

The Implementation of Rechtsverwerking Principle in Indonesia Land Register

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ABSTRACT

One of the causes of land disputes is the conflict about the right of land ownership. It is the problem of land registration in Indonesia. The sources of Agrarian Law in Indonesia are derived from *adat* (customary) law, including the principle of *rechtsverwerking*. This principle explains about the expiration of land claim when the certificate of land ownership has published. Therefore, the problem in this paper is to question about how the application of the *rechtsverwerking* principle in settling land cases in Indonesia. The result found that the regulation and the court jurisprudence related to the regulation of the *rechtsverwerking* principle often used by people to occupy another people's land. It represents from the case of land ownership disputes. The disputes on land need to be reduced by make the implementation of the *rechtsverwerking* principle more certain so that it will promote the just, peaceful and inclusive societies.

Keywords: *Rechtsverwerking, Disputes, Principle*

1. INTRODUCTION

Land is a place where humans lives, but the area of land on earth is almost certainly static, while humans continue to grow over time. Thomas Robert Malthus stated that "the power of population is indefinitely greater than the power in the earth to produce subsistence for man". It is because the population is growing based on the geometric ratio, while subsistence only grows in the arithmetic ratio [1]. The population of Indonesia in 2015 amounts to 255.5 million people and it is projected to reach 271.1 million by 2020 [2]. In 2014, the population of Indonesia has fourth ranks after India, China, and the United States [3]. This condition makes people eventually must scramble of the land and result in the disputes over the use of it.

At the end of July 2018, the dispute of the land sector in Indonesia that had been decided by the Supreme Court amounted to 9,163 cases [4]. According to the data from Agrarian Reform Consortium (KPA) in 2016, there were 450 agrarian conflicts affecting to 86,745 households with total land area 1,265,027.39 Ha, whereas in 2017 there were 659 incidents of agrarian conflict covered 520,491.87 Ha area of land and in involving 652,738 households [5]. One of the land disputes occur when people are already own the land materially, but they do not have the evidence of their ownership of land. Therefore, this condition makes them have a risk to be sued in front of the court, and this is caused by the land administration that is not implemented properly [6].

Article 19 Paragraph (1) of the Basic Agrarian Law (BAL) stipulates that "To ensure legal certainty by the Government there is a registration of land throughout the territory of the

Republic of Indonesia in accordance with the provisions stipulated by Government Regulation". This article regulates the importance of legal certainty in land ownership through the land registration activities. This legal certainty is necessary for people who need the land, they need to know what the legal provisions are to acquire the land and what is the evidence [7]. For those who want to buy the land, they will need information about the certainty of the land including the boundaries, the land area, what objects are thereon, the status of the land, who possess the right of ownership, and the presence or absence of other rights holders [7]. These will not only need to be informed by law but also through the implementation of land registration activities or legal cadaster [7].

According to Article 5 BAL, the agrarian law in Indonesia is based on adat law. One of the principles derived from adat law is *rechtsverwerking*. The applicability of this principle is regulated in Article 32 Paragraph (2) Government Regulation No.24 of 1997 on Land Registration. This article regulates the existence of land certificate as the strong evidence, and the ownership of the land cannot be sued by the one who claims as the owner of the land right, after 5 years of publication of the certificate. Beside this article, there is Article 24 paragraph (2) letter a stipulated that when there is no evidence, the recording of the right can be carried out when the land parcel has been physically possessed for twenty years or more as long as the predecessor has good faith and the possession was not questioned by the community during the process of land registration.

In some cases of land disputes, the disputing parties often used these regulations and each of them contrasted these two articles as the basic argument for acquiring the parcel of land or defended from it. Therefore, this study is questioning how the application of the *rechtsverwerking* principle in settling land cases in Indonesia? This paper will use four Supreme Court verdicts to derive the land cases that use the *rechtsverwerking* principle as one of the argumentation of the party.

2. LITERATURE REVIEW

2.1 Indonesia Land Register System

The definition of land registration is stated in Article 1 number 1 of Government Regulation no.24 of 1997, that land registration is a continuous series of activities undertaken by the Government, sustainably and orderly, including collection, processing, bookkeeping, as well as the presentation and maintenance of physical data and juridical data, in attempting to form a map and the list of areas of land and condominium units, including the granting of certificate as title deed of its rights to the areas of existing land rights and property rights over the Flats Unit, as well as certain rights, which encumber. One of the objectives of land registration according to Article 3 of Government Regulation No. 24 of 1997 is to provide legal certainty and legal protection to the right holder of land, apartment units and other registered rights so that he or she can prove himself/herself as the right holder.

