

The Essence of Rights Protection to Holders of Land Ownership Certificate

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Abstract: The purpose of this study is to find recognition of ownership rights to land and protection of the interests of landowners. This research uses a normative-empirical type of research. The approach used is a conceptual approach, using primary legal materials, secondary legal materials, and tertiary legal materials, the legal materials collected are then described descriptively. The results showed that the essence of rights protecting to the certificate holder of land rights, namely the recognition of ownership rights to land. Recognition of this right is obtained after someone has done the process of working to get recognition of ownership rights over the land under their control so far. Owners who control land in good faith after going through the process of working physically or obtaining rights through the transfer must be given the recognition of rights in the form of land certificates as a form of legal protection from the government, after going through the application for land registration. Every owner of the land, the owner must have various interests in it. These interests are part of the rights that must be respected by others. The rule of law must protect the interests of the certificate holder of his land right from interference from other people who can harm his rights/interests. Proof of legal certainty as a guarantee of protection that the rights to land owned by the community/right holders are safe from interference from others and can improve the welfare of the owners of land rights.

Keywords: certificate, essence, land, protection.

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I. INTRODUCTION

One of the goals of the formation of the Republic of Indonesia as mandated by the 1945 Constitution of the Republic of Indonesia is to realize public welfare and justice for all Indonesian people. The birth of the Basic Agrarian Law (Undang-Undang Pokok Agraria) also became the basis for providing legal certainty regarding land rights for the people of Indonesia. The Basic Agrarian Law becomes the legal basis governing relations between humans and legal entities with legal actions relating to land rights.¹ Land for the owner is a pillar of prosperity so that no plot of land can be transferred to others without the knowledge of the owner, and no one can transfer rights beyond the rights available to him (the principle of *nemo plus juris*). Only eligible people can register land rights because the results of land registration are certificates as evidence of land rights.² In order to protect people's rights to their land, the Basic Agrarian Law has ordered the government to register all land rights including the transfer of land rights through the provisions of Article 19 of the Basic Agrarian Law.

According to Mariam Darus Badruzaman and Boedi Harsono, that the land registration publication system adopted by the Basic Agrarian Law is more likely to be mixed, which is to adhere to a negative system as well as a positive system known as a negative publication with a positive tendency. The negative element is that it is still given the possibility of changes and revocation of certificates. This can be observed through the provisions of Article 19 paragraph (2) letter c, Article 23 paragraph (2), Article 32 paragraph (2), and Article 38 paragraph (2) the Basic Agrarian Law that the registration of various legal events is a strong means of proof. While the positive elements are outlined in Article 32 paragraph (2) Government of the Republic of Indonesia Regulation No. 24 Year 1997 concerning Land Registration.³

Weaknesses in the negative publicity system are overcome by the provisions of Article 32 paragraph (2) RI Government of the Republic of Indonesia Regulation No. 24 Year 1997 concerning Land Registration, that "In the case of a piece of land that has been legally issued a certificate in the name of the person or legal entity who obtained the land in good faith and is clearly in control of it, then other parties who feel they have rights to the land cannot again demanded the exercise of this right if within 5 (five) years of the issuance of the certificate did not file an objection in writing to the certificate holder and the Head of the relevant Land office or did not file a lawsuit with the Court regarding the control of the land or the issuance of the certificate".

However, the fact is that the holder of the certificate of ownership of the land can still be sued through the court even though it has exceeded the 5 (five) year grace period and must bear the consequences of the cancellation of the certificate which may not even be his fault. This legal fact is an indicator that an authentic deed such as a land certificate does not guarantee legal certainty and at the same time does not provide legal protection for holders of land ownership certificates in good faith.

It is interesting to analyze in more depth than the ineffectiveness of Article 32 paragraph (2) of Government of the Republic of Indonesia Regulation No. 24 Year 1997 concerning Land Registration is a dead article that needs to be reviewed. This is an inconsistency in the use of the Indonesian land registration publication system, which is a negative publication system with a positive tendency. This inconsistency can weaken the certainty of law enforcement on land registration. Suing for a claim on a land certificate has always been an interesting study because the certificate should be used as evidence of land rights and can prevent disputes from arising, rather than the certificate being the source of the dispute.

