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Rechtsverwerking Concept of Customary Rights in Land Registration

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Abstract

People would strive to justify any means to obtain a certificate because it is the only means of proving ownership of land rights. This effort can be prevented by the government by applying the principle of "nemo plus juris", which means that it is unjustifiable for people who are not entitled to become entitled to the certificate. As a result, the government cannot fully guarantee the validity of the certificates that have been issued. It means that anyone, who believes they have a claim to the land being certified, can sue the certificate holder at any moment. For this reason, the government has recently strengthened the negative publication system by adopting the rechtsverwerking institution, which governs customary rights in land registration, and by terminating the right to sue at any moment after 5 years from the day the certificate was issued. This effort is known as rechtsverwerking and it aims to improve the land registration system's positive publication mechanism.

Keywords: *Rechtsverwerking; Registration; The Principle of Legal Security*

Introduction

In the land registration system with registration of title, the right is registered with a media deed made by the Land Deed Making Officer (in Indonesia, often abbreviated as PPAT) at the local Land Registration Office. As a result, a "certificate" of land rights is issued, which can be used as credible evidence. The government does not entirely guarantee the accuracy of the certificate, despite the fact that the process of creating it is highly rigorous and painstaking. It is because the publications to which it conforms are negative publications with positive tendencies. Because there is no absolute guarantee that the certificate is true, the holder is constantly concerned about being sued in court. To relieve the concern indefinitely, the government has completed the regulation, namely PP no. 24 of 1997 concerning Land Registration, which adopted the *rechtsverwerking* institution that exists in customary rights into Article 32 paragraph 2, stating that "In the case of a parcel of land, a certificate is issued legally in the name of the person or legal entity that acquires the land with a good intention and really possesses it, then the other party who believes he has a right to land cannot claim implementation of the right unless it is done within 5 years of the certificate's issuance..."

Based on this description, it is important to investigate the following questions: 1) Is the *rechtsverwerking* institution well-known within Indonesian customary law communities' customary

rights? 2) How can applying the existing *rechtsverwerking* to customary rights strengthen the land registration system's positive publication system? The aim of the present study is to discuss the presence of the *rechtsverwerking* institution in Indonesian legal communities' customary rights and to demonstrate how applying the existing *rechtsverwerking* to customary rights might improve the positive publication system in land registration.

This study is categorized as a descriptive study because it examined the *rechtsverwerking* institution's control of land rights included in customary rights of the customary law communities, which were used in land registration. The researcher used a normative problem approach to approach the subject under investigation. In this case, the provisions of the relevant norm were customary land law norms that served as the primary source for the development of the Basic Agrarian Law (BAL) and PP 24/1997 on Land Registration, which implemented the *rechtsverwerking* institution in land registration in order to strengthen the positive publication system in land registration. The data used in this study is secondary, and it was gathered through performing document studies in personal libraries and the libraries on various campuses (including in one where the researcher also taught). The results are secondary data derived from primary data (legislation) and secondary data derived from secondary data (expert opinions outlined in various books or journals), and the findings were presented in a descriptive systematic manner before being qualitatively examined.

The data in the form of journals came from indigenous peoples' customary rights, and no one has developed a *rechtsverwerking* institution that was used to reinforce the positive publication system. It is significant since the preamble to the BAL specifies that national land law must be founded on customary land law rather than Burgerlijk Weboek's *rechtsverwerking* (Book of Civil Law Law).

Literature Review

1. Customary Rights

Hak Ulayat or customary rights is not a name that can be translated into Indonesian. In fact, there is no word in customary law for the term "right." The existing name refers to the land that is the customary law community's environmental area; "*ulayat*" means "territory." The name of the region varies depending on where one lives in Indonesia: "*prabumian*" in Bali, "*wewengkon*" in Java, "*pertuanan*" in Ambon, etc. Customary rights are referred to as "*beschikkingsrecht*" in the literature of customary law. Van Vollenhoven refers to "Customary Rights" as "beschikkingsrecht".[1]

Customary rights, as defined above, are the authority and obligations of customary law communities over land under their territory. These authorities and obligations apply to both civil and public law. In such instance, the customary law community, not individuals, is the embodiment of all of its members who have customary rights.

The Correlation Between Customary Rights and Individual Rights

Individual rights to a parcel of land are always inextricably linked to customary rights. Individual rights are greater and customary rights are weaker the more effort a person puts into a parcel of land. On the other hand, if a parcel of land is not managed again until it returns to forest or grows thickets on it, individual rights to the land may be weakened, and the land may be managed by other members of the community, implying that customary rights are strengthening because other members of the community can cultivate the land.

[1] Boedi Harsono, Hukum Agraria Indonesia, (Jakarta: Djambatan, 1997), hlm.180.