Under Article 19 of the BAL, the land registration system in Indonesia uses the registration of rights. According to this system, it is not the deed to be registered, but the rights arise and the changes from land. According to Article 19 paragraph (2) letter c, granting documentary instruments of evidence of rights, which shall serve as strong instruments of evidence. This provision does not mention the title as the strongest or absolute evidence, so that it can be interpreted that the land registration in Indonesia uses negative publication system [6]. It means that if a land certificate has been issued on behalf of a person and when there is another party can prove as the owner through a court decision, the certificate can be canceled [6]. The

use of publication system is stated in the general explanation of Government Regulation No. 24 of 1997. It stated that land registration is held to provide assurance of legal certainty on land, and the publication system is a negative system which it contains a positive element. This system enables to produce the instrument of evidence of ownership title that serve as a strong evidence, as it stated in Article 19 paragraph (2) letter c, Article 23 paragraph (2), Article 32 paragraph (2) and Article 38 paragraph (2) of the BAL.

There are four primary title of land ownership that are regulated in BAL, namely right of ownership (*hak milik*), right to cultivate (*hak guna usaha*), building rights (*hak guna bangunan*), and right to use (*hak pakai*). Each of right needs to be registered by the holder of the right to have the legal certainty for the ownership of land. The registration for the old right is regulated in Article 24 Government Regulation No. 24 of 1997. These old rights are the land rights from the conversion of dutch land rights and adat law before the enactment of BAL. This article required the evidence for people who want to register the land, such as written documents, witnesses information, and/or statement made by the party in question that will be evaluated by adjudication committee or the Head of the Land Office. In case there is no evidence, people need to proof their physically possessed for twenty years or more as long as the predecessor has good faith and the possession was not questioned by the community during the process of land registration.

2.2 Rechtsverwerking Principle in Indonesia Land Law

Before the enactment of BAL, the land law in Indonesia was dualistic, there were the western land law which was regulated in the Civil Code and the adat land law. The enactment of BAL ended this dualistic of land law. The use of adat law as the sources of agrarian law in Indonesia mentioned in considerations and stated in Article 5 of BAL. The consideration mentions that the need of a national agrarian law based on adat law on land, which is simple and ensures the legal certainty for all Indonesian people, without ignoring the elements that rely on the religious law. In the formation of National Land Law, adat law serves as the primary sources in the collection of necessary materials. These materials including the conceptions of adat law, adat law principles, and the institution in adat law that are based on adat law systems. One of the institutions in adat law and appointed in National Land

2.3 Law is rechtsverwerking principle.

In Land Law, there are two different terms namely *acquisitive verjaring* and *rechtsverwerking*. Both are related to land ownership and expiration regulations. *Acquisitive verjaring* is a principle regulated in the Civil Code which regulates the expiration as a means of obtaining property rights over an object (including land title). Sri Soedewi explained that acquiring property with *acquisitive verjaring* can be done by: 1) there must be *bezit* as owner; his *bezit* should be *betegoedertrouw*; 2) *bezit* must be continuous, uninterrupted; 3) *bezit* should not be disturbed; 4) *bezit* must be known by the public; 5) *bezit* must be for 20 years (in case there is a base) or 30 years (in the case of no basis of rights) [8].

The *rechtsverwerking* principle has a meaning whereby with the passage of time one can lose a material possession, including land if he or she is not possessing the land in reality [7]. J. Satrio provides the formulation of *rechtsverwerking* (as granting the right) from the scholars that are "as a neglect of the right which it is visible from the behavior of the person, such that it would be contrary to good faith if afterward, this person still demanding the exercise of his rights". Furthermore, he states that *rechtsverwerking* is a statement that ones do not want to

use the rights they have [9]. *Rechtsverwerking* and *acquisitive verjaring* are the term that concerns the setting of property rights relating to the passage of time.

The use of the *rechtsverwerking* principle can be recognized from the Supreme Court Decision No. 979/K/Sip/1971, whereby the court gave the decision for the defendant for more than 30 years, in good faith acted as the owner of a parcel of land. Otherwise, the plaintiff was lost because the judges made their decision based on the customary law that if one abandons the land, it is contrary to the purpose of the social function of the land and because of this then anyone can lose the right to the land. This case explains that if a person has abandoned the land, he or she will lose his or her rights to the land that previously owned, while there have been others who have controlled the land in ways in accordance with what has been regulated by the law (good faith).

