

## CHAPTER II

### PRIVATE AND COLLECTIVE PROPERTY RIGHTS

#### A. Property Rights

##### 1. Definition of Rights

The Indonesian dictionary has the right understanding about something that are true, belong, belonging, power, power to do something (as determined by the laws, rules, etc.), the true power over something or to demand something, degrees or dignity.<sup>1</sup> The theme of the new right of "birth" is formally in 1948 through the United Nations Declaration of Human Rights.<sup>2</sup> According to classic perspective, the meaning of right similarity with *ius est ad alios*, it is mean the ethic of social between one another. So, right here is relationship in the society and it is rule. The right is no correlation with the thing and his own personality business.<sup>3</sup>

##### 2. Types of Rights

###### a. Legal rights and moral rights

Legal rights are rights that are based on the law in one form. Legal rights are talking more about the legal or social. Examples of cases, decreed that the war veterans obtain benefits every month, then every veteran who has met the specified requirements are entitled to receive benefits.<sup>4</sup>

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<sup>1</sup> Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, edition III, (Jakarta: Balai Pustaka, 1990), p. 292.

<sup>2</sup> A. Ubaidillah, dkk., *Pendidikan Kewarganegaraan: Demokrasi, HAM & Masyarakat Madani*, (Jakarta: IAIN Jakarta Press, 2000), p. 210.

<sup>3</sup> Save M. Dagun, *Pengantar Filsafat Ekonomi*, (Jakarta: PT Rineka Cipta, 1992), p. 241.

<sup>4</sup> James W. Nickel, *Hak Asasi Manusia: Refleksi Filosofis atas Deklarasi Universal Hak Asasi Manusia*, translated by Titis Eddy Arini, (Jakarta: PT Gramedia Pustaka Utama, 1996), p. 38.

Moral rights are based on ethical principles or rules alone. Moral rights are more individuals. Case in point, if an employer provides a lower salary for women working in his company but his performance as a man who work in his company. With this employer implement its legal rights but with out of moral rights of the women who worked in his company. From this example it is clear that legal rights are not the same as moral rights.<sup>5</sup>

T.L. Beauchamp argues that there are legal rights and moral rights called the rights of the conventional. For example if I become a member of the futsal club Indonesia, then I get some rights. In general, these rights appear as a human subject to the rules and conventions agreed. Rights in contrast to conventional moral rights because these rights depend on the rules that have been agreed with members of the other. And this right is different from Legal rights because not listed in the legal system.<sup>6</sup>

#### **b. Positive rights and negative rights**

Negative rights is a negative right, if I am free to do something or have something in the sense that other people should not avoid or have I to do it. Example: the right to life, right to express opinions.<sup>7</sup>

Positive right is a right to be positive, if I right that others do something for me. Example: the right to education, health, and health. We must consider the negative rights because these rights are subdivided into two, namely: active and passive rights. An active negative right is the right to do or not do just as people want. For example, I have the right to go anywhere that I like or say what I want. Active rights could be called the right of freedom. Passive negative rights are the rights of others not to be treated a certain way. For example, I have the right of others that can not disturb my personality,

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<sup>5</sup> *Ibid.*, p. 38-39.

<sup>6</sup> *Ibid.*, p. 39.

<sup>7</sup> Robert Haas, ed., *Hak-Hak Asasi Manusia dan Media*, translated by Hermoyo, ed., (Jakarta: Yayasan Obor Indonesia, 1998), p. 20.

that my secret is not dismantled, that my name unstained. These rights can be called passive save rights.<sup>8</sup>

### **c. Special and public rights**

Special rights arising in a special relationship between a human being or as a special function which owned the one against the others. Example: if we borrow Rp. 10,000 from other people with the promise I will return in two days, then someone else gets the rights of others.

Public rights of human beings not because of a relationship or a particular function, but simply because he is human. This right is owned by all men without exception. Indonesia in our country is called the "human rights".

### **d. Private and social rights**

Concerning with private rights here first of all is the right of people toward the State. State should not prevent or interfere with the individual in realizing the rights that he has. Example: freedom of religion, conscience rights, the right to express opinions, we need to remember individual rights are all included that had been discussed negative rights.<sup>9</sup>

Social rights here are not only right to state interests, but also as a member of the community along with other members. This is called social rights. Example: the right to work, right to education, and right to health care. These rights are positive.<sup>10</sup>

### **e. Absolute rights**

Once we see and read about the explanation of rights and the types, now is there an absolute right? Absolute rights is a right which is absolute with no exceptions, they apply everywhere by not influenced by situations and

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<sup>8</sup> *Ibid.*, p. 21.

