

The Transfer of Ownership Rights of *Bengkok* Land Through Land Swap Agreements

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How to cite : Budiman, Haris; Mimin Mintarsih and Bias Lintang Dialog. "The Transfer of Ownership Right of Bengkok Land Through Land Swap Agreements". <i>UNIFIKASI : Jurnal Ilmu Hukum</i> . 7(1). 2020. 9-16. DOI : 10.25134/unifikasi.v7i1.2704		
Submitted : 20-12-2019	Revised : 18-04-2020	Accepted : 16-04-2020

Abstract : *The process of transferring bengkok land ownership rights through land swap agreements is frequently done, but due to lack of understanding of the legislations, the transfer of land rights often experiences various problems. This study aims to find out the mechanism of transferring bengkok land ownership rights through land swap agreements based on the legislations as well as the process of certifying bengkok land into proprietary land. This descriptive-analytic study applied an empirical juridical approach. The results showed that the mechanism of transferring bengkok land ownership rights through land swap agreements in Kuningan District is regulated in Kuningan District Regulation No. 44 of 2017 concerning Management of Village Assets. Meanwhile, the process of certifying bengkok land into proprietary land is regulated in Article 17 of Government Regulation No. 27 of 2014 concerning Management of State/Regional Property. In conclusion, the process of transferring land ownership rights, especially state-owned land, shall to be done in a written form and is based on the applicable legislation.*

Keywords: *Ownership Rights, Bengkok Land, Land Swap Agreement.*

Peralihan Hak Milik Tanah Bengkok Melalui Perjanjian Tukar Guling

Abstrak : Proses peralihan hak milik tanah bengkok melalui perjanjian tukar guling sering dilakukan namun karena ketidak pahaman terhadap peraturan perundang-undangan, peralihan hak milik atas tanah tersebut mengalami berbagai permasalahan. Tujuan penelitian adalah untuk mengetahui mekanisme peralihan tanah bengkok melalui perjanjian tukar guling menurut perundang-undangan dan proses pensertifikatan tanah bengkok menjadi tanah hak milik. Jenis penelitian deskriptif-analitis dengan pendekatan yuridis empiris. Hasil penelitian mengemukakan bahwa Mekanisme peralihan tanah bengkok melalui perjanjian tukar guling di Kabupaten Kuningan diatur dalam Peraturan Bupati Kuningan Nomor 44 Tahun 2017 tentang Pengelolaan Aset Desa dan Proses pensertifikatan tanah bengkok menjadi tanah hak milik diatur dalam Pasal 17 Peraturan Pemerintah Nomor 27 Tahun 2014 adalah pengalihan kepemilikan barang negara/daerah. Kesimpulannya Dalam proses perjanjian tukar menukar tanah terutama tanah milik negara perlunya dilakukan secara tertulis dan sesuai dengan peraturan perundangan yang berlaku.

Kata Kunci: Hak Milik, Tanah Bengkok, Tukar Guling.

INTRODUCTION

Article 16 paragraph (1) of Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles, hereinafter referred to as the Basic Agrarian Law or abbreviated as UUPA, describes that the rights on land include the right of ownership, the right of exploitation, the right of building, the right of use, the right of lease, the right of opening-up land, the right of collecting forest product, and other rights not included in the above mentioned right which shall be regulated by law and rights of a temporary nature as mentioned in Article 53 of the UUPA.

