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Legal Implications of Unlawful Acts of Building on Freehold Land as Debt Collateral

Charisma Megawati¹, Dr. Sugiharto²

¹charismamega782@ymail.com, ²sugiharto513@gmail.com

Universitas Bhayangkara Surabaya

*Corresponding Author: Charisma Megawati

Email: charismamega782@ymail.com

ABSTRACT

Land and buildings are objects that play a crucial role and become basic needs in human life. Considering the great role of land rights, Law No. 5/1960 (Basic Agrarian Law) and its implementing regulations were enacted. Land ownership rights can be used as debt collateral encumbered by mortgage rights. In the process of transferring land ownership rights, legal actions are carried out. Legal actions that cause harm, contrary to laws and regulations, and the rights of others are categorized as unlawful acts (onrechtmatige daad). In the process of transferring land rights, an unlawful act may occur by constructing a building on the land of property rights. This normative juridical research examines positive legal materials using statutory, conceptual, analytical, and case study approaches. This research aims to determine the factors that cause unlawful acts by constructing buildings on property rights and the settlement of land disputes over property rights. The findings of this research revealed that the proof of title to the land of the Appellant (originally the Plaintiff) was valid and under the provisions of Law No. 5/1960 and Government Regulation No. 24/1997. However, the Appellant filed an exception regarding the lack of parties (plurium litis consortium) claim. The court of judges at the appellate level accepted the lawsuit without delving back into the proof of the subject matter. Thus, the judges only reached the exception of Appellant I and Appellant II.

Keywords: *Plurium Litis Consortium, Transfer of Land Rights, Unlawful Acts*

INTRODUCTION

Land and buildings are objects that play an important role and become basic needs in human life. Given the large role of land rights, the Basic Agrarian Law (UUPA) and its implementing regulations were enacted. Property rights can be used as collateral for debt encumbered by mortgage rights. Land rights can be transferred, which is the transfer of land rights without being accompanied by legal actions carried out by the owner, such as through inheritance. Land rights can also be transferred by the transfer of land rights through a legal action carried out by the owner, such as through buying and selling transactions.

There are several related research with the focus on land rights conducted in the past. The first earlier research was conducted by Syarif et. al. (2019), which discuss further regarding transfer of land rights based on power of sale in the event of death of the grantor in Pekanbaru.¹ Syarif et. al.'s research specifically examine the position of the power of attorney to sell in the transfer of land rights, the process of transferring land rights based on the power of attorney to sell in the event that the grantor passed away, and the legal consequences of transferring land rights based on the power of attorney to sell in the event that the grantor passed away. Deed of Power of Attorney to Sell is used as the basis in the process of making Deed of Sale and Purchase on behalf of as well as a tool to register the transfer of land rights at the Pekanbaru Land Office. The process of transferring land rights based on a power of attorney to sell in the event that the grantor passed away in Pekanbaru City cannot be registered with the National Land Agency as it is null and void in accordance with Articles 1813, 1814, and 1816 of the Civil Code. The legal consequences of the transfer of land rights based on a power of attorney to sell in the event of the death of the grantor in Pekanbaru are considered unlawful act. The inheritance process must be carried out to the heirs concerned in advance if the transfer of rights will be proceeded. The aspect that distinguishes Syarif et. al.'s research from this research is the focus of the research. Syarif et.al's research focuses on the transfer of land rights based on a power of attorney to sell in the event of the death of the grantor in Pekanbaru, while this research focuses on the legal implications of unlawful acts on buildings on freehold land serving as debt collateral.

On the other hand, Nuraini & Yunanto (2023) examine and analyze the juridical implications of land rights transfers through court decisions and identify the challenges and obstacles in the process.² The findings of their research indicate

¹ Harmen Syarif, Azmi Fendri, and Delfiyanti Delfiyanti, "Transfer of Land Rights Based on the Data Authorization of Selling in Terms of Authority Giver Died in Pekanbaru," *International Journal of Multicultural and Multireligious Understanding* 6, no. 4 (October 8, 2019): 561, <https://doi.org/10.18415/ijmmu.v6i4.1071>.

² Laila Nuraini and Yunanto Yunanto, "Transfer of Land Rights through Court Decisions: Juridical Implications and Challenges in Implementation," *SIGn Jurnal Hukum* 5, no. 1 (May 14, 2023): 32–43, <https://doi.org/10.37276/sjh.v5i1.265>.

that the resolution of land rights disputes through *inkracht* court decisions may benefit the disputing parties by providing legal certainty. Implementing land rights transfers based on *inkracht* court decisions presents challenges and obstacles. Therefore, efforts to strengthen the system for enforcing court decisions are necessary. The aspect that distinguishes Nuraini & Yunanto's research from this research is the focus of the research. Nuraini & Yunanto's research focuses on analyze the juridical implications of land rights transfers through several court decisions and identify the challenges and obstacles in the process, while this research focuses on the legal implications of unlawful acts on buildings on freehold land serving as debt collateral.

