



Application of Good Faith Principles in Transition and Registration of Land Rights with the Deed of Land Deed Making Officials as the Embodiment of Article 33 Paragraph (3) of the 1945 Constitution

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Abstract

The principle of Land Law reads *Nemo Plus Juris Transfere Potest Quam Ipse Habet* which means that no one can transfer the rights to the land but the owner. In the Land Law, this means that the land can be transferred if the land owner transfers it before the competent official, in this case the Land Deed Official. This is in line with Article 28 H (4) of the 1945 Constitution which states that every person has the right to own private property and these property rights cannot be taken over arbitrarily by anyone. However, this principle doesn't apply in practice. The provisions of article 33 paragraph (3) of the 1945 Constitution are not fully applied in the transfer and registration of land rights with the deed of the Land Deed Making Official, because there is a legal vacuum related to the meaning of the Good Faith Principle in the transfer and registration of land rights with the deed of the Land Deed Making Official. By incorporating the meaning of the Good Faith Principle in the transfer and registration of land rights with the deed of the Land Deed Making Official to the statutory regulations, the Government's Good Faith Principles will be realized in the form of *Algemene beginselen Van Behoorlijk Bestuur*.

Keywords: *Land; Good Faith; Right*

Introduction

The principle of Land Law reads *Nemo Plus Juris Transfere Potest Quam Ipse Habet* which means that no one can transfer the rights to the land but the owner. In the Land Law, this means that the land can be transferred if the land owner transfers it before the competent official, in this case the Land Deed Official. This is in line with Article 28 H (4) of the 1945 Constitution which states that every person has the right to own private property and these property rights cannot be taken over arbitrarily by anyone. However, this principle doesn't apply in practice. Many land cases are found in the regions, and even lead to prolonged conflicts, especially issues of overlapping land ownership. This is due to the importance of

land and the lack of land for the community, which triggers disputes in the community, both between communities, communities and legal entities, and communities with the government.¹

Land issues between the community and legal entities or the government, namely the National Land Office, can also be caused by the incomplete rules of transferring land rights in agrarian law so that the embodiment of good faith principles in the transfer and registration of land rights is not implemented.²

Article 33 paragraph (3) of the 1945 Constitution states that the earth, water, air and all natural resources in it are controlled by the state and used for the prosperity of the people. In realizing the Agrarian Law in accordance with the provisions of Article 33 paragraph (3) of the 1945 Constitution, Law No.5 of 1960 concerning the basic regulations of Agrarian Principles (UUPA) was formed.³ The Basic Agrarian Law is a law that is formal in nature which contains Agrarian principles and principles, while the implementing regulations are regulated in various implementing regulations.⁴ So, with the formation of the UUPA, the implementation of the principles of good faith in article 33 paragraph (3) of the 1945 Constitution has been realized? Besides that, is the UUPA able to solve the agrarian problems that often occur?

At the practical level, various cases arise in Indonesia that are contrary to article 33 paragraph (3) of the 1945 Constitution, including land cases that have actually arisen between the community and the Indonesian government, for example cases of revocation of rights over land, cases of control and ownership of state lands, land disputes plantations,⁵ cases of land tenure and occupations of former land use rights that have ended and are not renewed,⁶ many cases related to the Transfer and Registration of Community Land Rights with the Government – 2017 occurred 101 case (second place), reports submitted to the Ombudsman until 2018 were ranked first with 14%. In 2019 it was ranked first with a total of 871 reports to the Ombudsman regarding land registration services and others. In fact, there are not a few cases that arise as a result of the abuse of authority of the Indonesian Government, in this case the National Land Agency Office.

The principle of good faith is a universal principle that must be implemented or realized by all elements, both from the community, Land Deed Officials, Government and all elements involved. The principle of good faith is popular in Article 1338 paragraph (3) of the Civil Code, which is that the agreement must be implemented appropriately and properly.⁷ Good faith must not only exist at the time of implementation of an agreement, but also when an agreement is made or signed.⁸ The making of an agreement can be made with the official authorized for the making of the Authentic deed, namely the Land Deed Making Official. Land Deed Making Officials are regulated in Government Regulation No. 37 of 1998 which has been amended by Government Regulation No. 24 of 2016. The position of Land Deed

¹ Mark Everard and Norman A. Dupont, 'Property Rights', in *The Wetland Book: I: Structure and Function, Management, and Methods*, 2018 <https://doi.org/10.1007/978-90-481-9659-3_188>.

