

The status of *Rechtsverwerking* in the land registration system in Indonesia

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Abstract

The legal certainty of the land rights certificates should be absolute and has been stipulated by the *Rechtsverwerking* institution in Government Regulation Number 24 of 1997 concerning Land Registration. However, in reality, every individual who has adequate evidence and data can still break the validity of the data in the certificate even though the period of 5 years has been exceeded. The objective of this article is to determine the legal certainty of land rights in the land registration system in Indonesia. The research method used by the author is a normative juridical method. The results of this study show that the negative land registration system has a positive tendency that actually does not guarantee legal certainty to the holders of land rights certificates

Keywords: legal certainty, land rights, land registration system, *Rechtsverwerking*

1. Introduction

The land is included as limited rights. Therefore, it is considered very valuable. The people control the land means that they also control the potential for profitable capital ^[1]. The entire territory of Indonesia is a unitary homeland of all Indonesian people. The land is a natural resource that is given by God Almighty. Land represents a national treasure for a nation because it supports the activities of people's lives and has an important role for the survival of living things on earth. The existence of land in human life has meaning as well as a dual function, including social assets and capital assets. As a social asset, land functions as a means of binding of social unity among the community to live and for life, while as a capital asset, it is a capital factor in the development and has established as a very important economic object as well as a business material and a speculation object ^[2].

The urgency of land for human life is appreciated by the Government of the Republic of Indonesia through the national land policy. Basic Agrarian Principles of the BAL (Basic Agrarian Law) is the mandate for the implementation of Article 33 paragraph (3) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the Constitution of 1945), stating that water and natural resources which are contained therein is controlled by the State and used as much as possible for the prosperity of the people, which then in Article 19 of the BAL, the land registration system is carried out by Government Regulation Number 24 of 1997. One of the purposes of land registration is to provide legal certainty of land rights, owned by an individual. The legal certainty of land rights can be obtained by the holder of land rights by registering the land. The target of legal certainty of land rights is to provide legal protection to the holders of land rights (who owns it, whether there is a burden on it or not) and certainty about

the object, including its location, its boundaries, its area, the presence of buildings, and the plants on it. Granting certificate as a proof of rights applies as a strong means of proof. Therefore, the government issued implementing regulations to realize this, which is by issuing Government Regulation Number 10 of 1961 concerning Land Registration, which has now been revised with Government Regulation Number 24 of 1997 concerning Land Registration ^[3].

A certificate of proof acts as strong proof. It is as regulated in Government Regulation Number 24 of 1997 concerning Land Registration, in which Article 32 paragraph (2) specifies that in the case if a land certificate has been legally issued on behalf of a person or legal entity that obtained the land in good faith and actually control it, then other parties who think they have rights to the land can no longer demand the implementation of these rights if within 5 (five) years of the issuance of the certificate do not submit objections in writing to the certificate holder and the Head of the Land Office concerned or do not file a lawsuit to the Court regarding the control of the land or the issuance of the certificate.

One of the benefits of the existence of legal certainty guarantees is driving the national economy because certificates of land rights can be used as a reference to obtain bank credit, preserving the environment due to a definite relationship between holders and rights objects ^[4].

The purpose of land registration is to provide legal certainty and legal protection to the holders of rights of a land, then other parties who think they have rights to the land can no longer demand the implementation of these rights if within 5 (five) years of the issuance of the certificate do not submit objections in writing to the certificate holder and the Head of the Land Office concerned or do not file a lawsuit to the

¹ Bachtiar Efendi, 1993, *Pendaftaran Tanah Di Indonesia dan Peraturan-peraturan Pelaksanaannya*, Alumni Bandung p. 15

² Achmad Rubaie, 2007, *Hukum Pengadaan Tanah Untuk Kepentingan Umum*, Cetakan Pertama, Bayu Media Publishing, Malang, p.1.

³ Bachtiar Effendie, 1993, *Pendaftaran Tanah di Indonesia dan Peraturan-Perturan Pelaksanaannya*, Bandung, Alumni, p. 5

⁴ Lego Karjoko, 2018, Implementasi asas terjangkau pendaftaran tanah di kabupaten sukoharjo untuk mempercepat persertifikatan tanah, jurnal Universitas Sebelas Maret, Surakarta p. 2

Court regarding the control of the land or the issuance of the certificate ^[5].