3. METHODS

This study is a study of the implementation of *rechtsverwerking* principle which is stipulated in Indonesia land law. This study was conducted with the qualitative approach using the literature review. Therefore, this study needs the availability of court verdicts files as the main sources [10]. Supreme Court verdicts related to the implementation of *rechtsverwerking* are the object of this study. These court decisions are used to get an overview of the problems regarding the implementation of *rechtsverwerking* thoroughly. The court verdicts were taken from the Supreme Court directories that have been published on the official website of Indonesia Supreme Court. Land conflicts are not merely the competence of civil courts but are also the competence of state administrative courts if it involves the public decisions from state administration officials. Therefore, one of the four court decisions come from the case of the state administration.

There are four Supreme Court decisions as the object of study in this paper. A verdict is derived from the State Administrative Court and three verdicts are from civil decision court. These four decisions are closely related to the application of *rechtsverwerking* principle. In these four decisions, it is envisaged that the disputing parties make Article 32 paragraph (2) PP. 24 of 1997, the jurisprudence of the Supreme Court. 408K/Sip/1973, and other decisions related to *rechtsverwerking* and *acquisitive verjaring*. Briefly these four decisions are explained below.

The first case is from Supreme Court Verdict No. 2159 K/Pdt/2012, involving La Baco, La Hariru, Agus Supriyatna (appellant in cassation) versus Wa Ode Hasiah. R, Wa Ode Sarnia, Surriati R, Wa Ode Nustia, La Ode Agusran (the respondents in cassation). La Baco, La Hariru, Agus Supriyatna occupied the land that owned by Wa Ode Hasiah. They claimed that the occupation are based on the physical occupied letter from the Headman, claiming that they have been consecutively for 42 years since 1970. They used the principle of *acquisitive verjaring* material over 30 years so that they are regarded as the honest ruler of the land and no longer required to show the proof of ownership of the immovable object. According to this argumentation, the appellant can refuse every claim by showing his occupation for 30 years and the law regards the ruler of the land as the owner of an immovable object. They based their arguments on the Decision of the Supreme Court of the Republic of Indonesia No. 408K/Sip/1973, dated December 19, 1975, since the respondents in cassation had for 30 years allowed the disputed land to be ruled. They also used the Decision of the Supreme Court of the Republic of Indonesia No. 1409K/Pdt/1996, dated October 21, 1997, determining that if a person continually controls the land and never transfers to others, well-meaning and deserving

of the right of ownership of the land. Supreme Court, in this case, Reject the appeal of the Cassation Appellant.

The second case is from Supreme Court Verdict No. 909 K/Pdt/2014, involving H. Abbas Nii, Wa Ode Asmiati, Arsyad (appellants in cassation) vs Anuddin Ramesa (the respondent in cassation). Wa Ode Asmiati and Arsyad on the orders of H. Abbas Nii occupied the land of Anuddin Ramesa located in Bau-Bau City. According to the appellants in cassation, they have physically occupied and possessed over the land since about 1980's in a sequence and not consecutively since the 1970s. According to acquisitive verjaring, extinctieveverjaring and rechtsverwerking, the Cassation Appellant stated that they have controlled the land for 32 years. Therefore, according to the law of material "rechtsverwerking" or "release of rights". They refer to the Supreme Court of the Republic of Indonesia No. 408 K/Sip/1973 dated December 19, 1975, claiming that they have occupied physically for more than 32 years. Eventually, the Supreme Court Decisions Rejected the appeal from the Cassation Appellant.

The third case is from Supreme Court Verdict No. 195 K/TUN/2013, the disputing party are Head of Land Office Kota Banjarmasin (appellants in cassation) vs Sahdan Bin Nasir (the respondent in cassation). Registration of land right owned by Sahdan Bin Nasir by another party, when the parcel of land as the object of the dispute is still in the civil litigation process. After the litigation has finished, Sahdan Bin Nasir applying for the right of land ownership certificate, but it has been published the building right certificate No. 2 of 1992 over the land issued by the Office of BPN Kota Banjarmasin on behalf of PT. Sinar Sari Mekar Kencana. The appellant used the argumentation based on Article 32 paragraph (2) of Government Regulation No. 24 of 1997, that the respondent has lost his right because, during the past five years, he did not cultivate the land and let the land occupied by others.