² Sanggup Leonard Agustian Rudi Pisteo, Fajar Sugianto, 'Pemaknaan Kembali Terhadap Tanggung Jawab Sosial Dan Lingkungan Perusahaan', *Hukum Magnum Opus*, 2020 <<https://doi.org/10.1155/2010/706872>>.

³ 'Kajian Yuridis Mengenai Pendaftaran Tanah Menurut Pasal 19 Uu No 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria', *LEX PRIVATUM*, 2018.

⁴ Triana Rejekiningsih, 'Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum', *Yustisia Jurnal Hukum*, 2016 <<https://doi.org/10.1109/ciced.2018.8592188>>.

⁵ and others, 'Conflict in Management of Passive State Administrative Decision in State Administrative Dispute', *Brawijaya Law Journal*, 2018 <<https://doi.org/10.21776/ub.blj.2018.005.02.08>>.

⁶ Iwan Permadi, 'Perlindungan Hukum Terhadap Petani Penggarap Tanah Negara Milik Perum Perhutani', *Arena Hukum*, 2016 <<https://doi.org/10.21776/ub.arenahukum.2016.00902.5>>.

⁷ Omer Cloutier and others, 'The Importance of Developing Strategies for Employee Retention', *Journal of Leadership, Accountability and Ethics*, 2015.

⁸ *Good Faith and International Economic Law*, *Good Faith and International Economic Law*, 2015 <<https://doi.org/10.1093/acprof:oso/9780198739791.001.0001>>.

Making Officials in Indonesia is intended to provide legal certainty regarding land registration.⁹ The presence of Land Deed Making Officials does not refer to the applicable legal system and the elements as General Officials are not fulfilled.¹⁰

Research Method

The type of research used in this research is normative juridical with statutory, conceptual, comparative and philosophical approaches.¹¹

Research Results and Discussion

Principles of Good Faith in Transfers and Registration of Land Rights with the Deed of the Official Land Deed Maker

Good faith or opposition from bad faith is often put forward in the arguments of the parties in civil litigation.

According to Jenie (2007), good faith which means honesty is regulated in article 1836 of the Civil Code. Meanwhile, according to Rutten (1974) that an agreement carried out based on good faith means that the parties, namely the creditor in exercising their rights and the debtor in fulfilling their obligations, must carry out the agreement as civilized people should, namely on the terms of *Redelijkheid en billijkheid*. Wery (1990) defines *Redelijkheid* as what can be understood with intellect or common sense, while *Billijkheid* defines what is considered polite or appropriate.¹²

The principle of good faith is as important as other legal principles, one of which is the principle of freedom of contract. The teaching of good faith is increasingly influencing where good faith doesn't only exist in the implementation of the contract, but also must exist at the time the contract is made.¹³

The Meaning of Good Faith Principles in Transferring and Registering Land Rights with the Deed of the Land Deed Making Official

The discussion related to Legal Principles according to the author is very important because it is related to the foundation for the formation of the legal system. In Stufenbau theory, freedom that humans have in living together needs objective guidelines that must be obeyed collectively called law.¹⁴ The "source of law" is a place where the law originates. The term "source" is used by lawyers in the sense of the historical origins of the current rules.¹⁵

⁹ Wilson Mandiri Lieputra, 'Peran Notaris Dalam Perjanjian Jual Beli Tanah Dan Jaminan Perlindungan Hak Bagi Para Pihak', *Peran Notaris Dalam Perjanjian Jual Beli Tanah Dan Jaminan Perlindungan Hak Bagi Para Pihak*, 2017.

¹⁰ 'Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Pertanahan', *Notarius*, 2020 <<https://doi.org/10.14710/nts.v12i2.29006>>.

¹¹ Tomy Michael, 'Humanity In The Enforcement Of Anti-Corruption Laws', *Jurnal Hukum Bisnis Bonum Commune*, 2.2 (2019), 211.

