The Development of Law of Buying and Selling Land in Indonesia

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Abstract

Land has an important meaning for human life, because on the land the human do the activities, Ranging from cultivating crops, establishing houses of residence, doing business, and so forth, in addition to the economic value of the land that continues to be higher so that it is not uncommon the land is used as an investment object.Everyone is always expecting to have a plot of land and one way to get it is by buying and selling. Recognizing the importance of land transactions, then every ruling government always regulates the institution of sale and purchase of land in order to ensure legal certainty and legal protection.The objectives of this study were (1) to know the provision of buying and selling land of customary rights before the enactment of BAL; (2) to know the provision of buying and selling land of western rights before the enactment of BAL; and (3) to know the provision of buying and selling land after the enactment of BAL. This study was a normative juridical research. The method of collecting data was by literature study. Data analysis used was qualitative analysis. The findings of this research were (1) Making the deed of buying and selling of customary land rights before the enactment of the BAL had been solely made by the seller and the buyer, witnessed by the village head; (2) Making the deed of buying and selling of western rights land before the enactment of BAL had been made in-front of notary and the juridical delivery had been made with the deed of transport as well as the registration by transfer of title officer; and (3) Making the deed of buying and selling land after the enactment of BAL was made before the official of the land deed officer (LDO) and the registration of its right transfer was registered in the land office.

Keywords: Buying and selling, Land.

The Background of the Study

Land is the surface of the earth, which in its use may include also some of the earth's underlying body and part of the space above it, with restrictions are being merely necessary for the immediate interests connected with the use of the land concerned.

Land has an important meaning for human life, because on the land the human do the activities, Ranging from cultivating crops, establishing houses of residence, doing business, and so forth, in addition to the economic value of the land that continues to be higher so that it is not uncommon the land is used as an investment object.

Everyone is always expecting to have a plot of land and one way to get it is by buying and selling. Recognizing the importance of land transactions, then every ruling government always regulates the institution of sale and purchase of land in order to ensure legal certainty and legal protection. Therefore, this paper will discuss the development of law of buying and selling land before and after the enactment of Law No. 5 of 1960 (Basic Agrarian Law) hereinafter in this paper it is abbreviated

as BAL.

The Problem of Study

1. What was the provision of buying and selling land of customary rights before the enactment of BAL?
2. What was the provision of buying and selling land of western rights before the enactment of BAL?
3. What was the provision of buying and selling land after the enactment of BAL?

The Objectives of the Study

1. To know the provision of the buying and selling land of customary rights before the enactment of BAL.
2. To know the provision of buying and selling land of western rights before the enactment of BAL.
3. To know the provision of buying and selling land after the enactment of BAL.

The Discussion

1. The provision of buying and selling land of customary rights before the enactment of BAL?

Regarding the buying and selling land of customary rights, the provisions of the sale and purchase of land according to customary law applied. Buying and selling of land under customary law were not a legal act which were called obligatoir agreement, but rather a legal act of transfer of rights with cash payments, meaning that a mutually agreeable price was paid in full at the time of purchasing concerned. In the customary law it was not known that juridical delivery was as the fulfillment of legal obligations for the seller, because precisely what was called the land purchase was the delivery of right of the sold land to buyers at the same time the sellers paid the full price which had been agreed upon.

The followings were the opinions of some customary law experts in providing restrictions on the selling and buying of land:

a. Buying and selling was the act of exchanging with payment, where the seller handed over the goods he had sold and received the payment, and the buyer handed over the money and received the goods. So the selling and buying of land were the delivery of the land at a certain price and they were not an agreement that created an obligation to submit, according to the notion of customary law, the selling and buying were one.[1]

b. Buying and selling of land were to hand over the land to receive payment of some money in cash, without the right of redeem, so the handover was valid forever.[2]

c. Buying and selling of land were the delivery of a plot of land forever with the receipt of cash, which the money was called the purchased money.[3]

In conclusion the buying and selling of land according to customary law were:

a. Buying and selling of land were legal acts of transferring the rights of the land from the seller

1 Hilman Hadikusuma, *Customary Agreement Law*, PT. Citra Aditya Bakti, Bandung, 1990, p. 77
2 Imam Sudiyat, *Customary Law of Sketches and Principles*, Liberty, Yogyakarta, 1978, p. 32
3 S.A. Hakim, *Sell Off, Sell Pawn, and Sell Yearly,* Bulan Bintang, Jakarta, 1965, p. 5

to the buyer.