The last case is from Supreme Court Verdict No. 3551 K/Pdt/2016 that involved The Government of Republic Indonesia, The Province Government of Jawa Barat, Badan Pertanahan Nasional (appellants in cassation) vs. PT. Sadang Sari (the respondent in cassation). The case is about the publication of right to manage (Hak Pengelolaan) to Government of West Java Province over the land (ex eigendomverponing) as the object of dispute initially owned by Sadang Sari NV. The right to manage was published on December 8, 1994. According to one consideration of the panel of the judges, the issuance of The Right to Manage has been published for more than 5 (five) years, and the appellants in cassation have over 20 years controlled the object of dispute with good faith. In accordance with the provision of Article 32 paragraph (3) Government Regulation No. 24 of 1997, Supreme Court Decision granted the petition of the cassation applicant.

4. RESULT AND DISCUSSION

From the case explained above, there are two articles of Government Regulation No. 24 of 1997 that seemly opposite each other, i.e. the Article 32 paragraph (2) and Article 24 Government Regulation No. 24 of 1997. From the cases, these regulations often used by one of the party to justified their occupation over the land as if it is a legal occupation. Even though most of the court decisions does not grant this occupation, but there still uncertainty of this regulation when it is involving the government interest (see case 4).

The Article 32 (2) of Government Regulation No. 24 of 1997 clearly strongly reinforces the existence of rechtsverwerking institution that "In the case of land parcel for which a certificate has been legally issued on behalf of a certain individual or a corporate body that has acquired the land parcel in question in good faith and has in reality been possessing it, any other parties which think they have rights thereon can no longer claim for these rights in the

case where, within five (5) years following the issuance of the said certificate and to the Head of the relevant Land Office and never filed a lawsuit with the court over the possession of the land parcel in question or the issuance of the said certificate".

Article 24 Government Regulation No. 24 of 1997 stated that if there is no complete evidence available, the 20-years period of time accompanied by continuous physical control by the applicant and his predecessors may be used as the basis for the right to register the land (for rights conversion lands on the old land) provided that it fulfills the conditions that the tenure of the land is done in good faith and is strengthened by the testimony of a credible person that he or she is indeed the true owner. Furthermore, the community does not question the land ownership prior to and during the registration process. This seemingly likes the acquisitive verjaring principle, but it is not because it applies to land that has been controlled with the old land rights but does not have strong evidence for conversion based on land rights regulated in the BAL [7].

From the Article 26 of the BAL, one can acquire land ownership with the following ways: 1) buying and selling; 2) exchange; 3) grant; 4) testament; 5) acquire the land according to customary law, and 6) other deeds. Conversely, the rights of ownership to the land can be abolished and become state land because of these conditions: 1) revocation of rights; 2) voluntary submission by the owner; 3) abandoned; 4) the provisions of Article 21 paragraph (3) and Article 26 paragraph (2) of BAL that regulate land alienation. The ownership due to expiration is excluded as one of acquisition way of land ownership rights. In the National Land Law which is based on adat law, the institution of expiration cannot be used as a tool to obtain land rights, as stipulated in the Civil Code. Rechtsverwerking institutions have the understanding that expiration can cause people to lose their rights of ownership to the land they originally owned [7]. It means that if the land is abandoned, then a person may lose the ownership rights to the land.

One of the important things that can be analyzed from these study, the regulations over the land registration often do not give the certainty for the land ownership of right. Whereas, humans must be able to live in harmony when they are utilizing natural resources in the form of land. However, considering as the center of the implementation of sustainable development, they are entitled to a healthy and productive life in harmony with nature and Government with the sovereign right, have responsibility for it [11]. According to the Constitution of Republic of Indonesia 1945, Article 28 H paragraph (4) that each person has the right to own private property and such ownership shall not be appropriated arbitrarily by whomsoever. The ownership rights on land are part of human rights that need to be regulated so that there is no conflict between humans. The large number of conflicts over the land, showed that the certainty of rights not regulated clearly, there will be a great potential for conflict between humans. The sustainable development goals No. 16 is to promote just, peaceful and inclusive societies [12]. One of this goal targets is to promote the rule of law at the national and international levels and ensure equal access to justice for all. This cannot be achieved when there are still no certainty over the land ownership of right.

5. CONCLUSION

The provisions on the rechtsverwerking principle stipulated in Article 32 paragraph (2) of PP. 24 of 1997 and some of the decisions of the Supreme Court related to the application of the principle of rechtstverwerking, is often used by people to grasp the land belonging to someone else. They make acts of occupation of land as if it were a legal act, if the time of occupied more than 20 years and meets the 5-year time limit as set forth in Article 32

paragraph (2) of PP 24 of 1997. Therefore, it need to regulated this provision more clear. The continuing use of this article will arise the potential conflict of the right of land ownership. This conflict will not promote the just, peaceful and inclusive societies.

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