The last related prior research with the focus on land rights was conducted by Abaidata (2023).³ Abaidata research aims to identify the legal review of the transfer of land rights to minors. The findings of Abaidata research revealed that The results showed that the process of transferring rights to the minor land owner or seller must fulfill the conditions for buying and selling land, where these conditions are material and formal requirements. Thus, the process of buying and selling land to minors has not been regulated in the applicable law in Indonesia unless the minor has a companion or guardian. The aspect that distinguishes Abaidata's research from this research is the focus of the research. Abaidata's research focuses on analyze the legal review of the transfer of land rights to minors in Indonesia, while this research focuses on the legal implications of unlawful acts on buildings on freehold land serving as debt collateral.

Legal actions that cause harm, contrary to laws and regulations, and the rights of others are categorized as unlawful acts (*onrechtmatige daad*), regulated in Article 1365 of the Civil Code. When transferring land rights has been carried out, the land should be immediately registered at the Land Office. However, it does not rule out the possibility that this cannot be separated from unlawful acts. It is evident in Decision No. 753/PDT/2020/PT Sby that there is an unlawful act due to the transfer of land rights, where the Appellant is the legal owner of the land. However, the Panel of Judges at the appellate level stated that the lawsuit could not be accepted (*niet onvankelijke verklaart*) and canceled the first-level decision, which could be interpreted as an unlawful act. Based on this description, the researchers believe that the research entitled Legal Implications of Unlawful Acts of Building on Freehold Land as Debt Collateral is interesting to examine further.

³ Yusup Abaidata, "Legal Review on the Transfer of Land Rights (Buying and Selling) to Minors," *Estudiante Law Journal* 3, no. 3 (February 23, 2023): 344–57, <https://doi.org/10.33756/eslaj.v3i3.16216>.

LITERATURE REVIEW

Theory of Justice

Aristotle defines the theory of justice as wisdom related to relationships between people.⁴ Justice is divided into two models: distributive and corrective or commutative. Distributive justice is similar to justice on the grounds of proportional equality, i.e., provides each individual the things that are their rights. Whereas corrective or commutative justice focuses on correcting a wrong, seeking to provide adequate compensation for the disadvantaged party.⁵ Furthermore, according to Rawls, the principle of justice is the fulfillment of equal rights to basic freedoms (equal liberties). Rawls also argues that economic differences must be regulated, thus creating maximum reasonable benefits for everyone, including the weak (maximum minimorum), and creating opportunities for everyone.⁶

Theory of the Rule of Law

Hadjon stated that the characteristics of the Pancasila state of law are:

- a. Proper correlation between the government and the people based on the principle of harmony;
- b. Proportional functional relationship between state powers;
- c. The principle of deliberative and judicial dispute resolution as a means of last resort;
- d. Balance between rights and responsibilities.⁷

Mahmodin also argues that the Indonesian state of law is based on Pancasila and the 1945 Constitution of the Republic of Indonesia, taking the prismatic and integrative concept of the two concepts of the Rule of Law, which adheres to the principle of justice and the concept of *Rechtstaat* which emphasizes the principle of legal certainty.⁸ Indonesia adopts both elements in order that legal certainty and justice are upheld.⁹

⁴ Zakki Adhlyati and Achmad, "Melacak Keadilan Dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, Dan John Rawls," *Undang: Jurnal Hukum* 2, no. 2 (2019): 409–31, <https://doi.org/10.22437/ujh.2.2.409-431>.

⁵ Sugiharto, *Bantuan Hukum Bagi Anggota POLRI Dan Keluarga POLRI: Filosofi, Formulasi Dan Implementasi* (Surabaya: Jakad Media Publishing, 2022).

⁶ Sugiharto.

⁷ Otong Syuhada, "Karakteristik Negara Hukum Pancasila Yang Membahagiakan Rakyatnya," *Presumption of Law* 3, no. 1 (2021): 1–18, <https://www.ejournal.unma.ac.id/index.php/jpl/article/download/979/585>.

⁸ Divani Khaira Anggistya and Alisya Afifah Maulidina Putri Abdillah, "Negara Hukum Pancasila Dalam Konsepsi Prismatic," *Jurnal Hukum Dan Sosial Politik* 1, no. 1 (2023): 48–60, <https://journal.widyakarya.ac.id/index.php/jhsp-widyakarya/article/download/236/247>.

⁹ Sugiharto, *Bantuan Hukum Bagi Anggota POLRI Dan Keluarga POLRI: Filosofi, Formulasi Dan Implementasi*.

