has implications for social stability and national security. Land encroachment involves an element of intent (*dolus*), wherein the perpetrator is aware that the land they are controlling does not belong to them yet proceeds to use or claim it as their own. Another element is

the *actus reus*, manifested as an actual act—such as using, occupying, repurposing, or even selling the land without legal right^[21].

“Land encroachment constitutes an unlawful act involving the intentional appropriation of another person's property rights, thereby causing harm to the affected party. As an unlawful act, it falls under the scope of Article 1365 of the KUHPerdata; furthermore, under certain circumstances, land encroachment may also trigger criminal law implications.”^[22].

“Land encroachment is an unlawful act committed intentionally by an individual or a group involving the control, use, occupation, repurposing, or even sale of land that legally belongs to another party, without permission or a valid legal basis. This act involves an element of intent, wherein the perpetrator is aware that the land they are controlling does not belong to them yet proceeds to control or utilize it for personal or group interests. If land possession does not align with the land certificate, title documents, parcel boundaries, deeds, or agreements between the parties, this can administratively indicate a land dispute. The BPN will assess the situation based on physical data, legal data, land registration history, and supporting documents.”^[23].

Land encroachment not only causes harm to the landowner but also has the potential to trigger social conflict and undermine legal certainty within the community. Therefore, law enforcement regarding land encroachment cases is crucial to protecting the public's land rights and ensuring legal certainty regarding land possession and utilization. Consequently, all parties are expected to respect the ownership rights of others and pursue legal channels should a dispute regarding land rights arise^[24].

An instance of land encroachment also occurred in Banda Aceh, where the encroachment took place following a land exchange arrangement. An interview with the Plaintiff's attorney revealed the following legal facts:

“The land exchange process was carried out in 2013 between the Plaintiff and Defendant II. This exchange was executed as a measure to resolve a non-performing loan issue that existed at the time. The process was not conducted covertly; rather, it was known to and witnessed by the surrounding community and local village officials. Thus, the existence and execution of the exchange are facts of common knowledge within the community, and no objections or rejections were raised by interested parties at the time of its implementation. Consequently, the land exchange transaction between Defendant II and the Plaintiff may be regarded as an act performed openly and with the knowledge of relevant parties, having been in effect since 2013 without any disputes arising at that time.”^[25].

“Subsequently, following the land exchange process and the assumption of possession of the land by the interested parties, a sale-and-purchase transaction regarding the land in question took place between Defendant I and Defendant II. This transaction was conducted based on the mutual agreement of both parties and executed in accordance with applicable procedures. As a follow-up to the transaction, Defendant II submitted an application to the National Land Agency (BPN) to modify the physical data regarding the land.”^[26].

“The application to modify the physical data was submitted to align the condition, location, boundaries, area, and other land-related data with the actual situation on the ground,

thereby ensuring that the data recorded in the land administration system corresponded to the factual and legal status of the land.”^[27].

The role of the BPN lies in the realm of land administration—specifically, verifying physical and legal data, examining land history, recording administrative details regarding disputes or lawsuits, facilitating the handling of land cases, and taking preventive measures to avoid the emergence of new disputes. The BPN does not determine whether a person is guilty of land encroachment; making determinations regarding criminal offenses or unlawful acts falls within the authority of law enforcement agencies and/or the courts ^[28].

Land conflicts can arise from various sources, such as inheritance, possession certificates, formal transfers of land rights (grants, sales, and purchases), and land acquisition for public purposes. Why Do Land Disputes Involving Two Certificates Occur? Social challenges now extend to the land sector. These challenges are complex and require comprehensive solutions. The nature and substance of land disputes have evolved to the point where they are no longer merely administrative land disputes resolvable through administrative means; rather, the complexities surrounding land have permeated the political, social, and cultural spheres, while also intersecting with issues of human rights and nationalism ^[29]. Land dispute resolution can be pursued, among other ways, through the BPN in accordance with the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of BPN (Permen ATR/Head of BPN No. 21 of 2020) ^[30].

This land encroachment dispute arose from actions taken by Defendant II. During the process of modifying the physical data of the land in question, Plaintiff I had a close relationship with the District Head (*Camat*), who at the time also served as the Acting Land Deed Official (PPATS) and had held that role for approximately fifteen years. Given this experience and long-standing working relationship, the District Head/PPATS also maintained professional ties with the local National Land Agency (BPN) office. Facts subsequently discovered—and verifiable via the *Sentuh Tanahku* application—revealed that the physical data of the disputed land had been altered. These modifications were made without adhering to proper procedures, resulting in a discrepancy between the physical data recorded in the land administration system and the actual conditions on the ground ^[31].