According to customary law, if an individual leaves their land unworked for a long time, then that land has been managed by another individual who obtained it in good faith, then their rights are lost to reclaim the land. The Agrarian Law states that a landowner who leaves their land unmanaged within a certain time and allowing others to occupy and take advantage will cause the original owners to lose their land rights ^[6].

Based on the background of the above problems, we can formulate a problem of what is the status of *Rechtsverwerking* in the land registration system in Indonesia?

2. Research Methods

This study uses a normative juridical approach which is legal research that departs from written legal material. The study was conducted by examining secondary data which can be in the form of primary, secondary and tertiary legal materials. This study uses descriptive-analytic specifications in the form of descriptions of applicable legal provisions and legal theories relating to and relevant to the object of research in the agrarian law to provide concrete explanations about the state of the object or problem under study without drawing general conclusions.

The data collection techniques used is Document Study by conducting research on documents that are closely related to the application of the *Rechtsverwerking* institution in Government Regulation Number 24 of 1997 concerning Land Registration to obtain a theoretical basis and obtain an overview of legal certainty and legal protection of land rights. The data that has been collected, both secondary data and primary data, will be analyzed based on qualitative juridical methods. The results will be presented descriptively to obtain a comprehensive overview of the status of the *Rechtsverwerking* institution in the land registration system in Indonesia in Government Regulation Number 24 of 1997 concerning Land Registration. This type of research is included as normative juridical research. This study was conducted to identify concepts, legal principles, systematic law and comparative law. This study requires data sources and also examines documents, such as laws, court decisions and legal theory.

3. Discussion

According to customary law, the *Rechtsverwerking* institution cannot be separated from the concept of rights and the concept of relationship. Rights are relative, while relationships are real/concrete, permanent and even eternal. Thus, land rights can change, but the relationship in the form of a bond between humans and land are two elements that are spirited, unchanging and must be maintained.

The basis of the *Rechtsverwerking* institution regarding the land registration system in Indonesia is regulated in the Supreme Court jurisprudence on September 24, 1958, Number 329 K/Sip/1958 which determines that a land of the jungle and then for 5 (five) consecutive years are left alone not in use by the owners, then the rights to the land can be

considered to have been released by the owners. Hence, the land can be given to other people. Although Indonesia does not follow the principle that jurisprudence must be followed by judges, the decision has recognized the *Rechtsverwerking* institution as part of the national land law and at the same time used it as a basis for resolving national land disputes and as a basis for resolving land disputes between owners who disregard the obligation to use land with people who have clearly controlled and worked intensively ^[7].

Land Law in Indonesia before the BAL is the Old Land Law because it consisted of Customary Land Law and Western Land Law. The enactment of Law of the Republic of Indonesia Number 5 of 1960 concerning the Rule of Agrarian Principles shows that at this time, Indonesia creates the principles for the development of a single national land law based on customary law. The provisions of customary law according to the BAL are:

The principle of customary law

Customary law after the BAL is very different compared to the previous ones. While the customary law in the past still adheres to a concrete system, then after the BAL, the system is different, in which it has followed the concession or abstract system that is known as the European legal system.

Customary law which forms the basis of the BAL must meet the following conditions

- a. It must not contradict national and state interests based on the principle of national unity. The Land Law must serve national and state interests and must be placed above personal, class and regional interests.
- b. It must not contradict Indonesian socialism. This is based on the purpose of the struggle of the Indonesian people to form a just and prosperous nation based on Pancasila. In this BAL, it is called the Indonesian socialist society.
- c. It does not contradict the provisions in the BAL because BAL is the basic regulation of national land law. There should not be any legal regulations, whether written or unwritten, that contradict it. One of the provisions of the BAL that must be followed is that each Indonesian citizen has an equal opportunity to eliminate elements of extortion ^[8].
- d. It must not contradict other laws and regulations. The same as other laws and regulations, the BAL also requires liens, business rights, production sharing rights, join rights and rental rights for agricultural land.
- e. It must prioritize the elements that rely on religious law.