Theory of Unlawful Acts

Unlawful acts are regulated in Article 1365 of the Civil Code, which states that every unlawful act which brings loss to another obliges the person whose fault caused the loss to compensate for the loss.¹⁰ According to Projudikoro, violating the law does not only mean positive but can also mean negative; that is, a silent person can be said to violate the law because, in this case, according to the law, a person must take action.¹¹

Theory of Legal Protection

According to Raharjo, legal protection is an effort to organize various interests in society to avoid collisions between interests and to enjoy all the rights granted by law.¹² Hadjon also classifies legal protection into two forms, which are preventive legal protection and repressive legal protection.¹³ Preventive legal protection means allowing legal subjects to raise objections before a definitive government decision is made. Meanwhile, the state gives repressive legal protection to all parties to exercise their legal rights and interests in their capacity as legal subjects.¹⁴

RESEARCH METHODOLOGY

This research is a normative juridical research, which uses several data related to the problem being examined.¹⁵ There are several approaches used in this research. The first one is the statutory approach. This approach is carried out by exploring legislation and regulations related to the legal issues being examined and learning the consistency and suitability of one legislation with another. The laws and regulations used in this research include The 1945 Constitution of the Republic of Indonesia, the Civil Code, Law No. 5/1960 on Basic Agrarian Regulations, Government Regulation No. 24/1997 on Land Registration, Government Regulation No. 18 on Management Rights, Land Rights, Flat Units, and Land

¹⁰ Mahkamah Agung Republik Indonesia, *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek)* (Jakarta: CV. Karya Gemilang, 2013).

¹¹ Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum: Dipandang Dari Sudut Hukum Perdata* (Bandung: CV Mandar Maju, 2018).

¹² Luthvi Febryka Nola, "Upaya Perlindungan Hukum Secara Terpadu Bagi Tenaga Kerja Indonesia (TKI)," *Negara Hukum* 7, no. 1 (2016): 35–52, <https://dprexternal3.dpr.go.id/index.php/hukum/article/view/949/560>.

¹³ Suprat Aditia, Rinitami Njatrijani, and Rof'ah Setyowati, "Perlindungan Hukum Masyarakat Akibat Penggunaan Vaksin COVID-19 (Emergency Use Authorization) Dalam Kejadian Ikutan Pasca Imunisasi (KIPI) Di Indonesia -022 DG 2022" (Universitas Diponegoro, 2022), <https://eprints2.undip.ac.id/id/eprint/6352>.

¹⁴ Yulisa Laili Zahro, "Pengetahuan Hukum Masyarakat Tentang Penyelesaian Masalah Pelanggaran Atas Layanan Ojek Online Berbasis Aplikasi (Studi Pada Go-Jek Dan Grab Di Wilayah Kabupaten Cilacap)" (Universitas Islam Indonesia, 2019).

¹⁵ Lolita Permanasari, "Legal Analysis of Interfaith Marriage in Indonesia," *IUS POSITUM: Journal of Law Theory and Enforcement* 2, no. 1 (2023): 35–44, <https://doi.org/https://doi.org/10.56943/jlte.v2i1.282>.

Registration. The second approach is the concept approach. This approach is carried out by exploring views and doctrines in law and finding ideas to create legal notions, concepts, and principles relevant to the research topic.¹⁶ These views and doctrines are useful for researchers to build legal arguments in conducting research. The third approach is the analytical approach. This approach is carried out by conceptually analyzing the meanings in the legislation, obtaining new meanings listed in the legal rules concerned, and examining legal terms through analysis of legal decisions.¹⁷ The last one is the case study approach. The most significant aspect of the case study approach that needs to be understood is ratio decidendi, which is the legal reason used by the judge to make their decision.¹⁸ Ratio decidendi suggests that law science is prescriptive rather than descriptive knowledge. The purpose of the case study is not only because the ratio decidendi is the interpretation or refinement of the law but also because the law does not regulate it.¹⁹ In this case, the data that serves as the object of this research is Supreme Court Decision No. 753/Pdt.G/2020/PT Sby.

RESULT AND DISCUSSION

Legal Regulation of Transfer of Land Rights in Indonesian Legislation

The term agrarian comes from the Dutch word *akker*, *agros* from the Greek, which means farmland, and *agger* from Latin, which refers to land or plot of land.²⁰ According to Subekti and Tjitrosoedibio, agrarian is a matter of land and all that is in and on it, such as stones, gravel, and mines; while what is on the land can be in the form of plants and buildings.²¹ In a narrow sense, the term agrarian only covers the surface of the earth called land.²² In a broader sense, the term agrarian includes the earth, water, space, and natural resources contained therein.²³ The definition of land in this context is not in the physical sense but in the juridical sense, which is the right in Article 4 Paragraph 1 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (UUPA). Land rights are rights granted to holders of land rights to be authorized to use, take advantage of, or for the purpose of the land they are

¹⁶ Peter Mahmud Marzuki, *Penelitian Hukum*, 13th ed. (Jakarta: Kencana, 2017).

¹⁷ Marzuki.