<sup>9</sup> Dr. Franz Magnis-Suseno S. J, *Etika Politik: Prinsip-Prinsip Moral Dasar Kenegaraan Modern*, (Jakarta: PT Gramedia Pustaka Utama, 1987), p. 126.

<sup>10</sup> *Ibid.*, p. 128.

circumstances. But apparently there are no absolute rights. Why? According to ethicists, most rights are prima facie right or right at the first sight, which means that right applies until defeated by another, stronger rights. Every human being has the right to life and is a very important right. Humans have the right to not be killed but this does not apply in all circumstances without sufficient reason. Someone who will defend the attacks on him have the right to kill if there is no other way to do. Another example is the citizens who have the task of defending the homeland in a state of war. Both of these are examples where the right to life is important and should be regarded as absolute rights but apparently lost by the situation, circumstances, reason enough.

Freedom is also one of the most important things, but this right can not be said to be absolute rights because these rights can also be defeated by other rights. A person who is mentally ill and dangerous to the surrounding communities is forced to put in a mental hospital although he refused. The right is not absolute because something is always going to lose the right reasons or other circumstances that could abort the right position.<sup>11</sup>

All economic goods have attributes of property rights. This attribute has four major components:<sup>12</sup>

- a. The right to use either
- b. The right to earn a good income from
- c. The right to transfer the good to others
- d. The right to enforcement of property rights

### **3. Definition of Property**

There many theories about property. Property is thing or object of people which has economic value, and it is recognized and protected by the law based

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<sup>11</sup> <http://id.wikipedia.org/wiki/Hak>

<sup>12</sup> [http://en.wikipedia.org/wiki/Property\\_rights\\_\(economics\)](http://en.wikipedia.org/wiki/Property_rights_(economics))

on legal proof, and can be replace to other. Perhaps one of the most popular, are the natural rights definition of property rights as advanced by John Locke. Locke advanced the theory that when a mixture of people working with nature, one gains a relationship with the mixed nature of employment, subject to the restriction that there should be "enough, and good left in common for others."<sup>13</sup>

Anthropological study of various systems of ownership, use and transfer rights, and ownership under the term "theory of property." Western based theory of law, as mentioned, the legal owner of the property. However, not all property systems are founded on this basis. In the text of *The Common Law*, Oliver Wendell Holmes describes property has two fundamental aspects. The first is ownership, which can be defined as control over resources based on the practical inability of another to contradict with the tip of the owner. The second is the title, which is the expectation that others will recognize rights to control resource, even when it is not in possession. He outlines the differences between these two concepts, and proposes the history of how they came to be attached to the person, as opposed to families or entities such as churches.<sup>14</sup>

A property right is the exclusive authority to determine how resources are used, whether the resources are owned by the government or by individuals. Below will be mentioned some of opinion of Muslim Scholar concerning with the meaning of property.

According to Hanafiah concerning with the definition of property, they said:<sup>15</sup>

مَا يَمِيلُ إِلَيْهِ طَبَعُ الْإِنْسَانِ وَيُمْكِنُ إِدْخَارُهُ إِلَى وَقْتِ الْحَاجَةِ

“Every thing that makes desire of humans tends to it and can be saved until the moment we want to use it.”

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<sup>13</sup> Hans Fink, *Filsafat Sosial: Dari Feodalisme hingga Pasar Bebas*, translated by Sigit Djatmiko, (Yogyakarta: Pustaka Pelajar, 2003), p. 65.

<sup>14</sup> *Ibid.*, p 20.

<sup>15</sup> Mustafa Ahmad al-Zarqa', *al-Madkhal fi fiqh al-'Am*, (Dar al- Fikr, 1967), p. 114.

In simpler, the concept of property according to Malikiyah, Syafi'iyah and Hanabilah is:<sup>16</sup>

مَا يَمِيلُ إِلَيْهِ الطَّبَعُ وَ يَجْرِي فِيهِ الْبَدْلُ وَ الْمَنْعُ

“Every thing that makes desire of humans tends to own it and can be bartered.”