Law is a collection of rules or rules that have general and normative contents.⁴ Any law must be sourced from "true law".⁵ There are laws that are universal. He always longed for a higher law and exist than a positive law.⁶ Land issues are no longer sectoral issues but have become cross-sectoral and multi-aspect, this means that land issues are also multi-disciplinary, integrated and thorough. Land issues can lead to conflicts that cause victims of their own countrymen. For the national economy, foreign investors will be interested to invest in Indonesia if the land sector guarantees legal certainty of ownership of land rights and there is no land conflict. Based on the explanation, the problem that will be discussed in this paper is how is the recognition of ownership rights to land? and how is the protection of the interests of landowners?

II. RESEARCH METHODS

This research uses a normative-empirical type of research. Normative research type⁷ it is focused on analyzing the principles, the systematic system of laws and regulations, the synchronization (harmony) of regulations with each other, and the history of law. While the type of empirical research is focused on studying the effectiveness or working of the law in society.⁸ The approach used is a conceptual approach, using primary legal materials, secondary legal materials, and tertiary legal materials,⁹ legal materials collected are then described descriptively.

III. RESULTS AND DISCUSSION

Land rights are the strongest rights compared to other land rights. The legal certainty of ownership rights on land cannot be ignored because upon ownership rights can be attached to other rights, such as mortgage rights, lease rights, usage rights, and others. The legal certainty of ownership rights to land can be proven through certificates of ownership of land. The certificate of ownership of the land contains the name of the certificate holder recognized by the state as the legal owner of the land, as long as no other party claims to be the legal owner or another party who feels disadvantaged by the issuance of the certificate.

The land is a gift from God Almighty, to humanity as a nation to fulfill their daily needs. That means that as long as the Indonesian people are united as the Indonesian nation and as long as the earth, water and space still exist, in any case, there is no one power that can break or nullify the relationship.¹⁰ One component of nature that is very urgent for humans is land, namely the surface of the earth including the body of the earth to those directly related to the human interests that are above it.¹¹

Humans need legal protection from the government to end social conflicts in the pre-contract period arising from the principle of individual freedom of life in meeting their needs, as is the descriptive description from Thomas Hobbes (1588-1679) on the pre-contract human natural condition that "On Basically humans are equal in body and mind capacities. From this similarity arises the same hope to achieve life goals and therefore, if there are two people who want the same thing, both of which cannot enjoy it together, then they are hostile in achieving their respective goals, they try to destroy, or subject one another. People live without security guarantees except for their own strength. This situation is described by Hobbes as *bellum omnium contra omnes*, (war of all against all)".¹²

For the sake of maintaining survival, humans bind themselves in an agreement with others called social contracts. To accept a ruler who has the power to force people to act as they wish. The authorities/governments act to regulate their survival so that social conflicts do not arise.

In contrast to Hobbes's thought, John Locke (1632-1704) explained his thoughts in a natural state (pre-contract) that: "Everyone has freedom as well as equality. Assuming having both freedom and equality, everyone in natural conditions is equally able to find and be bound by natural law. This natural law is in Locke's view the basis of all morality. Natural law instructs everyone not to harm others in relation to life, health, freedom, and ownership. This natural condition is a situation where everyone is free to pursue their interests and life plans, free from distractions, with the awareness to recognize and obey natural law. in pre-contract conditions, there is no civil power that can protect someone who feels disadvantaged. Such a situation is a

strong reason why humans later leave natural conditions and agree to an agreement to form a civil government".¹³

Based on the agreement to form a civil government, according to Locke, property rights become an important cause. This is important because, in order to protect his private property including land ownership, humans in natural conditions decide to make social contracts, form civil governments to protect their rights. According to researchers that the civil government formed through social contracts aims to protect one's private property from threats/interference from other people. This is a historical momentum that became the forerunner to the birth of legal protection of human rights including land rights. Human freedom in fulfilling needs and maintaining life without the involvement of civil government, so this freedom is a security threat to one another. To realize the nature of the social contract, the government formed regulations aimed at protecting the people as the sovereign of a nation.