¹⁸ Sugiharto, *Bantuan Hukum Bagi Anggota POLRI Dan Keluarga POLRI: Filosofi, Formulasi Dan Implementasi*.

¹⁹ Sugiharto.

²⁰ Damianus Krismantoro, "Penyelesaian Permasalahan Klaim Sengketa Tanah Eigendom Verponding Melalui Hukum Konflik Agraria," *AKSELERASI: Jurnal Ilmiah Nasional* 1, no. 3 (2019): 9–24, <https://ejournal.goacademica.com/index.php/ja/article/download/539/504>.

²¹ Dwight George Nayoan, "Kepastian Hukum Investor Berdasarkan Ketentuan Bank Tanah" (Universitas Kristen Indonesia, 2022), <http://repository.uki.ac.id/id/eprint/8668>.

²² Ira Tresnawati, "Sengketa Penguasaan Tanah Antara Pemegang Hak Guna Usaha (HGU) Dengan Pemerintah Desa Berdasarkan Hukum Positif Di Indonesia" (Universitas Pasundan, 2017), <http://repository.unpas.ac.id/id/eprint/27319>.

²³ Hartana and I. G. A. A. Mas Candraswati, "Hukum Tanah Sebagai Bagian Dari Hukum Agraria Dalam Pembangunan Nasional Di Indonesia," *Jurnal Pendidikan Kewarganegaraan UNDIKSHA* 7, no. 3 (2019): 114–18, <https://ejournal.undiksha.ac.id/index.php/JJPP/article/view/60829>.

entitled to. Therefore, on the basis of the right to control from the state, it is determined that there are various kinds of individual rights to land contained in Article 16 of the Basic Agrarian Law, including:

1. Property Rights

In Article 20 of Law No. 5/1960, property rights are hereditary, strongest, and fullest rights that people may have over land.²⁴ In this context, the strongest and fullest right does not necessarily imply that property rights are absolute, unlimited and inviolable as referred to in eigendom rights. However, rather it is used to indicate that property rights are the strongest and fullest rights among land rights. A property right is said to be hereditary since it may be inherited by the right-holder to their heirs. The strongest right implies that it is not easily annulled and can be easily defended against interference from other parties. Fullest means that property rights provide the broadest authority compared to other rights. In addition to being hereditary, strongest, and fullest, property rights can also be transferred and assigned to other parties. According to Article 21 of the Basic Agrarian Law, Indonesian citizens can only own property rights. In Paragraph 2, property rights can also be owned by legal entities determined by the government with conditions. A property right cannot be owned by a non-Indonesian citizen. After the Basic Agrarian Law comes into force, foreigners who have a property right due to inheritance without a will or property mixing due to marriage, or citizens with dual citizenship, must relinquish the property right within one year. If the property right is not relinquished within this period, it will be nullified and become state-owned land, provided that the rights of other parties encumbering it shall continue. A property right can be transferred to another party through sale, exchange, grant, gift by will, gift according to custom, and other acts. If a property right is transferred to a foreigner directly or indirectly, except for those that the government has determined following Article 21 Paragraph 2 of Law No. 5/1960, it is null and void and the land belongs to the state.

2. Cultivation Rights

Cultivation right is the right to cultivate land directly controlled by the state, for a maximum of 25 years. For companies that require a longer period, a maximum period of 35 years can be granted for agricultural, fishery or livestock companies.²⁵ Cultivation rights can be owned by Indonesian citizens and legal entities domiciled in Indonesia and established under Indonesian law.

²⁴ Sekretaris Negara, “Undang-Undang (UU) Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria” (Jakarta, 1960), <https://peraturan.bpk.go.id/Details/51310/uu-no-5-tahun-1960>.

²⁵ Negara.

3. Building Rights Title

According to Article 35 of the Basic Agrarian Law, the building rights title is the right to construct and own buildings on land that is not one's own, for a maximum period of 30 years.²⁶ Only Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia can own a building rights title. Building rights title occurs because the state directly controls the land due to government stipulation and an authentic agreement between the landowner and the party who will obtain the building rights title.

4. Right of Use

In Article 41 of the Basic Agrarian Law, right of use is the right to use or collect products from land directly controlled by the state or land owned by others.²⁷ Right of use is granted based on a decision of the authorized official or upon an agreement with the landowner. Those who can hold a right of use are Indonesian citizens, foreigners domiciled in Indonesia, legal entities established under Indonesian law and domiciled in Indonesia, and foreign legal entities with representatives in Indonesia. Right of use can be transferred to other parties with the permission of the authorized official. The holder of the right of use has the right to develop the land owned, such as managing and developing the land in order to obtain returns.

5. Leasehold Rights

Leasehold rights for buildings are regulated in Article 44 of the Basic Agrarian Law, which refers to the right of a person or legal entity to lease vacant land owned by another person for building purposes by paying a certain amount of money as rent.²⁸ Rent can be paid once or at any given time and before or after the land is occupied.