b. Contingent handeling means the delivery of objects and payment of the price occurs by cash, which was simultaneously submit the object and pay the price. The legal consequences of the cash was the buyer directly became the owner of the land, If there was a shortage of payment, it was a receivable debt between the former buyer and the former seller, which could not be used as an excuse to cancel the buying and selling on the basis of breach of contract.
c. Concrete / real / visual means the buying and selling were considered to occur when they were marked by a real bond that could be captured with the five senses. The agreement alone was not a treaty binding on the parties, if either party cancelled; the other party could not claim anything. If the prospective buyer wished from the beginning, then the prospective buyer submitted a bond signature in the form of down payment to the prospective seller.
d. Transparent (not covert) means the buying and selling were made in the presence of the village head with a written agreement made on seal paper between the seller and the buyer witnessed by the head of the village

In customary law it adhered to the principle of horizontal separation in which the buildings and plants were not part of the land, So that the right to land did not necessarily involve the ownership of the buildings / plants on it. Legal acts on land did not necessarily include the building / plant owned by the landowner. If things were meant covering also building / plant then it was expressly stated in the relevant legal acts.

2. The provision of buying and selling land of western rights before the enactment of BAL

Regarding the buying and selling of land for the land of western rights, then the sale and purchase provisions contained in the book III the criminal code. One of them was article 1457 of the criminal code which stipulated that the so-called buying and selling (land) was an agreement in which the party who owned the land called "seller" promised and bound himself to surrender the rights to his land concerned to another party called "buyer ", while the buyer promised and bound himself to pay the agreed price. According to article 1458 of the Code of Civil Law, the agreement was the occurrence of buying and selling even though the object had not been submitted and the price had not been paid.

With the occurrence of such buying and selling, there had not been any change in the rights to the land concerned even if the buyer had paid the full price and the land had been physically delivered to the buyer. Therefore, in spite of the land, the legal provisions concerning the buying and selling were not a provision of land law, but the provisions of civil law, namely the law of the western treaty, the buying and selling were made in the presence of a notary.

The rights to the land sold were transferred to the buyer only, if the seller had given the legal right of the land to the buyer in order to fulfill his legal obligations (1459 Civil Code). Under the terms of the Civil Code, the articles governing the procedure of juridical handed over as a continuation of the buying and selling of the land had not been valid until revoked by the BAL. Originally the procedure were as follows, after the sale was made in the deed of buying

and selling before the notary, Subsequently, the juridische levering submission (set forth in article 616, 620 Civil Code) should be conducted by a deed also made in the presence of a notary namely the deed of transport (transport acte), then the deed of transport was registered to an official called "hypotheek storage officer"

The applicable provisions were based on the Overschrijvings Ordonantie (S. 1834 number 27) where it was determined that the duty to make the deed of transport and to register was "transfer of title officer" (overschrijvings ambtenaar).

From the above provision, it was clear that according to the provisions of the western civil law, that the "buying and selling land" was entirely separate between the "the sale" which was the obligatory agreement with "surrender" namely the zakelijk agreement.[4]

According to western law which adhered to the principle of accessie or the principle of attachment, Buildings and plants that exist on the land were one-unit with the land. So the right to land by itself included also the ownership of buildings / plants existing on the land (article 500 jo. 571 Civil Code). Thus the legal act of the land by itself included the building / plant on it

3. The provision of buying and selling land after the enactment of BAL

The enactment of BAL had ended the diversity of legal instruments that govern the land sector and created a single national land law, which was based on customary law. In addition to the law, the BAL also identified land tenure and land rights. All land rights which were regulated in the old legal instruments of land, were simultaneously declared to be deleted and converted into one of the rights set forth in the BAL.

In general explanation figure III (point 1) BAL stated that "with the new agrarian law itself must be in accordance with the legal consciousness of the people. Since the Indonesian people were largely subject to customary law, then the new agrarian law would be based also on the provisions of customary law, as the original law, which was perfected and adapted to the interests of society in a modern state"

In chapter 5 of the BAL stated that "the agrarian law that applied to the earth, water and air space were the customary law, as long as they did not contradict national interests and state, which was based on the unity of the nation, with Indonesian socialism and with the rules set out in this law. In order to establish national land law, customary law was the main source for obtaining its materials, in the form of conceptions, principles and legal institutions, to be formulated into written legal norms.

In meeting the needs of modern society, the land buying and selling agencies undergo modernization and adjustment without changing their nature as legal actions of transfer of land rights with the payment of its price in cash, and its character as a real and bright act. Buying and selling of land according to the BAL should be evidenced by a deed made by the land deed officer (LDO), a change that aimed to improve the quality of evidence of legal acts committed. This change of procedure did not exclude the provisions of customary law governing the material terms

4 Subekti, *Various Agreements*, Alumni, Bandung, p. 23

of the land sale agency, as interpreted by the some parties. [5]

It could be concluded that according to BAL that the material law of land sale agency was based on customary law, while its formal law was regulated in government regulation no. 24 year 1997 on Land Registration and its implementation regulations.