When discussing the status of ownership rights over land in human life, the discussion is inseparable from the history of property rights. As is known laying the foundation of the philosophy of regulating the relationship between humans and land that gives rise to ownership rights since the Roman Empire, known as maxim "*ciusestsolumeiususque ad caelum et ad inferos*" in the free translation that a person has land covering the space above it (sky) and the space below it (body of the earth).¹⁴With regard to the legal protection of human rights such as land rights, it always involves the obligation of others to respect the interests behind those rights. The relationship of rights and obligations that correlate with one another according to Hans Kelsen, that if those rights are legal rights, those rights must be the obligations of others. Legal rights require other people's legal obligations.¹⁵Behind a person's legal relationship with his land arises a right that is the interest that must be respected or protected, both by the government through the enforcement of legal principles and by the community. These interests may take the form of economic, social, cultural, religious interests of the land rights owner.

Human relations with their land embody land rights as stipulated in Article 16 and Article 53 of the Basic Agrarian Law. One of the rights listed in Article 16 of the Basic Agrarian Law is property rights. Property rights are a form of the owner's relationship with his land which goes on for generations and gives full authority to the owner. As long as the land (hereditary) is in the possession of the owner in good faith, then there is not a single reason that can separate land rights from the owner. As a form of the legal protection of property rights, this has been regulated in Article 28 H paragraph (4) of the 1945 Constitution of the Republic of Indonesia, that every person has the right to have private property rights and such property rights may not be taken arbitrarily by anyone.

Land rights registration activities constitute a social contract between the community as the owner of the land and the government (Land Office), as mandated by Article 19 of the Basic Agrarian Law. This social contract is essential to protect the security and ownership interests of community property. Therefore, the legal product of land registration activities in the form of a certificate of ownership of land is a symbol of the legal protection of land ownership, which can certainly provide security protection for ownership of land.

Recognition of Ownership Rights to Land

Within a country, there are laws governing its citizens and within a country, there must be a legal relationship between the state and its citizens. This relationship gives birth to rights and obligations. Legal protection will be a right for citizens. On the other hand, legal protection becomes an obligation for the state. The state is obliged to provide legal protection for its citizens, especially if what is being discussed is a rule of law such as Indonesia.

Indonesia established itself as a state of law through the 1945 Constitution of the Republic of Indonesia in Article 1 paragraph (3) that "The State of Indonesia is a state of law. This means that Indonesia is a country based on law. The consequence is that every action by the government and the community must be based on law and automatically legal protection becomes an essential element and a consequence in the rule of law, namely the state is obliged to guarantee the legal rights of its citizens".

The constitutional reform that has been carried out through the amendments to the 1945 Constitution of the Republic of Indonesia has brought changes, especially the constitutional recognition of Human Rights regulated in Chapter XA on Human Rights consisting of 10 articles and 24 paragraphs. Among these, there are two provisions governing the protection of ownership rights, namely Article 28 G paragraph (1) and Article 28 H paragraph (4) of the 1945 Constitution of the Republic of Indonesia. The aforementioned provisions, guarantee the protection of human rights including land ownership rights. This shows that ownership of land rights is one of the most essential rights for humans besides the right to life. The consequence is that the state, through its institution, is responsible for protecting, respecting and facilitating the community in achieving and maintaining the right to ownership by everyone without discrimination.¹⁶

Discussing property rights, always faced with two sides of ownership, namely common property rights and private property rights. According to the Stoics, there is no natural property right, because naturally there

are only common property rights. According to Cicero property can only be private property “either because it has long been controlled or because it has gone through a legal process”. Whereas the other Stoic philosophers argued that nature established that all things belong together. This is in line with their understanding that all human beings are cosmopolitan citizens who have an inner bond/sense of brotherhood. Among friends all things come together, everything that is produced by nature will become the property of Together.¹⁷ Cicero’s view is that the researcher associated with the activity of registering land rights that before something on the land is registered in the name of someone, then nature (land) granted by the Creator is shared property as citizens of cosmopolis. All people have the right together to use/enjoy the results of the cosmos (nature) in accordance with natural law demands that no one can use nature by damaging nature and/or harming the interests of others.