6. Right to Open Land and Collect Forest Products

In Article 46 of the Basic Agrarian Law, Indonesian citizens can only hold the right to open land and collect forest products and is legally regulated by government regulation.

7. Other rights that are not included in the rights mentioned above, which will be determined by law, as well as temporary rights as mentioned in Article 53 of Law No. 5/1960, contains temporary land rights, including:

- a. Lien
- b. Right to sharecrop
- c. Right to lodge
- d. Right to lease agricultural land

²⁶ Negara.

²⁷ Negara.

²⁸ Negara.

Article 20 Paragraph 2 of Law No. 5/1960 states that land titles can be transferred or being transferred to other parties.²⁹ The following is an explanation of the two forms of transfer of land ownership rights:

a. Transfer

Transfer, in its juridical meaning, is the transfer of property rights to land from the right holder to another party due to an event or legal action such as through inheritance. If the land owner passes away, the property rights to the land are legally transferred to their heirs as long as they meet the requirements as the subject of property rights.

b. Being Transferred

Transfer itself has the meaning of moving, hence transferring refers to the transfer of property rights to land from the landowner to another party due to a legal event. For instance, buying and selling, granting, exchanging, and auctioning.

The transfer of ownership rights to land because it is transferred through buying and selling, granting, exchanging must be proven using a deed made by an authorized Land Deed Official, except for the transfer of rights due to auction is proven using Minutes of Auction made by officials at the local auction office. The transfer of ownership rights to this land must be immediately registered with the local Land Office in order to record and make changes to the name of the new landowner in the certificate.

Analysis of the Legal Regulation of Transfer of Land Rights under Indonesian Legislation

Agrarian law regulates land, land ownership, and land registration in accordance with applicable laws and regulations in the sector of land. Agrarian law, land rights, and land rights transfer regulations have been regulated in the 1945 Constitution of the Republic of Indonesia Article 33 Paragraph 3 which states that the state controls the earth, water, and natural resources contained therein and is used for the greatest prosperity of the community.

In addition to being regulated in general laws, agrarian law, land rights and land rights transfer regulations are also regulated in special laws, namely Law No. 5/1960 on the Basic Regulation of Agrarian Principles Article 1 Paragraph 2, which states that all earth, water and space, including the natural resources contained therein within the territory of the Republic of Indonesia, as a blessing of God Almighty, are the earth, water and space of the Indonesian nation and constitute national wealth. Article 19, Paragraphs 1 to 4, state that to ensure legal certainty, the government shall conduct land registration throughout the territory of the Republic of Indonesia per the provisions stipulated by Government Regulation. The registration referred to in Paragraph 1 of this article includes: Measurement of land

²⁹ Negara.

mapping and bookkeeping; Registration of land rights and the transfer of such rights; Provision of title deeds, which shall serve as strong instruments of proof. Land registration shall be carried out with due regard to the state of the country and society, the needs of socio-economic traffic, and the possibility of its implementation, according to the considerations of the Minister of Agrarian Affairs. In a Government Regulation, the fees related to the registration referred to in Paragraph 1 above shall be regulated, provided that incapable people shall be exempted from paying such fees.

According to the 1945 Constitution of the Republic of Indonesia, Law No. 5/1960 and Government Regulation No. 24/1997 have regulated matters relating to land rights and the transfer process. However, today, there are still many cases of land disputes that need to follow the laws and regulations. Therefore, Article 19 of Law No. 5/1960 is addressed to the government as an instruction, to conduct a *rechts-kadaster* land registration, which means that it aims to ensure legal certainty throughout the territory of Indonesia. Article 19 Paragraph 3 also emphasizes that people who cannot afford it are exempted from land registration fees. Thus, the government must further socialize land registration to the authorities in order to obtain a guarantee of legal certainty over the land, to avoid any undesirable things in the future.

In terms of theoretical studies as an analytical tool in this legal research, the following theoretical basis are used:

- a. Hadjon's theory of the state of law states that the form of the Pancasila State of Law is:
 - 1) Harmonious relations between the government and the people based on the principle of harmony;
 - 2) Proportional functional relationship between state powers;
 - 3) The principle of deliberative and judicial dispute resolution is a means of last resort;
 - 4) Balance between rights and obligations.³⁰
- b. Legal Protection Theory
Hadjon classifies legal protection in two forms, which are preventive legal protection and repressive legal protection.³¹ Preventive legal protection refers to when people are given the opportunity to express their opinions before a government decision takes a definitive form to prevent disputes from occurring. Meanwhile, the state gives repressive

³⁰ Syuhada, "Karakteristik Negara Hukum Pancasila Yang Membahagiakan Rakyatnya."