¹² P. Abas, 'Redelijkheid En Billijkheid', *Maandblad Voor Accountancy En Bedrijfseconomie*, 1991 <<https://doi.org/10.5117/mab.65.13629>>.

¹³ Hugh Collins, 'Good Faith in European Contract Law', *Oxford Journal of Legal Studies*, 1994 <<https://doi.org/10.1093/ojls/14.2.229>>.

¹⁴ Jörg Kammerhofer, 'Sources in Legal- Positivist Theories: The Pure Theory's Structural Analysis of the Law', in *The Oxford Handbook of the Sources of International Law*, 2018 <<https://doi.org/10.1093/law/9780198745365.003.0017>>.

¹⁵ Fathul Laila and others, 'The Implementation of Good Faith Principles in the Transfer and Registration of Land Rights Based on Basic Agrarian Law', *International Journal of Innovation, Creativity and Change*, 2020.

In daily legal activities, there are many legal actions related to an agreement or contract between two or more parties. This requires legal certainty as a bulwark of compliance with the agreement or contract. The meaning of the principle of good faith in the transfer and registration of land rights with the Deed of the Land Deed Making Official as the embodiment of Article 33 paragraph (3) of the 1945 Constitution can be defined by the form of efforts to create moral attitudes and stay away from disgraceful actions by upholding the values of honesty, truth and justice the realization of legal certainty over land rights in Indonesia. The meaning of the principle of good faith in transferring and registering land rights with the Deed of the Land Deed Making Official has not materialized as a manifestation of Article 33 paragraph (3) of the 1945 Constitution by considering the number of reports to the ombudsman.

The Embodiment of Good Faith in the Transfer and Registration of Land Rights by the Government as a Manifestation of Article 33 Paragraph (3) of the 1945 Constitution

In implementing the transfer and registration of land rights, Article 26 paragraph (1) of the UUPA contains the words .. "*Supervision* ..". Thus, apart from applying the general principles of good governance (AUPB), and manifested in the form of supervision carried out by the head of the local Land Agency. With regard to the implementation of Article 19 (1) and Article 26 (1) of the UUPA, it will not create a conflict of interest, if supervision is carried out in the form of a *checks and balances system* on the implementation of registration and transfer of land rights. One of the most important main components in public services is external supervision by the community, considering that it is the community who will receive services when people are aware and care about their rights and obligations in supervising public services.

The community is expected to be able to actively participate in improving public services by being aware of their rights and obligations and cultivating a critical nature of the public services they receive. The overall function of control and supervision by both internal and external supervisors in this public service must be able to complement and cooperate so that it can run well. Quick response and concrete follow-up from service providers and internal supervisors in handling complaints or public complaints absolutely must be carried out because if internal supervision has not been carried out properly, the DPR, Provincial DPRD, Regency/City DPRD, ombudsman and the community will quickly carry out their functions as external supervisor.

In a legal act the transfer of rights, which constitutes the transfer of rights to land to the party receiving the transfer, must be carried out before the Official for Making Land Deeds. The legal basis for the existence or existence of Land Deed Making Officials currently in effect is Government Regulation (PP) number 37 of 1998 which has been amended by Government Regulation number 24 of 2016, concerning Regulations on the Position of Land Deed Making Officials.

Conclusion

The provisions of article 33 paragraph (3) of the 1945 Constitution are not fully applied in the transfer and registration of land rights with the deed of the Land Deed Making Official, because there is a legal vacuum related to the meaning of the Good Faith Principle in the transfer and registration of land rights with the deed of the Land Deed Making Official. By incorporating the meaning of the Good Faith Principle in the transfer and registration of land rights with the deed of the Land Deed Making Official to the statutory regulations, the Government's Good Faith Principles will be realized in the form of *Algemene beginselen Van Behoorlijk Bestuur*. The realization of *Land Deed Official Governance* and the Good Will of the Indonesian people. The application of the principle of good faith in the transfer and registration of land rights with the deed of the Land Deed Making Official will be realized if the LoGA is

renewed by establishing the Law on Transfer of Land Rights or the Law on Property Rights and the Law on Land Deed Making Officials.

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