National land law in Indonesia must uphold and implement the first precept of the Pancasila. In the customary law, *ulayat* land is the common land of the related indigenous community, while in the national land law, the land in the territory of the Republic of Indonesia is the common land of all Indonesian people. It is the same as the relationship between the Indonesian people and the earth, water, and eternal space. It means that as long as the Indonesian people unite to become the nation of Indonesia and the earth, water, and space, then Indonesia exists. Therefore, in any case, no power can break or negate the relationship ^[9].

⁵Maria S, W. Sumardjono, 2005, *Kebijakan Pertanahan Antara Regulasi Dan Implementasi*, Buku Kompas, Jakarta. P. 201.

⁶Nurhasan Ismail, 2007 "Rechtsverwerking" dan Pengadopsiannya Dalam Hukum Tanah Nasional. Mimbar Hukum Volume 19 Nomor 2 Universitas Gadjah Mada, Yogyakarta, p. 1

⁷ *Ibid* p. 195

⁸ Elza Syarif. 2002. *Menuntaskan Sengketa Tanah melalui Pengadilan Khusus Pertanahan*. Jakarta. Kepustakaan Populer Gramedia p. 127

⁹ *Ibid* p. 128

The land registration system in Indonesia is still not consistent because it still adopts a negative land registration system with a positive land registration system. It is called so because it cannot be called a positive publication system. It means that the state still does not guarantee the accuracy of the data contained in the certificates that have been issued. A positive publication system should include the provision that the accuracy of the data that has been registered is guaranteed. For this purpose, the government scrutinized the authenticity and validity of each certificate submitted for registration before it was included in the lists so that the government guaranteed the reliability of the data. In other words, the publication system adopted in Indonesia is a negative but not pure negative publicity system. Rather, it is a negative publicity system with a positive tendency^[10]. The system of land registration in Indonesia which has a negative system with positive tendency has an inherent principle called Nemo plus Juris Principle, which means that people cannot transfer their rights over their rights. It indicates that the transfer of rights by a person who has no rights is null and void. This principle aims to protect the actual rights holders^[11].

This *Rechtsverwerking* concept is known in customary law as a consequence of the existence of nomad lifestyles of indigenous people who always move their residence by opening the forest and leave it if it gives no results and cannot be utilized. In Indonesian law, the *Rechtsverwerking* Institute has been recognized for its existence in national law, as evidenced by the existence of several decisions of the Supreme Court which based its decision on *Rechtsverwerking*^[12].

More detailed rules regarding the loss of land rights can be seen in Government Regulation Number 24 of 1997 concerning Land Registration. Furthermore, Article 24 regulates: if complete evidence is not available, then the time limit of 20 years accompanied by continuous physical control by the applicant and its predecessors can be used as a basis for the right to register land (for land conversion to old land rights). The requirements for land acquisition must be performed in good faith, and be strengthened by the testimony of a person who can be trusted that they are indeed the real owner. In addition to the above conditions, the surrounding community must not question the ownership of the land before and during the registration process. However, the above method cannot be interpreted as acquisitive *verjaring* because it only applies to lands that have been possessed with old land rights but do not have solid evidence for conversion based on land rights as stipulated in the Basic Agrarian Law (UUPA).

Land title certificate applied by the holder of land rights has a strong proof that the object of the land is under the owner's control and must be performed in a real and continuous manner for more than five years.

Article 24 paragraph 2 of Government Regulation Number 24 of 1997 concerning Land Registration states that:

“In the event that no or no more complete means of evidence as referred to in paragraph (1) are available, the bookkeeping of rights can be performed based on the reality of physical control of the relevant plots of land for 20 (twenty) years or more consecutively by registration applicants and their predecessors, on condition:

- a. *The control is carried out in good faith and openly by the related person as having land rights, and is strengthened by the witnesses of people who are trusted;*
- b. *The control either before or during the announcement as referred to in article 26 shall not be disputed by the customary law community or the village concerned or any other parties.*

The above land registration emphasizes that legal subjects wishing to issue certificates of land rights must physically control the land for 20 (twenty) years or more consecutively by the registration applicants or its predecessors.