Procedures of buying and selling land according to BAL which had been implemented by government regulation no. 24 year 1997 and PMNA / KBPN no. 3 years1997 were as follows:

a. Buying and selling of land were carried out in the presence of the land deed officer (LDO) by making the deed of buying and selling. The nature of cash was maintained, so the deed proved that the buyer had become the new rights holder. As it was known that the official administration of the land deed officer was closed to the public so that the stage was only known by the parties involved, two witnesses, and the land deed officer. To obtain stronger and broader evidence of its evidentiary power, then it was registered in the land office to be recorded on a land book and certified as a proof of a strong right. The nature of the administration of the land office was opened to the public, and then at this stage the general public was considered to have known the transfer of rights from the seller to the buyer.
b. The nature of Transparent and permanent was a requirement for the transfer of rights, and previously the transfer of rights must be made in the presence of the village head, so now the transfer of the rights had been done in the presence of the land deed officer (LDO).
c. The nature of the concrete / real was also maintained that the deed signed by the involved parties showed the real legal act of buying and selling land.

Here was the jurisprudence of the Supreme Court which proved that buying and selling land were materially based on customary law:

a. Related to the nature of cash:
    1). Supreme Court decision no. 674.K / Pdt / 1989 on 8th December 1990. Buying and selling land in front of the land deed officer which was not followed by registration / returning the name were still valid, because they were based on buying and selling according to the customary law that was contingent (kontante handeling / simultanous transfer).
    2). Supreme Court decision no. 2373.K / Pdt / 1989 on 18th February 1988. Buying and selling of land measured from Article 1320 jo. 1471 Civil Code were wrong, because buying and selling of land were based on customary law.
    3). the jurisprudence of the Supreme Court no. 544.K / Sip / 1976 on 26th June 1979. Based on Article 19 of Government Regulation no. 10 of 1961 any transfer of land rights should be made in the presence of the Land Deed Officer (LDO), at least in the presence of the village head.
    4). Supreme Court Decision no. 601.K / Sip / 1972. Buying and selling of land known to the headman and subdistrict / land deed officer (LDO) proved the existence of legitimate buying and selling. While the registration according to Article 19 BAL did not determine the validity of buying and selling of land.

5 Boedi Harsono, *Indonesian Agrarian Law*, Publisher Djambatan, 1999, p. 204

5). Supreme Court Decision no. 123.K / Sip / 1970. In customary law the act which caused the transfer of rights was in cash, while the registration according to BAL and the administrative regulations was merely administrative.

b. Relating to the transparancy:

1). Supreme Court decision no. 3438.K / Pdt / 1987 on 30th 30 of 1989. To measure the buying and selling of land could be seen from two ways, first, according to government regulation no. 10 year 1961 namely in the presence of deed land officer, (if it ws not in the presense of deed land officer), then go to the second way, that was according to the customary law, it should be neutral and cash.

2). Supreme Court decision no. 1252.K / Sip / 1983 on 9th April 1986. Buying and selling of land with "Certificate of legal Sale" without known by the village officials were a sale that was not transparant, so it was illegal and must be cancelled.

3). Supreme Court decision no. 1589.K / Pdt / 1989 on 16th July, 1992. Buying and selling of land were cash and clear, although they were not yet followed by the record in the village book, then they were still valid.

In the practice, it was possible that legal acts concerning to the land also included buildings / plants on it, with the provison that the building / the physical plant was the unity with the land (A building that had a foundation and a perennial plant), and the owner of the land, and such intention was expressly mentioned in the relevant sale deed.[6] In national land law based on customary law, the principle that had been adopted was the principle of horizontal separation. This was evidenced in the practice of justice as follows:

1). Supreme Court decision no. 2339.K / Sip / 1982 on 23th May, 1983. According to Article 5 of the BAL that the land customary law was applied, which meant that the house could be traded separately from the land?

2). Supreme Court Decision no. 574.K / Pdt / 1992 on 14th May, 1994. a plot of land which had buildings, At first the building was sold to the first buyer, then the land (which the seller said that it was an empty land) was sold to a second buyer, then the second buyer (landowner) could not sue the first buyer (building owner) to vacate and hand over the building.