According to the preceding statement, "*the weaker the customary rights, the greater the individual rights; on the other hand, the stronger the customary rights, the weaker the individual rights*." Although originally found in practically every part of Indonesia, the power of customary rights has weakened in many locations, and in certain areas, such as cities, it can be said to have completely vanished, both due to internal causes and external factors. In this regard, Boedi Harsono (one of the BAL's drafters) concludes that when citizens' control of certain areas of the common land grows stronger, the influence of the customary law community in question inevitably becomes less and weaker, until it eventually vanishes entirely (Boedi Harsono, 1997: 183).

2. Data Publication System

The legality of the legal action used as the basis for determining the transfer of rights to the buyer is at issue in a negative publication system, not the question of registration. A person who buys land from an unlawful entity does not become the new right holder. The principle of nemo plus yuris applies in this system, which reads "*nomo plus yuris in alium transperrepotest quam ipse habet*" which means "people cannot give up or transfer rights beyond what they have". As a result, the data supplied in the registration with this negative publication system should not be trusted to be accurate, implying that the State does not guarantee the accuracy of the data presented (Bodi Harsono, 1997: 80).

Even though the buyer has conducted registration, it is always possible for the buyer to be sued by someone who can prove that he is the true owner of the property. Countries that follow the negative publicity system, according to Boedi Harsono, deal with this matter by establishing an "*aquisitieve verjaring*" institution. Because of this system, the government's data is not guaranteed to be accurate, so people should not take the data supplied with full accuracy. Although the government makes every effort to provide and publish truthful data, it does not imply that it can guarantee the truth. For example, a third party (C) uses the wrong data (to buy land from B), in a legal relationship, between A and B, B is wrongly recorded as the rightful person, even though the one who actually has the right is A. Thus, in this case, B and C will not be the holders of the land rights, because A can claim the land from C, while C can claim compensation from B.

Errors can happen in every system, and they can always be fixed. As a result, if the rights registration system is negative, the publication system is also negative. For this reason, certificates are reliable (but not ultimate) proof. The BAL and PP 10/1960 Publication System is a negative system with positive elements. It is not purely negative because it is stated in Article 19 paragraph 2 letter c "registration produces letters of proof of rights, which act as strong evidence". Likewise, it is stated in Articles 23 (2), 32 (2) and 38 (2) of the BAL.

This statement suggests that the government, as the land registration organizer, must make every effort to supply accurate data in the land book and registration map. The data contained in the land certificate and registration map must be recognized as correct unless it can be demonstrated differently both in day-to-day legal activities and in courtroom litigation. Likewise, the data contained in the certificate, as long as it corresponds to the data contained in the land book and registration map. However, the system is not positive. Because the data presented in this system is guaranteed to be correct, it not only serves as strong proof, but it also has absolute evidentiary power.

The publication system is not a positive system; in fact, it is explained in the general explanation of PP 10/1961. Registration does not result in an inviolable title. It is stated in the general explanation C/7 *"The recording of a right in the land register in the name of a person does not mean that the person who actually has the right to the land will lose his right; that person can still claim the rights of the person who is in the land book as the entitled person".* Thus, the registration method regulated in this regulation is not positive but negative.

Because the positive publication system is based on a rights registration system, there is always a register or land book where legal data and certificates of rights can be stored and presented as proof of their rights. According to Boedi Harsono (1997), the registration or entry of a person's name in the land book establishes a right holder and entitles that person to the land in question, rather than a formal act of transferring rights, *("title by registration, the register is everything").* This is the philosophical underpinning of the Torrens system, which employs the positive publication system.

As a result, the person who will acquire the land or the creditor who will get the land as collateral for the credit should not be afraid to take legal action against the party whose name is in the register as the right holder (Boedi Harsono, 1997, 79).

Discussion

1. The Existence of Rechtsverwerking

The term rechtsverwerking initially appeared in Indonesian civil law, which is regulated in the Civil Code (KUHPerd), formerly known as *Burgerljik Wetboek* (BW). Especially in Book III, when it comes to Engagement, which is utilized when the debtor cannot be held liable because the creditor has abandoned the right to be billed. The creditor's acts are known as "*Rechtsverwerking*" or "rights waiver." As a result, it is common for civil references to include rechtsverwerking as one of the legal remedies for a debtor who fails to defend himself, if the debtor can show that his creditor has committed rechtsverwerking (releasing his claim rights). Although the application of *rechtsverwerking* appears to be the same in this case, the content or legal material stems from one of the strengths of the validity of customary rights of customary law communities that apply between individual members of the community.