³¹ Aditia, Njatrijani, and Setyowati, "Perlindungan Hukum Masyarakat Akibat Penggunaan Vaksin COVID-19 (Emergency Use Authorization) Dalam Kejadian Ikutan Pasca Imunisasi (KIPI) Di Indonesia -022 DG 2022."

legal protection to all parties to exercise their legal rights and interests in their capacity as legal subjects.³²

Based on the theoretical analysis above, it can be concluded that the transfer of land rights is a legal act in which land rights have been transferred from one legal subject to another. Regarding the procedure for transferring land rights, the balance between legal rights and obligations regulated in statutory regulations must be fulfilled. Thus, the problem of disputing rights can be avoided, and guarantees of protection and legal certainty for legal subjects can be obtained.

This research does not only examine legal issues from the juridical aspect but also from the sociological aspect. In law, there are two terms, which are *das sollen* (legal rules that explain the expected conditions) and *das sein* (the real situation).³³ Land law in Indonesia, which was formed from Western and customary law, combines existing legal systems, where there has been legal unification in the land sector. Therefore, people certainly need legal certainty. Normatively, legal certainty is a regulation promulgated with certainty and regulated clearly (no multiple interpretations) and logically (into one system between one norm and another to prevent norm obscurity).³⁴

In the reality of community life, there are still many problems in the transfer of land rights that originate from the need for legal certainty over a plot of land. There are still various disputes in the land sector due to the unregistered land rights or after the registration of land rights. The issue of legal certainty still needs to be solved in state administration activities. This is due to regulations that still overlap, are inconsistent, and unclear, resulting in uncertainties. The government shall continue optimizing land registration to achieve a simple, safe, and affordable process, so that the economically weak classes may register their land systematically. The Land Office shall be more active in socializing land registration procedures to avoid legal problems, such as land disputes.

Legal Implications of Unlawful Acts of Building on Freehold Land as Debt Collateral

In the process of transferring property rights to land, a legal action will certainly occur. A legal action is an action that is given legal consequences by the law, and in this case, the perpetrator consciously expects the consequences according to the law. In addition, Soeroso also argues that legal actions will occur

³² Zahro, "Pengetahuan Hukum Masyarakat Tentang Penyelesaian Masalah Pelanggaran Atas Layanan Ojek Online Berbasis Aplikasi (Studi Pada Go-Jek Dan Grab Di Wilayah Kabupaten Cilacap)."

³³ Amran Suadi, *Sosiologi Hukum: Penegakan, Realitas Dan Nilai Moralitas Hukum (Edisi Pertama)* (Surabaya: Prenada Media, 2018).

³⁴ Ridel Filbert Tuelah, Tomy Sondakh, and Debby Telly Antow, "Praktek Penegakan Hukum Yang Terkait Dengan Ujaran Kebencian Di Indonesia," *Lex Privatum* 11, no. 3 (2023), <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/47306/42102>.

if there is a statement of will.³⁵ A person must act, issue, or cause consequences regulated by the law for a statement of will. The statement of will is not bound to certain forms, and there are no exceptions.

When there is an event or legal action that disobeys, violates the provisions of the law and the rights of others, and may cause harm to others, then the violation of the provisions of the law is classified as an unlawful act or commonly referred to as *onrechtmatige daad*. This action is further regulated in Article 1365 of the Civil Code, which states that every act that violates the law and harms others obliges the person who causes the loss to compensate for the loss.³⁶ In the provisions of Article 1365 of the Civil Code, an unlawful act shall contain the following elements:

- a. The existence of an act
- b. An act that is unlawful
- c. The existence of any errors
- d. The existence of any losses
- e. The existence of a causal correlation between the act and the loss.³⁷

The law recognizes personal and property rights. The law will protect and provide strict sanctions to those who violate these rights by imposing the responsibility to compensate the party whose rights are harmed. Legal implication is the impact seen from a legal perspective in the future on an act committed by a legal subject. The loss must be compensated by those charged by law to compensate for the loss. The forms of compensation for unlawful acts recognized by law are as follows:

- a. Nominal compensation
When there is a serious unlawful act, such as an intentional act that does not cause real harm to the victim, the victim can be compensated with a certain amount of money according to a sense of justice without calculating how much the actual loss is.³⁸
- b. Compensatory damages
Compensatory damages compensate the victim for unlawful acts that are actually experienced by the victim, such as mental suffering, loss of profit, pain or suffering.³⁹ Therefore, this kind of compensation is also

³⁵ Arman Hanafi, "Analisis Yuridis Pertanggung Jawaban Direksi Dalam Melakukan Perbuatan Melawan Hukum Atas Dasar Kelalaian Dalam Pengurusan Perseroan Terbatas," *Khazanah Hukum* 3, no. 3 (2021): 116–20, <https://doi.org/10.15575/kh.v3i3.14788>.

³⁶ Mahkamah Agung Republik Indonesia, *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek)*.