During the application process for modifying the physical data, the BPN should have meticulously examined both the legal and physical data—including conducting re-measurements and document verification, as well as ensuring there were no objections from other interested parties. Nevertheless, the modification of the physical data was processed and approved, thereby causing loss to the Plaintiff. The encroachment on the disputed land appears to have occurred because the Defendant felt that the location, shape, or physical condition of their own land did not fully meet their desires or interests. Consequently, the Defendant attempted to expand or alter the boundaries of their land possession by entering and occupying a portion of land that legally belonged to another party. These actions were taken without the consent of the rightful owner and without any valid legal basis, thereby giving rise to a dispute and causing loss to the party holding rights to the land. Such actions

have clearly caused loss to the Plaintiff and constitute an unlawful act ^[32].

Such actions certainly caused loss to the Plaintiff and constituted an unlawful act. An unlawful act results in the occurrence of loss or damage. The law requires that any loss resulting from an unlawful act be compensated by the person whose fault caused that loss—that is, the perpetrator of the unlawful act. Thus, Article 1365 of the KUHP establishes, on the one hand, the obligation of the perpetrator to compensate for the resulting loss and, on the other, the right of the aggrieved party to claim such compensation ^[33].

An unlawful act is defined as an act that violates the law, infringes upon the rights of others, or causes harm to another party (the victim). Some interpret an unlawful act as an act performed beyond one's authority. Furthermore, acts contrary to law are also interpreted as those violating moral values or values regarding human dignity and worth prevailing in society ^[34].

The legal consequences of an unlawful act may include an obligation for the perpetrator to compensate for the loss caused by said act. This consequence arises as a measure to restore the victim to the position they would have occupied had the unlawful act not occurred. In certain cases, the court may impose fines or other sanctions upon the perpetrator. In civil law, compensation refers to the restitution provided to the victim. There are several types of compensation: nominal damages, awarded as a matter of justice even in the absence of actual loss; compensatory damages, involving payment proportionate to actual losses such as expenses, lost income, medical costs, and suffering; and punitive damages, which exceed the actual loss and serve to punish the perpetrator in serious cases ^[35].

Land encroachment is an unlawful act because it is carried out without a legal right to the land being occupied or used. The judge explained that if it is proven in court that a person has committed land encroachment, the act can be categorized as an unlawful act that entails legal consequences for the perpetrator. Therefore, to resolve land disputes effectively, a comprehensive approach and integrated solutions must be employed. ^[36] According to the judge, the legal consequence arising from land encroachment is that the encroaching party is obliged to return the land to its rightful owner. Furthermore, any form of possession or utilization carried out without legal right holds no legal validity and can be annulled through a court ruling. The judge added that if the encroachment causes loss to the landowner—whether material or immaterial—the perpetrator may be ordered to pay compensation commensurate with the losses proven in court ^[37].

Based on the Schutznorm theory, enforcing liability against the perpetrator of an unlawful act requires more than merely demonstrating a causal link between the act and the loss; one must also prove that the violated rule was specifically designed to protect (*schutz*) the victim's interests. Although the basis for the lawsuit and the legal consequences of the unlawful act may appear clear, there are limitations and considerations that must be taken into account. In certain situations, ethical considerations, the public interest, and the complexity of the case can influence the application of the law. Consequently, legal protection regarding unlawful acts must be comprehensive and meticulous, taking into consideration various relevant factors ^[38].

Based on the explanation above, the legal consequence of the land encroachment incident is that the Defendant is deemed to have committed an unlawful act that caused loss to the Plaintiff, necessitating the restoration of rights.

Conclusion

The legal consequence of land encroachment is that the Defendant has committed an unlawful act causing loss to the Plaintiff; consequently, the Defendant is obligated to restore the rights that were usurped.

Legal protection can be implemented through preventive and repressive measures. Preventive measures aim to forestall such acts, whereas repressive measures are applied after the encroachment has occurred—specifically through a final and binding court judgment.

The aggrieved party may pursue mediation facilitated by the National Land Agency (BPN) or the District Court; if unsuccessful, the party may file a lawsuit with the District Court.

Suggestions and Recommendations

Landowners should enhance their legal awareness by registering their land and safeguarding all ownership documents as valid evidence. Furthermore, landowners need to periodically monitor their property to prevent unauthorized possession or encroachment by other parties.

The government and the National Land Agency (BPN) are expected to improve oversight, land administration services, and public outreach regarding the importance of land registration. Additionally, the BPN should optimize its role as a mediator in land dispute resolution to ensure conflicts are resolved effectively without escalating to litigation. Establishing legal certainty regarding land ownership and ensuring swift dispute resolution is expected to minimize future instances of land encroachment.

Law enforcement agencies and District Courts are expected to resolve land disputes swiftly and fairly, providing legal certainty for the disputing parties. Moreover, judges should prioritize mediation efforts prior to examining the merits of the case to encourage an amicable settlement between the parties. If mediation fails, the examination and evidentiary proceedings must be conducted meticulously, taking into account all submitted evidence, so that the resulting decision provides legal protection to the party whose rights have been infringed and prevents similar land disputes from arising in the future.

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