Bengkok land is found in the legal structure of customary land in Java. *Bengkok* land is village-owned land that is used for village heads and/or village apparatus as compensation for the salaries given. *Bengkok* land in the agrarian system on Java Island is arable land belonging to the

village. Hence, *Bengkok* land cannot be traded without the consent of all villagers, but it may be leased by those who are given the right to manage it.¹

Bengkok land is village-owned land that is used for village heads and/or village officials as compensation for the salaries given. The rights over land attached to the village head and village apparatus are not the right of ownership, but the right of use as stated in the conversion of Article VI of the UUPA that the rights over land giving the authority that is similar to the rights as referred to in Article 41 paragraph (1), namely: the rights of *vruchtgebruik*, *gebruik*, *grant controleur*, *bruikleen*, *ganggam bantuik*, *anggaduh*, *bengkok*, *lungguh*, *pituwat* and other rights which will be further confirmed by the Minister of Agrarian Affairs. *Bengkok* land is the land provided as compensation for the salaries of Village Head and Village Apparatus including the secretary, the government sector, and the development sector. They have the rights over the land granted by the village to support their family life. If at any other time the person concerned is no longer serving as the village administrator, the *bengkok* land will become village-owned land. However, Article 1 letter a of Law No. 5 of 1979 concerning Village Governance states: "Village is an area occupied by a number of residents as a community unit, including a legal community unit, that has the lowest government organization directly under the Sub-District Head and has the right to manage its own household in the Unitary State of the Republic of Indonesia."

In 1999, in Sidaraja Village, Ciawigebang Subdistrict, Kuningan District, there was a land swap over a *bengkok* land. However, at that time, there were no regulations governing the technical of land swapping. According to Article 1 of Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency (Permen Agrarian/Head of BPN) No. 5 of 1999 concerning A Guideline for the Settlement of Problems Related to the Communal Reserved Land of the Customary-Law-Abiding Community, the communal reserved land shall be an authority which rests with a particular customary-law-abiding community over a particular region constituting a living environment of its member, and which they can exercise to take benefits from the natural resources, including the land within this region for the continuity of their lives and living inasmuch as such authority arises from an uninterrupted physical and spiritual relationship from generation to generation between the said customary-law-abiding community and the region concerned.² The technical of land swapping was firstly developed in 2007 in the form of Regulation of the Minister of Home Affairs No. 17 of 2007 concerning A Technical Guideline for the Management of Regional-Owned Property. Based on the description, the problem discussed in this study is formulated into the following questions: 1) What is the mechanism of transferring *bengkok* land ownership rights through a land swap agreement based on the legislations? and 2) What is the process of certifying *bengkok* land into proprietary land?

RESEARCH METHODS

This study was conducted by using a descriptive-analytical method which is a method used to analyze the current status of a group of people, an object, a condition, a system of thought or an event.³ Meanwhile, the approach used in this study was an empirical juridical approach, meaning that this study analyzed the problems by combining secondary data (legal materials) and primary data obtained in the field.⁴

¹ Bagus Yudhantoro Panji W, *Tinjauan Yuridis Tentang Status Tanah Bengkok Di Desa Prembun Kecamatan Prembun Kabupaten Kebumen Jawa Tengah*, Jurnal Hukum Universitas Hasanuddin Makasar, 2013., pp. 1-2

² Saeful Bahri, *Kajian Yuridis Tukar Menukar Tanah Pecatu Di Desa Apitaik Kecamatan Pringgabaya*, Jurnal ilmiah Universitas Mataram, Mataram, 2018, p. 3.

³ Hadari Nawawi, *Metode Penelitian Bidang Sosial*, Gajah Mada University Press, Yogyakarta, 2005, p. 33.

⁴ Adnan Mahdi dan Mujahidin, *Panduan Penelitian Praktis dalam menyusun Skripsi, Tesis & Disertasi*, Alfabeta, Bandung, 2014, p. 102.