The provision of the implementation of buying and selling deed in the presence of deed land officer was regulated in government regulation no. 24 year 1997 on Land Registration, which had been implemented with PMNA / KBPN No. 3 of 1997 included:

1). In the case of transfer of land rights through buying and selling could only be registered if it could be proven by deed made before the deed land officer (DLO)

2). in making a deed, it should be attended by the involved parties to take legal actions and witnessed by at least two witnesses who were qualified to act as witnesses.

3). after the deed had been completed, not later than 7 (seven) working days from the date of signature of the deed concerned, the land deed officer had to submit the deed and the relevant documents to the land office for registration, the documents included:

6 Sudargo Gautama, *Comments on the Implementation rules of BAL*, Citra Aditya Bakti Publishers, Bandung, 1997. p. 55

a). letter of application for registration of rights transfered by buyer.
b). deed of buying and selling which had been made before the land deed officer.
c). proof of identity of the involved parties.
d). the original certificate of land rights which had been affixed with the record of its compliance with the existing list in the land office.
e). Proof of payment of BPHTB in case that the fee was due.
f). Proof of payment of income tax in case that the tax was owed.

The conclusion

1. Making the deed of buying and selling of customary land rights before the enactment of the BAL had been solely made by the seller and the buyer, witnessed by the village head.
2. Making the deed of buying and selling of western rights land before the enactment of BAL had been made infront of notary and the juridical delivery had been made with the deed of transport as well as the registration by transfer of title officer.
3. Making the deed of buying and selling land after the enactment of BAL was made before the land deed officer (LDO) and the registration of its right transfer was registered in the land office.

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REKONSTRUKSI UPAYA PAKSA DALAM PUTUSAN PERADILAN TATA USAHA NEGARA BERBASISKAN PERSEPEKTIF REVOLUSI SOSIAL DAN INDUSTRI

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Abstrak

Aturan teknis tentang pelaksanaan putusan tentang Upaya Paksa belum ada aturan teknis. Sudah ada 2 penelitian yang mengkaji hal ini tetapi malah berujung pesimis dan mencari-cari dasar yang tidak relevan. Penelitian ini berusaha memberi kajian yang optimis menggunakan peraturan yang sudah ada bahwa Upaya Paksa bisa dieksekusi. Metode pendekatan yang digunakan adalah yuridis normatif, yaitu mengumpulkan dan menghubungkan sumber hukum yang relevan lalu mendeskripsikannya secara deduktif. Permasalannya diajukan adalah bagaimana tata cara pelaksanaan putusan Peratun tentang Upaya Paksa menurut peraturan perundang-undangan yang sudah ada? Setelah diteliti ditemukan bahwa Upaya Paksa terdiri dari 2 yaitu Sanksi Administratif dan Uang Paksa. Presiden sebagai pemangku pemerintahan teratas harus ikut bertanggung jawab dalam mengenakan Sanksi Adminitratif dan lembaga perwakilan rakyat melakukan pengawasan. Uang Paksa merupakan bentuk kesalahan pribadi (*fautes personalles*). Eksekusi Uang Paksa dilakukan oleh Ketua PTUN dengan memerintahkan Panitera dan Jurusita untuk menjalankan tugasnya.

Kata kunci*: Pelaksanaan Putusan, Upaya Paksa, Sanksi Administratif, UangPaksa, Peratun, PTUN*

A. Pendahuluan

UU Peratun (Undang-undang Tentang Peradilan Tata Usaha Negara) sudah mengalami perubahan beberapa kali, yaitu

1. UU 5/1986 (Undang-undang Nomor 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara),
2. UU 9/2004 (Undang-undang Nomor 9 Tahun 2004 Tentang Perubahan Atas Undang-undang Nomor 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara),
3. UU 51/2009 (Undang-undang Nomor 51 Tahun 2009 Tentang Perubahan Kedua Atas Undang-undang Nomor 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara).

Ketiga undang-undang tersebut hingga kini masih berlaku selama isi atau pasal- pasalnya tidak dirubah oleh UU Peratun yang lebih baru. UU Peratun berisi hukum materiil dan formil. Hukum materiil berisi hak-hak dan kewajiban sedangkan hukum formil berisi aturan-aturan bagaimana menegakkan hak-hak dan kewajiban-kewajiban.[1]

1 Soerjono Soekanto dan Purnadi Purbacarakan, 1989, *Aneka Cara Pembedaan Hukum* (Bandung:Citra Aditya Bakti), Hal. 27-28.