Along with the times, human needs are increasingly different with the support of abilities and skills in meeting the different needs of life. Because the human ability to meet their needs is not the same, cosmopolitan citizens begin to leave the common property and think of the importance of private property rights. To meet their needs, people start working until they have a relationship with the land as private property. In order for the private property rights to obtain legal protection from the government, landowners start thinking about registering their land rights.

Protection of the Interests of Landowners

The existence of a right requires legal protection so that the right is protected from threats/interference from other parties that can harm the interests of the owner/right holder. Legal protection in the form of laws and regulations is basically a community agreement to regulate the behavioral relationship between community members and between individuals and the government that is considered to represent the interests of the community.¹⁸ Legal protection is providing protection for human rights that are harmed by others and the protection is given to the public so that they can enjoy all the rights provided by law.¹⁹ According to Aminuddin Salle, “People who have dignity and dignity will want to appear with high values (*labbiri*), but someone who has no dignity and dignity, then he sells his pride in the form of receiving bribes or paying tens or even hundreds of millions to be able to give a reward to someone”.²⁰

The value of local wisdom should be a basic value in land registration activities so that conflicts or disputes originating from land ownership can be minimized. A land registration applicant who upholds his dignity and self will not commit an act that is not commendable (not high) such as falsifying land registration documents or making a transfer of rights in a deceptive manner which can be detrimental to the next certificate holder. Likewise, the land registration committee that has dignity and dignity will carry out its duties with full responsibility (upholding *labbiri* values, such as honesty, work discipline, rigorous, law-abiding, and others).

Recognition and respect for human dignity and values in the state philosophy of the Republic of Indonesia are formulated in the second principle of Pancasila, namely humanity which is just and civilized. Humans are noble creatures created by God Almighty who are endowed with reason and mind to act justly and civilized, do not violate the rights of others, act in accordance with legal and social norms so that human beings have demonstrated their dignity and status. Respecting rights equals respect for human dignity. Rights can be attached to objects, both movable and immovable objects, tangible and intangible objects. The rights attached to immovable objects such as land have a very important meaning in human life because most human interests are fulfilled by utilizing land.

Land as an object of individual ownership has a high value from various aspects such as economic aspects, the land value will increase after the land is registered or certified. The land is a means of production that can improve welfare. From the cultural aspect, the land is a traditional value that has been passed down from generation to generation can also determine the level of the social status of the owner. From the social aspect, a land is a place of interaction between individuals and their communities. From the legal aspect, a land is a legal object that has the status of ownership rights such as ownership rights. Even land can be used as the final resting place.

One way to protect land rights is to register land rights with an institution established by the government. With the registration of land rights, the government has granted legality of ownership so that the landowner can use his land for his welfare. For example, using land certificates as collateral for mortgage rights at the bank, when the landowner will start/increase business capital. The land is a natural resource that is highly needed by humans to meet their needs, both directly for their lives such as farming or living, as well as for carrying out businesses such as trade, industry, agriculture, etc.