RESULTS AND DISCUSSION

A. The Mechanism of Transferring *Bengkok* Land Ownership Rights through a Land Swap Agreement

The procedure for obtaining land rights is defined as granting, extending, renewing, and changing land rights. Granting of land rights is the granting of land rights controlled directly by the state to a person or a group of people or a legal entity.⁵ The transfer of *bengkok* land ownership rights through a land swap agreement in Sidaraja Village is a transfer of ownership rights of village-owned land to another party, namely the community. In this case, the Village Government accepted the change in the form of land and money in which the value is considered the same between those obtained by the Village Government and those received by the community. The purpose of land swapping was for fulfilling the village government's needs of operational activities in the construction of multipurpose buildings in Sidaraja Village. According to Kuningan District Regulation No. 44 of 2017, a swap is the transfer of ownership of Village assets carried out between the village government and other parties. One of the village assets is *bengkok* land. The mechanism of transferring *bengkok* land ownership rights is regulated in Article 35 paragraph (1), namely:

- a. Village Head submits a letter to the Regent regarding the results of village deliberation on the exchange of village-owned land with the prospective replacement land located in the local village.
- b. Village Head submits a request for approval to the Regent, henceforth the Regent continues the application to the Governor. If the replacement land is not available in the local village, the following stages are done:
 1. The Regent conducts a field survey to see the physical condition of the location of village-owned land and the location of prospective replacement land as well as conducts data verification to obtain formal evidence through meetings in the village.
 2. The results of the field survey and data verification are submitted to the Governor to be used as a consideration for granting approval that will be published in the Minutes signed by the parties and/or other relevant agencies.
 3. Before granting approval, the Governor can conduct field survey and data verification.
 4. After the Governor grants his approval, the Village Head then establishes a Village Regulation regarding village-owned land swapping.

The mechanism applies to land swapping in the form of village asset land both for public interest and not for public interest as well as the village treasury land both for public interest and not for public interest. In addition, the administration of land swapping, the review team of regional land swapping, and the financing of land swapping are regulated.

- a. The Establishment of the Review Team of Regional Land Swapping.
In accordance with Kuningan District Regulation No. 44 of 2017 concerning Management of Village Assets, the Review Team of Regional Land Swapping is established in the context of utilizing village assets in the form of land to be released and obtaining replacement land that benefits the village in the implementation of village-owned land swapping.
- b. Giving Consideration to the Governor and the State Minister.
In accordance with Kuningan District Regulation No. 44 of 2017 concerning Management of Village Assets as previously described, the implementation of the exchange of village assets in the form of land must obtain written permission from the Regent and the Governor as well as approval from the State Minister. In its implementation, the file submitted by the Regent to the

⁵ Dr. H.M. Arba, *Hukum Agraria Indonesia*, Sinar Grafika, 2017, p. 130.

Governor contains the considerations as well as the recommendations concerning land swapping.

According to Government Regulation No. 27 of 2014 concerning Management of State/Regional Property, exchange is the transfer of ownership of regional/state-owned properties carried out between the central government and regional governments, between regional governments or between the central/regional governments and other parties by accepting changes in the form of properties with the same value. *Bengkok* land is found in the legal structure of customary land in Java. *Bengkok* land is village-owned land that is used for village heads and/or village apparatus as compensation for the salaries given. *Bengkok* land in the agrarian system on Java Island is arable land belonging to the village. Hence, *Bengkok* land cannot be traded without the consent of all villagers, but it may be leased by those who are given the right to manage it.⁶

Based on its use, *bengkok* land is divided into three groups: *lungguh* land managed by the active village administrator, village treasury land managed by the active village apparatus, and *pangaremarem* land managed by the pensioner of village apparatus as old-age insurance. If the pensioner of village apparatus is dead, the land is returned to the village.

The exchange of *bengkok* land through a land swap agreement in Sidaraja Village occurred in 1999 in which its notification was carried out through broadcasting at the village mosque initiated by the village apparatus. *Bengkok* land that is the object of land swapping is the village treasury land as the land is managed by an active village apparatus. The transfer of ownership rights of *bengkok* land in Sidaraja Village involved approximately 1 (one) hectare or 10,000 (ten thousand) square meters or approximately 750 (seven hundred fifty) bricks in which one brick is 14 meters x 1 meter. The land located in Dusun Manis RT 004 is exchanged with land that is located in 3 (three) different locations.