³⁷ Mahkamah Agung Republik Indonesia.

³⁸ Rivo Krisna Winastri, Ery Agus Priyono, and Dewi Hendrawati, "Tinjauan Normatif Terhadap Ganti Rugi Dalam Perkara Perbuatan Melawan Hukum Yang Menimbulkan Kerugian Immateriil (Studi Kasus Putusan Pengadilan Negeri Istimewa Jakarta No. 568/1968.G)," *Diponegoro Law Journal* 6, no. 2 (2017): 1–18, <https://media.neliti.com/media/publications/177705-ID-tinjauan-normatif-terhadap-ganti-rugi-da.pdf>.

³⁹ Sebastian Peyer, "Compensation and The Damages Directive," *European Competition Journal* 12, no. 1 (2016): 87–112, <https://doi.org/https://doi.org/10.1080/17441056.2016.1221168>.

known as actual damages. Actual damages are damages for losses that have been experienced in real terms.

c. Punitive damages

Punitive damages are a large amount of compensation above the actual loss. The amount of compensation is intended as a form of punishment for perpetrators who commit unlawful acts with an element of intent, such as cases of persecution.⁴⁰

Article 1365 of the Civil Code explains that based on the lawsuit, the Plaintiff cannot expect the amount of the loss, because the judge determines the calculation of the amount of this loss concerning previous decisions (jurisprudence).

The unlawful act of occupying land belonging to another person is a form of intentional conduct. According to Fuady, occupying land belonging to another person is a form of usurpation.⁴¹ Trespass to land is the intentional act of unlawfully entering or occupying another's land, causing another person or thing to enter another's land, or causing a person or thing to remain on another's land.⁴² Thus, the elements of an unlawful act in the trespass to land consist of the following:

- a. The existence of actions taken by the perpetrator
- b. The existence of intention or desire
- c. Entering or being on someone else's land
- d. The victim is the party authorized to own the land
- e. The existence of a causal relationship
- f. Not with the consent of the victim.⁴³

This unlawful act has been proven by strengthening decision No. 753/PDT/2020/PT Sby, where the Appellant was the aggrieved party. However, the decision of the panel of judges at the appellate level contained accepting the Appellant's appeal and canceling the district court's decision at first instance. In this case, there is a conflict of norms where a norm has been made but is contradictory or incompatible with other legal norms.

⁴⁰ Shurun Lin, "Punitive Damages for Corporations in China: Establishment and Improvement," *BCP Social Sciences & Humanities* 21 (2023): 478–91, <https://doi.org/https://doi.org/10.54691/bcpssh.v21i.3631>.

⁴¹ Ervina Eka Putri, "Penegakan Hukum Terhadap Pelaku Tindak Pidana Penyerobotan Dan Pengrusakan Tanah Di Wilayah Bandar Lampung" (Universitas Lampung, 2018), <http://digilib.unila.ac.id/id/eprint/31306>.

⁴² Nina Maulanny Herlan and R. Rahaditya, "Analisis Putusan Lepas Pada Tindak Pidana Memasuki Rumah Orang Lain Secara Melawan Hukum," *Jurnal Hukum Adigama* 3, no. 2 (2020): 1239–59, <https://journal.untar.ac.id/index.php/adigama/article/download/10612/6786>.

⁴³ Safitri, "Analisis Yuridis Putusan Tindak Pidana Penyerobotan Tanah (Stellionaat) Ditinjau Dari Hukum Positif Dan Hukum Pidana Islam (Studi Kasus Pengadilan Negeri Medan Kelas I-A Khusus)" (Universitas Islam Negeri Sumatera Utara Medan, 2022), http://repository.uinsu.ac.id/14741/1/SKRIPSI_SAFITRI_terbaru_revisi_2.pdf.

Analysis of the Implications of Unlawful Acts of Building on Freehold Land as Debt Collateral

Regarding juridical studies, applying Article 1365 of the Civil Code and Article 1366 of the Civil Code still needs to run optimally. This is confirmed in Decision No. 753/PDT/2020/PT Sby where the Panel of Judges did not impose a penalty for compensation of losses suffered by the Plaintiff. The appellate judges' non-fulfillment of the principles of legal certainty, justice, and expediency made the Plaintiff suffer losses and did not get the rights they should have obtained. The above juridical analysis can be used as a basis in the application of liability for unlawful acts that will be realized in the form of compensating material and immaterial losses whose calculation of the amount of loss is determined by the judge concerning the jurisprudence, so that no more owners of land rights are harmed from any unlawful acts.