IV. CONCLUSION

The essence of rights protecting to the certificate holder of land rights, namely the recognition of ownership rights to land. Recognition of this right is obtained after someone has done the process of working to get recognition of ownership rights over the land under their control so far. Owners who control land in good faith after going through the process of working physically or obtaining rights through the transfer must be

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REFERENCES

- [1]. UripSantoso, 2012, *HukumAgraria: Kajian Komprehensif* (Agrarian Law: Comprehensive Study), KencanaPrenada Media Group, Jakarta, p. 50-52
- [2]. Adrian Sutedi, 2017, *Sertifikat Hakatas Tanah* (Land Rights Certificate), SinarGrafika, Jakarta, p. 100
- [3]. A. SuriyamanMustariPide, 2009, *Quo Vadis Pendaftaran Tanah* (Quo Vadis Land Registration), Pukap, Makassar, p.22
- [4]. Sudikno Mertokusumo,1991, *MengenalHukum, SuatuPengantar* (Know the Law, An Introduction),Liberty, Yogyakarta, p. 38
- [5]. Achmad Ali, 1996, *MengukTabirHukum* (Opening the Essence of Law), Chandra Pretama, Jakarta, p. 271
- [6]. Marwan Mas, 2018, *PengantarIlmuHukum* (Introduction to Legal Studies), Ghalia Indonesia, Bandung, p. 133-135
- [7]. Kadarudin, *PeranPerpustakaan dalam Membantu Penegakan Hukum Serah-Simpan Karya di Indonesia* (The Role of Libraries in Assisting Law Enforcement of Hand-Saving Works in Indonesia). *Jurnal Jupiter*, Vol. 14 No. 2, 2015, p. 4
- [8]. Zainuddin Ali, 2017, *Metode Penelitian Hukum* (Legal Research Methods), SinarGrafika, Jakarta, p. 22
- [9]. Peter Mahmud Marzuki, 2006, *Penelitian Hukum* (Legal Research), Kencana, Jakarta, p. 141
- [10]. Explanation of the Basic Agrarian Law, in Part II Number 1
- [11]. BoediHarsono, 2003, *Hukum Agraria Indonesia, Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya* (Indonesian Agrarian Law, History of the Establishment of the Basic Agrarian Law, Contents and Implementation), Djambatan, Jakarta, p. 5
- [12]. Andi Tarigan, 2018, *Tumpuan Keadilan Rawls* (The Rawls Foundation of Justice), PT.GramediaPustaka Utama, Jakarta, p. 20-21
- [13]. *Ibid.*, p. 30-31
- [14]. YudhiSetiawan, *et.al.*, 2017, *Hukum Administrasi Pemerintahan TeoridanPraktik* (Government Administration Law Theory and Practice), RajawaliPers, Jakarta, p. 305
- [15]. Hans Kelsen, 2006, *Teori Umum Tentang Hukum dan Negara* (General Theory of Law and the State), translated by Raisul Muttaqien, Nusa Media & Nuansa, Bandung, p. 11
- [16]. Achmad Ali, 2005, *Perlindungan Hak Asasi Manusia di Bidang Kepemilikan Tanah* (Protection of Human Rights in the Field of Land Ownership), National Commission of Human Rights, Jakarta, p. 41
- [17]. A. Sonny Keraf, 1997, *Hukum Kodrat dan Teori Hak Milik Pribadi* (Natural Law and Theory of Private Property), Kanisius, Yogyakarta, p. 54
- [18]. Naomi Elviene Yanto, *Implementasi Asas Nemo Plus Yuris Sebagai Perlindungan Hukum Bagi Pemegang Hak Atas Tanah: Studi Kasus Pembatalan Sertifikat Nomor 2690/KeBonKelapa* (Implementation of Nemo Plus Yuris Principle as Legal Protection for Land Rights Holders: Case Study of Cancellation of Certificate Number 2690/KeBonKelapa), *Jurnal Era Hukum*, Vol.16 No. 1, June 2018, p. 135.
- [19]. Satjipto Rahardjo, 2000, *Ilmu Hukum* (Legal Science), Citra Aditya Bakti, Bandung, p. 53
- [20]. Aminuddin Salle, 2011, *Memaknai Kehidupan dan Kearifan Lokal* (Understanding Life and Local Wisdom), 2nd Edition, AS Publishing, Makassar, p. 71

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