The process of land swapping was initially aimed at providing residential land for residents who did not have a house. In order to facilitate the residents to obtain land for their house, *bengkok* land was divided into 30 lots in which each lot can be bought by one resident. Yet, in its practice, land swapping cannot be done as the location of the replacement of *bengkok* land is not in one location. This condition then triggered the community to demonstrate at the Village Head's Office as they thought that the replacement land does not have the same value as *bengkok* land.

From this incident, it is clear that the process of *bengkok* land swapping shall be in accordance with the mechanism stated in Kuningan District Regulation No. 44 of 2017. This regulation regulates the mechanism that should be done when exchanging *bengkok* land to avoid conflicts in the future. In addition, from this incident, we can see the importance of approval granted by the Governor in *bengkok* land swapping because *bengkok* land swapping requires a letter of release of land issued by the Governor. In the process of *bengkok* land swapping in Sidaraja Village, the Village Government only invited the Governor to see *bengkok* land.

In the process of land swapping in Sidaraja Village, there is a mechanism of land swapping that is not done by the Village Government so that it triggers conflict in the community. This relates to the location, the size, the reasonable price, and the type of village land. The community does not agree with the decision made by the Village Government regarding the exchange of *bengkok* land as the *bengkok* land is considered to not have the same value as the replacement land. The protest carried out by the community makes the Village Government to not keep the documents related to this land swapping in order to avoid prolonged conflict.⁷ As a result of the absence of these documents, there are some *bengkok* lands that cannot be certified by the owner.

The role of Regional Government in the implementation of the exchange of village assets in the form of land is inseparable from the policy of the Regional Government itself. In addition, the rule of

⁶ Bagus Yudanthoro Panji W, *Loc.Cit.*

⁷ Interview results with Tjasta as the Head of Sidaraja Village, 2019

law also plays a significant role to assist the regional government in finding the alternatives as well as the basis for issuing good and beneficial policies. Based on the description, one of concrete roles of the Regional Government in the implementation of the exchange of village assets in the form of land is the Formulation of Regent Regulation. As stated in Article 45 of Regulation of the Minister of Home Affairs (Permendagri) No. 1 of 2016 that further provisions regarding Management of Village Assets are regulated in Regent/Mayor Regulation. In Kuningan District, the procedures for managing village assets, as mandated in Permendagri No. 1 of 2016, are stated in Kuningan District Regulation No. 44 of 2017 concerning Management of Village Assets.

The exchange of village assets in the form of land can only be done if there are more important and strategic national interests while still paying attention to and adjusting the regional spatial plan (RTRW) and complying with the provisions in the legislations. As stated in Article 34 paragraph (2) of Kuningan District Regulation No. 44 of 2017 that:

- a. The exchange is carried out after an agreement concerning the amount of compensation has been made by using the reasonable value calculated by the review team;
- b. If the replacement land is not yet available, the replacement can be first given in the form of money;
- c. The money, as stated in letter b, must be used to buy replacement land;
- d. The replacement land is preferably located in the local village; and
- e. If the replacement land is not available in the local village, the replacement land can be located in one subdistrict and/or in a village in another subdistrict having a direct border.

From the description, there are several things contradicting with the theory of law enforcement, namely the failure to fulfill the following factors:

- a. Factor of law – in 1999, the rules governing *ruislag* for village treasury land did not yet exist.
- b. Factor of law enforcers – in 1999, law enforcers did not yet have a basis to decide whether it was right or wrong.
- c. Factor of facilities/infrastructure supporting the law enforcement – in 1999, the facilities were inadequate.
- d. Factor of community, the environment in which the law applies – in 1999, there are only a few of people who understood the law and media information was not as sophisticated as today.
- e. Factor of culture as a result of works, inventions, and tastes based on a sense of humanity in the association of life – in 1999, the culture was very thick so that people believe that the village apparatus were people who were in power and could not be criticized by the community.