In the Customary Rights

In fact, equating the institution of *rechtsverwerking* in western civil law with *rechtsverwerking* in the sense of customary rights is not a good idea. Because the definition of relinquishment in western civil law is based on the creditor's acts in relinquishing his rights, whereas in customary law, the release of rights occurs according to circumstances. As a result, the application of *rechtsverwerking* requires that the ownership of land for certificate holders be carried out with a good intention, and that people who will utilize their claim rights never blame *the bezitter*, government agencies, or courts, and that their claim rights be limited to only 5 years.

In light of the above discussion, it is also worth considering "waiver of rights," which, like *heredity verjaring*, entails exemption from collections or claims. In this case, a dishonest *bezitter* can utilize it as well, as long as the time limit has passed. Apart from being made impossible by the preamble to the BAL, the *rechtsverwerking* provision imposed in Article 32 paragraph 2 does not embrace this institution, and it can be carried out by a dishonest *bezitter*.

Thus, the application of *rechtsverwerking* in Article 32 paragraph 2 is the application of the name "*rechtsverwerking*", which has long been known in western civil law, while the essence of the institution is to apply the nature of customary rights that apply between individual members of the community concerned, as previously stated.

In the Recognition of the Practice

The nature of customary rights in respect to the individual rights of the community will be discussed in cases that illustrate the *rechtsverwerking* institution's recognition of customary rights. In this case, it is worth remembering that the nature of *ulayat* in individual relationships is a form of argument

that the more effort a person puts into a parcel of land, the greater the relationship with the land, and the greater the individual rights, the weaker the customary rights. This situation has been practiced in the decisions of the highest court (Supreme Court) before the BAL in the Republic of Indonesia exists, as illustrated below:

1) The Case of a Land of "*Kesain*" - In Karo Customary Law

This case was decided by the Supreme Court on February 7, 1959, in Number 59/K/Sip/1958, which stated that "According to Karo Customary Law, a piece of land "*kesain*," i.e., a piece of vacant land located in a village, could become a private property after the land had been intensively managed by a village resident." In this situation, the holder of the original land rights did nothing, and the land became vacant. As a result, individual rights grew weak (or even vanished), while the vacant condition strengthened customary rights, and the land rights were returned to the community, so as not to prohibit (implicitly allow) other residents of the village to work (intensively) which resulted in later strengthening of individual rights and customary rights weakening because they returned to being the new individual rights.

2) The Case of Rice Fields Being Left Behind for 5 Years – Padang Lawas

This case was decided by the Supreme Court of the Republic of Indonesia on September 24, 1958, with No. 329/K/Aip/1957, which stated that "Based on the prevailing custom in Padang Lawas area, rice fields that have been abandoned for 5 consecutive years are considered to be a vacant land again, so that its control by another person after a period of 5 years is valid, if the land is obtained from the person who is entitled to give it".

The three cases mentioned above demonstrate that the highest court practice recognizes the nature of customary law communities' customary rights in relation to their citizens' individual rights, resulting in the release of individual rights to land rights owned, but this practice does not use the term "*rechtsverwerking*" (Boedi Harsono, 1997: 188).

In the Basic Agrarian Law

In addition to acknowledging the practice of *rechtsverwerking* in these customary rights, the legislation also recognizes its existence as clearly established in the Basic Agrarian Law (BAL), but it does not use the term *rechtsverwerking*:

1) BAL Article 27 letter a number 3, states that the right of ownership is nullified because the land is abandoned;

2) BAL Article 34 letter e, which states that the right to cultivate is abolished, because it is neglected;

3) BAL origin 40 letter e which states that the right to use the building is abolished, because it is neglected;

4) PP No. 40 of 1996, states that the usufructuary rights are nullified because they are neglected.

The term "abandonment" is used in the articles above to indicate that the holder of the right in that case loses or relinquishes his land rights, as well as that parliament has implemented the *rechtsverwerking* institution contained in customary rights. It is not a waiver of rights in the sense of the western civil law concept of *hereditary verjaring* (Book II on Objects). It is stated that it is not the same (despite the fact that it is the same), because national land law, including land registration law, is founded on customary land law rather than western civil law (customary rights).

2. The Implementation of Rechtsverwerking

In the Land Registration

The implementation of rechtsverwerking to land registration is stated in PP no. 24 of 1997 Article 32 paragraph 2: In the event that a parcel of land has been legally issued in the name of the person or legal entity who acquired the land with a good intention and actually has a control over it, then the other party who feels that he has rights to the land can no longer demand the implementation of the said right if within 5 (five) years since the issuance of the certificate, the certificate holder and the relevant Head of the Land Office have not submitted a written objection or have not filed a lawsuit with the court regarding the control of the land or the issuance of the certificate. The sentence which means *rechtsverwerking* (release of rights) is that other parties who feel they have rights to the land can no longer demand the implementation of these rights if, within 5 (five) years from the issuance of the certificate, ...".