Objek kajian dalam penelitian ini adalah pelaksanaan putusan Peratun, khususnya tentang pelaksanaan putusan yang amarnya menghukum tergugat untuk dikenai Upaya Paksa. Pengaturan tentang pelaksanaan putusan tersebut diatur dalam Pasal 116 yang mana sudah mengalami perubahan beberapa kali. Seringnya perubahan tersebut mengindikasinya bahwa Pasal 116 yang lama dipandang tidak efektif, maka dari itu oleh pembentuk undang-undang dilakukan perubahan hingga 2 kali yaitu dengan UU 9/2004 dan UU 51/2009. Berikutperbandingan Pasal 116 dari ketiga UU Peratun:

1. Menurut UU 5/1986 dan UU 9/2009, pelaksanaan putusan pencabutan Keputusan TUN (Tata Usaha Negara) jangka waktunya adalah 4 bulan sejak putusan tersebut dikirim, apabila melebihi jangka waktu maka secara otomatis KTUN tersebut tidak mempunyai kekuatan hukum lagi. Sedangkan di dalam UU 51/2009 jangka waktunya dipersingkat dari 4 bulan menjadi 60 hari kerja.
2. Menurut UU 5/1986 dan UU 9/2009, pelaksanaan putusan pencabutan dan penerbitan KTUN baru jangka waktunya adalah 3 bulan sejak putusan tersebut dikirim. Sedangkan di dalam UU 51/2009 jangka waktunya lebih lama dari 3 bulan yaitu menjadi 90 hari kerja. Artinya di luar hari kerja tidak dihitung sehingga kalau dihitung berdasarkan tanggalan kalender maka 90 hari kerja itu melebihi 3 bulan.
3. Menurut UU 5/1986, jika tergugat tidak melaksanakan putusan secara sukarela untuk menerbitkan KTUN baru maka Ketua PTUN mengajukan hal ini kepada instansi atasan tergugat dan dalam jangka waktu 2 bulan harus sudah memerintahkan tergugat untuk melaksanakan putusan. Jika melebihi jangka waktu 2 bulan tetapi instansi atasan tidak mengindahkannya maka Ketua PTUN akan mengajukan hal ini kepada Presiden. Sedangkan menurut UU 9/2004 dan UU 51/2009, penggugat dipersilakan mengajukan permohonan terlebih dahulu kepada Ketua PTUN agar tergugat diperintah untuk melaksanakan putusan, apabila tetap membangkang maka akan dikenakan Upaya Paksa berupa Sanksi Administratif dan/atau Uang Paksa. UU 9/2004 dan UU 51/2009 menghilangkan peran instansi atasan untuk ikut terlibat dalam pelaksanaan putusan.
4. Menurut UU 5/1986, peran Presiden diperlukan dalam pelaksanakan putusan. Namun setelah UU 9/2004 terbit, peran Presiden dihilangkan diganti dengan pengumuman media massa setempat (lokal) bagi tergugat yang tidak melaksanakan putusan. Lalu berdasarkan UU 51/2009, peran Presiden dikembalikan lagi ditambah dengan peran lembaga perwakilan rakyat untuk menjalankan fungsi pengawasan, sedangkan pengumuman di media massa tetap dipertahankan.

Dari ketiga UU Peratun di atas, Pasal 116 yang berlaku saat ini adalah yang termuat dalam UU 51/2009, sedangkan yang ada di dalam UU 5/1985 dan UU 9/2004 sudah tidak berlaku lagi karena sudah dirubah dengan UU 51/2009 sebagi undang-undang yang baru. Walaupun sudah dirubah beberapa kali, pelaksanaan putusan Peratun tetap meninggalkan permasalahan yaitu tentang tata cara pelaksanaan putusan tentang Upaya Paksa sebagaimana tercantum dalam Pasal 116 ayat (4) UU 51/2009 sebagai berikut: *Dalam hal tergugat tidak bersedia melaksanakan putusan pengadilan yang telah memperoleh kekuatan hukum tetap, terhadap pejabat yang bersangkutan dikenakan upaya paksa berupa pembayaran sejumlah uang paksa dan/atau sanksi administratif.* Menurut Pasal 116 ayat (7) UU 51/2009, aturan teknis tentang tata cara, besaran Uang Paksa dan jenis Sanksi Administratif akan diatur lebih lanjut dalam peraturan perundang- undangan. Sayangnya hingga kini peraturan perundang-undangan yang dimaksud belum ada. Alih-alih mengeluarkan aturan teknis tentang Upaya Paksa, pemerintah malah mengeluarkan PP 48/2016 (Peraturan Pemerintah Nomor 48 Tahun 2016 Tentang Tata Cara Pengenaan Sanksi Administratif Kepada Pejabat Pemerintah). Di dalam PP