B. The Process of Certifying *Bengkok* Land into Proprietary Land

Land registration process recognizes the existence of a publication system in which there are several publication systems of land registrations from countries that have implemented and conducted land registrations aimed at providing legal certainty for the related parties by having proof of ownership in the form of a certificate of land rights. “The publication systems of land registration applied by the countries conducting land registration are: *Torrens* System, Negative System and Positive System”.⁸ In managing land rights, it is necessary to know about the acquisition of land rights, while the acquisition of land itself is very much influenced by the land status.⁹

⁸I Made Adi Wiranegara, *Tukar Menukar Hak Atas Tanah Antar Wilayah Oleh Pejabat Pembuat Akta Tana*, Jurnal Hukum Universitas Udayana, Bali, 2018, p. 7.

⁹*Ibid*, p. 131.

Transfer, according to Article 17 of Government Regulation No. 27 of 2014, is the transfer of ownership of state/regional-owned property. The transfer of *bengkok* land to individuals can be done by requesting ownership rights to the Regional Office of the National Land Agency and the Head of the District/City Land Office. Certifying *bengkok* land into proprietary rights can be done by applying for ownership rights. Ownership rights can be given to Indonesian Citizens (WNI) and Legal Entity determined by the Government in accordance with the applicable regulations, namely Government banks, religious bodies and social bodies appointed by the Government.

According to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1999, the application for obtaining ownership rights to *bengkok* land is submitted in a written form containing information about the applicant and information about the land. If the applicant is individual, the information needed involves his name, age, nationality, address, and occupation as well as his wife/husband and children who are his dependents. If the applicant is a legal entity, the information needed involves name, domicile of the deed, date and number of the company's decision letter issued by the authorized official regarding the appointment of the company as a legal entity that can have ownership rights based on the applicable legislation. The terms and conditions of the application for ownership rights over *bengkok* land, as stated in the Land Services Standard Operating Procedures (SPOPP) of District/City Land Office, are:

1. Information on the applicant.
2. Information on physical data: Excerpts of Field Maps.
3. Information on juridical data:
 - a. For the regional government, there is a regional regulation on the source of village income and wealth that regulates the release/the exchange of *bengkok* land/village treasury land. Thus,
 - 1) for villages which do not yet have a local regulation on the source of village income and wealth as well as have not formed a Village Representative Body (BPD), the procedure for the the release/the exchange of *bengkok* land/village treasury land is based on the old provisions, namely village decisions, approval of the Regent and approval of the Governor.
 - 2) for villages which have formed a Village Representative Body (BPD), the procedure for the the release/the exchange of *bengkok* land/village treasury land is based on the legal products in the form of village regulation and village decision.
 - b. For the release which is based on the old provisions, the release/the exchange of *bengkok* land/village treasury land refers to the District Regulation concerning the Source of Village Income and Wealth which regulates the release/the exchange of *bengkok* land/village treasury land.
 - c. Determination of the amount of compensation in the form of money or replacement land.
 - d. Minutes of surrender of replacement land.
 - e. Deed/letter of release of ownership rights to *bengkok* land/village treasury land made before a Notary/Head of Sub-District/Head of the local Land Office.
 - f. Copy of replacement land certificate (if the acquisition comes from an exchange).

As stated in Article 103 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 9 of 1999, the obligations of the recipient of land rights are: paying the Fee for Acquisition Rights to Land and Buildings (BPHTB) to the state in accordance with applicable legislation, maintaining boundary marks, using land optimally, preventing damage and loss of land fertility, using land in accordance with environmental conditions, and other obligations listed in the certificate.