The Requirements of *Rechtsverwerking*

Apart from that, the condition for the occurrence of rechtsverwerking (waiver of rights) is not easy, because:

1) The certificate must be issued legally, which means it must be made in accordance with the applicable provisions;
2) The certificate must be used to acquire land rights with a good intention. In general, everyone is presumed to have a good intention, whereas a bad intention must be proven. In customary law, good intention, for example in buying and selling land, must meet cash and clear conditions. Cash means that there are goods and there is also money as the price, while clear means not being afraid of being known by others or carried out in front of the customary head. In the context of land registration, it must be carried out in front of the Land Deed Making Officer (PPAT) to make the Sale and Purchase Deed, then registered at the Land Registration Office.
3) The land mentioned in the certificate is actually controlled by the right holder. This provision has no explanation. Does the party whose name is listed on the certificate have to live on or on the land? What if the land is leased or occupied by another party with the permission of the right holder?
4) During the 5 (five) years since the certificate was issued, those who feel entitled, have not submitted a written objection to either the right holder, the local Land Office or to the Court regarding the control of the land and the certificate. There is no further explanation, so what if after the right is registered in the name of the first right holder it has been transferred several times and it turns out that in one of the transactions there is fraud? Is the last land right holder also protected, if registered as the right holder for a period of 5 years? Can the new mortgage holder be able to safely use the parcel of land for debt security after the land has been registered for 5 years in the name of the mortgagee?

If the four elements listed above are met, there will be rechtsverwerking (rights waiver) for people who have been sued.

The reasons why Rechtsverwerking is needed

There are several reasons why a rechtsverwerking institution in land registration may be deemed necessary, including:

1) *Nemo Plus Yuris Principle*:

The *nemo plus juris* principle states that people cannot be justified in acting in ways that go beyond their rights. This principle, in addition to containing limitations, also includes caution

when carrying out a legal conduct that could lead to serious consequences if the contrary occurs. Because it is valid in both PP No. 10 of 1961 and PP No. 24 of 1997, this concept is followed by stating a principle that is contained in its explanation with the statement that registration does not indicate that those who are not eligible to become entitled become entitled.

2) Ownership Principle in Horizontal Separation:
By making it possible for a member of the customary law community to own land on shared land through the ownership of trees as described previously, this principle can also be used to further weaken negative publicity in land registration.

Legislators can use the two principles outlined above to limit or prevent efforts to weaken the negative publicity system in land registration.

The Consequences of Rechtsverwerking Implementation

According to Article 32 paragraph 2 of PP 24 of 1997, "a certificate is a letter of proof of rights that applies as a strong proof of the physical and juridical data contained in it, as long as the physical and juridical data are in accordance with the existing data. in the letter of measurement and the book of land rights in question". The statement makes that the government in land registration does not guarantee the truth of the party mentioned in the certificate as the absolute owner, therefore, it is very possible that the certificate can, at any time, become the object of a lawsuit for those who feel they own the land mentioned in it, through the efforts mentioned above. To prevent the possibility of a land title certificate being subject to a lawsuit at any time, then the government realizes that it is necessary to balance the interests of the rights holder (the certificate) with those who feel that they actually own the land mentioned in the certificate, by implementing the reshtsverwerking institution that exists on the customary rights in land registration as stated in Article 32 paragraph as follows:

"If a land parcel has been legally issued in the name of the person or legal entity that acquired the land with a good intention and actually controls it, the other party who believes he has rights to the land can no longer demand the exercise of those rights if he does not file a written objection to the certificate holder and the head of the relevant Land Office within 5 (five) years of the issuance of the certificate or does not file a lawsuit with the Court."

The meaning of *rechtsverwerking* in the above statement is "… the other party who feels he has the right to it can no longer demand the implementation of that right if within 5 (five) years from the issuance of the certificate, …". The regulations have provided a balance for the interested parties and at the same time can improve the positive publication system in land registration with the application of the *rechtsverwerking* institution (releasing rights) that exist in customary rights.

Conclusion

Regarding the institution of *rechtsverwerking*, it was first known in western civil law which means that the opponent has released the bill, therefore he is no longer in debt. In Indonesia recently, there has been a lot of discussion which means the waiver of rights is the same as relinquishing rights, but relinquishing it comes from the weakening of individual rights, which will automatically strengthen the customary rights of customary law communities to control over land. above and at the same time proves that in Indonesia the *rechtsverwerking* institution has long been known.

If the government is very careful in carrying out land registration, by applying the "*nemo plus juris principle*", thus, causing concerns for right holders based on one-on-one proof of ownership, because at any time it is possible for the right holders to be sued in court, then *rechtsverwerking* is

adopted in land registration, to strengthen the positive publicity system to balance the negative publicity system, by dropping the lawsuit at any time after 5 years of the land title certificate has been issued.

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