In terms of theoretical analysis as an analytical tool in this legal research, the theoretical basis of justice, according to Rawls, is used, which is the fulfillment of equal rights to basic freedoms (equal liberties), the creation of maximum reasonable benefits for everyone including for the weak (maximum minimorum), and the creation of opportunities for everyone.⁴⁴ Furthermore, Rawls also emphasized that justice will be obtained if the use of goods is evenly distributed by taking into account the personality of each (justice as fairness).⁴⁵

In the view of Projodikoro, an unlawful act is an act that causes a disturbance in the balance of society.⁴⁶ Violating the law does not only mean positive but can also mean negative; that is, a silent person can be said to violate the law because, in this case, according to the law, a person must take action.

In the civil law system, justice in equality before the law raises the principle of *audi et alteram partem*, which determines that in deciding cases the judge must listen to the litigants in a fair and balanced manner, so that the principles of legal certainty, justice, and expediency can run properly. Therefore, the function of civil law in protecting the rights and interests of the community must run well so that unlawful acts by building buildings on property rights do not occur again in the community.

From the point of view of sociological studies, the problem of illegal building on private land is a problem that often causes long-term conflicts in the lives of Indonesians, and it is not easy for the government to resolve these problems. Compensation for unlawful acts in land disputes often does not match the value of the disputed land, and people still lose their land. The government's inconsistent attitude towards the community's demands results in unlawful acts over land

⁴⁴ Damanhuri Fattah, "Teori Keadilan Menurut John Rawls," *Jurnal Tapis: Jurnal Teropong Aspirasi Politik Islam* 9, no. 2 (2013): 1–16, <https://doi.org/https://doi.org/10.24042/tps.v9i2.1589>.

⁴⁵ Fattah; Adlihyati and Achmad, "Melacak Keadilan Dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, Dan John Rawls."

⁴⁶ Projodikoro, *Perbuatan Melanggar Hukum: Dipandang Dari Sudut Hukum Perdata*.

disputes harming people's lives, even on foreign businesses to invest in Indonesia. The urgency of unlawful acts of constructing buildings on property rights must be accounted for by compensating commensurate losses experienced by the owner of the right.

CONCLUSION AND SUGGESTION

Conclusion

Juridically, the law of transfer of land rights has been regulated under general legislation, which is in the Constitution of the Republic of Indonesia Article 33 Paragraph 3, as well as in specific legislation, which are Law No. 5/1960 concerning Basic Agrarian Principles and Government Regulation No. 24/1997 concerning Land Registration. Following Article 19 of Law No. 5/1960, the government is instructed to conduct a *rechts-kadaster* land registration throughout the territory of Indonesia to ensure legal certainty.

Theoretically, the balance between rights and obligations in the rule of law in regulating the procedure for transferring land rights is very important. This balance must be further promoted so that legal certainty and protection guarantees for legal subjects who will transfer land rights are immediately achieved. With this balance, the problem of disputing rights can also be avoided.

Sociologically, in the reality of community life, there are facts that there are still many problems of legal certainty in the transfer of land rights which are still an obstacle in development activities. This is due to regulations that are still overlapping, inconsistent, and unclear, which results in doubt. The government must be decisive in optimizing land registration in order to achieve a simple, safe and affordable process, so that the weak economic groups can register their land systematically.

Juridically, the implications of unlawful acts have been regulated in Articles 1365 to 1366 of the Civil Code. However, in reality, the judges often do not fulfill the principle of legal certainty, justice, and expediency in deciding a case. The juridical analysis above can be used to apply liability for unlawful acts. This will be realized by compensating material and immaterial losses so that unlawful acts harm no more land rights owners.

Theoretically, justice in law is the fulfillment of equal rights to basic freedoms, which means that justice in equality before the law creates the principle of *audi et alteram partem*, which means that judges in deciding cases must listen to the litigants fairly and equally, so that the principles of legal certainty, justice, and benefits can run properly. Therefore, civil law's function in protecting the community's rights and interests can run well.

Sociologically, compensation for unlawful acts in constructing buildings on property rights often does not follow the value of the disputed land, yet people still end up losing their land. Thus, the urgency of the unlawful act of erecting buildings

on property rights must be emphasized by replacing commensurate material and immaterial losses experienced by the owner of the right.

Suggestion

The regulation on the unlawful act of constructing a building on the land of another person is addressed to the government as an instruction, so that in the entire territory of Indonesia a *rechts-kadaster* land registration is held or which means it has the aim of ensuring legal certainty, so that undesirable things will not happen in the future. The government is expected to continue conducting socialization related to land registration to the public and the authorities so that legal certainty over the land can be guaranteed and unlawful acts of building on land owned by others can be avoided. In terms of deciding compensation for unlawful acts in land disputes that often do not match the value of the disputed land, the Panel of Judges is expected to listen to the litigants in a fair and balanced manner, so that the principles of legal certainty, justice, and expediency can be implemented properly. Thus, the function of civil law in protecting the rights and interests of the community is also expected to run well. Academics, law enforcers, and legal practitioners are expected to conduct further research to produce concepts and thoughts in the field of land law to minimize the problematic land disputes that often occur in the community.

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