The process of transferring *bengkok* land ownership rights into proprietary land shall be done in accordance with the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 9 of 1999. The process of transferring land rights shall meet the material conditions, namely both parties as holders of land rights; 1) are entitled and authorized to exchange land rights, and 2) fulfill the conditions as subjects of land rights which are the object of land swapping. Thus, in this case, the Village Government has the right over the replacement land and the community has the right over the *bengkok* land. Besides, the registration of transferring land rights shall meet the formal conditions. The formal conditions in the registration of transferring land rights must be proven by a deed made by and in the presence of an authorized Land Deed Making Official (PPAT). It can be said that the registration of ownership rights over land is an absolute thing to do even any form of transfer, abolition or imposition of ownership rights must also be registered. In relation to this land registration, it is important to note that prior to the enactment of the Basic Agrarian Law, the land registration system applied was registration of deed.¹⁰

However, in its practice, the process of certifying *bengkok* land into proprietary land in Sidaraja Village faced various obstacles as the required documents were not archived. This is related to juridical and physical data, one of which is the deed of release of rights as well as the proof of land acquisition. If, at any time, there is a complaint regarding the exchange of *bengkok* land by a party (person/body) which contains objections and claims for land rights both in terms of the status and the ownership of the land, this can lead to land disputes.¹¹ Legal disputes over land cannot be separated from the concept of the Unitary State of the Republic of Indonesia which is the state based on the rule of law oriented towards public welfare as stated and implied in the 1945 Constitution of the Republic of Indonesia. Hence, every government effort will inevitably affect almost all aspects of people's lives, both as individuals and communities. Besides, rights and obligations are also unavoidable and will always happen.

CONCLUSION

The mechanism of transferring *bengkok* land ownership rights through land swap agreements is regulated in Kuningan District Regulation No. 44 of 2017 concerning Management of Village Assets where Village Head submits a letter to the Regent regarding the results of Village Deliberation on the exchange of village-owned land with the prospective replacement land located in the local village by attaching Minutes of BPD meetings, BPD decisions, Draft of Village Regulation, Minutes of Village Deliberation, Copies of map of the replacement land or map of village treasury land, Proof of replacement land ownership, Copies of inventory list of village treasury land, and Statement of ability from those who need village treasury land to meet administrative fees up to completion of certificate of the right to use the village treasury land. Village Head then submits a request for approval to the Regent, henceforth the Regent continues the application to the Governor.

The process of certifying *bengkok* land into proprietary land is regulated in Article 17 of Government Regulation No. 27 of 2014. The terms and conditions of the application for ownership rights to *bengkok* land are stated in the Land Services Standard Operating Procedures (SPOPP) of District/City Land Office that includes information on the applicant, information on physical data, and information on juridical data covering; a) for the release which is based on the old provisions, the release/the exchange of *bengkok* land/village treasury land refers to the District Regulation

¹⁰ Ibrah Parlindungan Hasibuan, *Analisis Hukum Terhadap Peralihan Hak Atas Tanah Kas Desa yang Dikelola Masyarakat*, Jurnal Hukum Universitas Muhammaduyah Sumatera Utara, 2018. p. 19.

¹¹ Dwi Edi Wibowo. et al. "The Analysis of Standard Agreement in Credit Transactions Through Financial Technology Viewed from Law No.8 of 1999 Concerning Consumer Protection". *UNIFIKASI : Jurnal Ilmu Hukum*, 6(1). 2019. 61-70.

concerning the Source of Village Income and Wealth which regulates the release/the exchange of *bengkok* land/village treasury land; b) Determination of the amount of compensation in the form of money or replacement land; c) Minutes of surrender of replacement land; d) Deed/letter of release of ownership rights to *bengkok* land/village treasury land made before a Notary/Head of Sub-District/Head of the local Land Office; and e) Copy of replacement land certificate (if the acquisition comes from an exchange).

SUGGESTION

The process of land swapping, especially state-owned land, shall be done in a written form and is based on the applicable legislation. In this case, the documents shall be kept from one period to another. Further, the written agreement must involve the Land Deed Making Official (PPAT) in order to protect the rights of citizens participating in *bengkok* land swapping so that they can certify the land as a proof of ownership. The process of exchanging administration and documentation shall be done as soon as possible in order to prevent land disputes in the future. Thus, it will be better if the fulfillment of land rights, which had already been done in the years before the prevailing legislations, applies the current procedure based on the evidence of land swapping.

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