If the criteria for a certificate as evidence of a strong right have been fulfilled as stated above, then certainly and clearly, legal certainty for the certificate holder of land rights will be issued, in case there is interference or a lawsuit from another party at any time. It is in line with the theory of legal certainty proposed by J.M. Otto as quoted by Sri Djatmiati that legal certainty (*rechtszekerheid*) has the following elements:

- a. There are consistent and applicable rules determined by the country.
- b. Government officials apply the rule of law consistently and adhere to the rule of law.
- c. The people are basically subject to the law.
- d. Independent and impartial judges consistently implement the rule of law.
- e. Judges' verdicts are carried out clearly.

Therefore, when the criteria for certificates as proof of strong rights have been met, the holder of the certificate of the landowners can maintain ownership rights with the means of proof in the form of certificates of ownership of the land owned and controlled by the legal subjects^[13].

In strengthening the existence of *rechtsverwerking* institutions, the arrangements are in article 32 (2) PP No. 24 of 1997, stating that:

“In the case of a plot of land that already has a certificate that is legally issued on behalf of the person or legal entity who obtained the land in good faith and has actually controlled it, then another parties who feels that they have rights to the land cannot claim the right again if in 5 (five) years since the issuance of the certificate did not file an objection in writing to the certificate holder and the Head of the Land Office concerned or did not file a lawsuit to the Court regarding land control or the issuance of the certificate”^[14].

Furthermore, by looking at practice in the field, if a party can dispute the validity of juridical data and physical data of a certificate that has been issued in the name of a person or

¹⁰ Boedi Harsono, 2005. Hukum agraria indonesia: sejarah pembentukan undang-undang pokok agraria isi dan pelaksanaannya p. 80

¹¹ Widhi Handoko, 2014. Kebijakan Hukum Pertanahan sebuah refleksi keadilan hukum progresif p. 108

¹² Christiana Tri Budhayati. 2008. Jaminan Kepastian Kepemilikan bagi pemegang Hak Atas Tanah dalam Pendaftaran Tanah Menurut UUPA. Jurnal Ilmu Hukum volume 2 Nomor 2 p. 130

¹³ Dadi Arja Kusuma, Rodiyah Sahnan 2017. Sertifikat Hak Milik Atas Tanah Sebagai Alat Bukti Hak Yang Kuat. Jurnal IUS Nusa Tenggara Barat : Fakultas Hukum Universitas Mataram Vol 5 p. 314

¹⁴ <https://business-law.binus.ac.id/2017/03/27/rechtsverwerking-dalam-hukum-tanah-nasional/>
accessed on January 22, 2020 at 19:00

legal entity, then the District Court or State Administrative Court can accept its claim. In the reality that often happens in this matter, other parties can file a lawsuit at any time against a certificate that has been issued by the National Land Agency as a form of guarantee of legal certainty even though the certificate has been issued for more than 5 (five) years. There is an imbalance between what is regulated in Article 32 paragraph 2 when other parties file a lawsuit. Defendants generally could not submit an expired exception because the Judge considered the National Land Law in Indonesia to be based on custom law. Therefore, *rechtsverwerking* institution does not give much influence on the legal protection of certificates of land rights that have been issued for 5 (five) years or more. However, on the other hand, the real owners will also lose their rights if they do not try to prove their rights or difficulties in proving or refuting the validity of juridical data or physical data of the certificate that has been registered by another party. It is because of the negligence or carelessness of the owners that can be controlled by other parties in good faith. The law should provide certainty of assurance to the real owner. In its position in the registration system in Indonesia, the *Rechtsverwerking* institution has not been at the highest level to guarantee the legal certainty of the holder of a certificate of land rights and has not been fully operational because it does not affect the owner of the certificate of land rights that have been issued.

4. Conclusion

The legal certainty guaranteed by the *Rechtsverwerking* institution in registering land in Indonesia has not been able to run optimally. Basically, article 32 paragraph 2 states clearly that since the issuance of the certificate, if no one makes an objection after five years from the issuance of the certificate, then the other party cannot claim its land rights again. However, in reality, there is still a lawsuit against the certificate of land rights in the District Court or State Administrative Court. Thus, it does not mean that a certificate of land rights guarantees legal certainty. As long as there is no judge's decision that invalidates or refutes the validity of the juridical and physical data of the certificate, the certificate is deemed accurate. The position of the *Rechtsverwerking* institution in the land registration system in Indonesia is still sidelined because it has not been effective in guaranteeing legal certainty of land rights certificates.

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