Musthafa Ahmad al-Zarqa', one of the famous contemporary Muslim scholars said:<sup>17</sup>

الْمَالُ هُوَ كُلُّ عَيْنٍ ذَاتِ قِيَمَةٍ مَادِيَةٍ مُتَدَاوِلَةٍ بَيْنَ النَّاسِ

“The meaning of property is every matter that has value according to the common of people.”

Muhamad Shalaby, as the other contemporary Muslim scholar said:<sup>18</sup>

مَا يُمَكِّنُ حَيَازَتَهُ وَ إِحْرَارَتَهُ وَ الْإِنْتِفَاعَ بِهِ إِنْتِفَاعًا مُعْتَادًا

“Every thing that can be owned and saved, then commonly people consume it.”

#### 4. Types of Property

Most legal systems distinguish different types (immovable property, real on the ground, real estate, real property) of property, especially between land and all other forms of wealth, goods and property, movable or personal property. They often distinguish tangible and intangible assets. One categorization scheme

<sup>16</sup> *Ibid.*, p. 114.

<sup>17</sup> *Ibid.*, p. 118.

<sup>18</sup> Drs. Ghufron A. Mas'adi, M. Ag., *Fiqh Muamalah Kontekstual*, (Jakarta: PT Raja Grafindo Persada, 2002), p. 12.

specifies three types of property: land, improvements (immovable man made things), and personal property (moving man-made things).<sup>19</sup>

Common law give definition about real property (immovable property) that is a combination of additional interests in land and improvements, personal property and interests in property are moving. Real property rights are rights relating to land. These rights include ownership and usage. Owner may grant to persons and entities in the form of leases, licenses and easements.<sup>20</sup>

Then, with the development of theories that are more complex than property, personal property is divided into tangible property (such as cars and clothing) and intangible property (such as financial instruments, including stocks and bonds, and intellectual property, including patents, copyrights, and brands trade).

## 5. Definition of Property Rights

The concept of property rights such as those used by economists and legal scholars are related but different. This difference is especially noticeable in the focus of economists' on a private or collective ability to control the use of the good. For example, a thief who has stolen the well will not be considered to have a legal (de jure) property rights are good, but will be considered to have economic (de facto) property rights for the good.

Big Indonesian Dictionary mentions the definition of property rights is the right to use or take advantage of an object that is in power without harming the other party, and defended against any party.<sup>21</sup>

According to Ibn Taymiyyah, property right is a force that is based on shari'a. The power to use an object. Nevertheless, the power level varies greatly form.<sup>22</sup>

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<sup>19</sup> Save M. Dagun, *op. cit.*, p. 239.

<sup>20</sup> *Ibid.*, p. 239.

<sup>21</sup> Departmen Pendidikan dan Kebudayaan, *op. cit.*, p. 335.

In perspective of property concept, the owner is the important thing and can not be separated. Start from this statement then the concept of right rise with its regulations. We can call it as the right of property. In the literature of the law, the right of property is same with the property is belonged. Furthermore, between one country and another, the rule how to manage the property is different.

In this statement below was mentioned what the meaning of property is, like Sri Soedewi Masjchoen said in her book, the property right is the right to master and enjoy the property that belonged by people freely, as long as not contra with the law, and without reducing the possibility of the remove of the right for public interest by payment of appropriate compensation and according to the provision of the law.<sup>23</sup>

Basically, the owner has absolute power toward his property. He has right to the property under his authority to use it freely and no one has right to forbid him, peacefully as long as no disturb other people in using it, further, the owner has right to keep his property from other who want to disturb his right in mastering, enjoying, and using. The right of property is include the right to use, the right to take outcome, liens, and mortgages and so on.<sup>24</sup>

## 6. Principles of Property Rights

Traditional principles of property rights include:<sup>25</sup>

- a. Control or exploit and use of property
- b. Right to any benefit from the property (examples: mining rights and rent)
- c. Right to transfer or sell the property

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<sup>22</sup> Abdul Azim Islahi, *Economic Concepts of Ibn Taimiyah*, (United Kingdom: The Islamic Foundation, 1988), p. 9.

<sup>23</sup>Prof. Dr. Ny. Sri Soedewi Masjchoen Sofwan.S H, *Hukum Perdata: Hukum Benda*, (Yogyakarta: Liberty, 1974),p. 42

<sup>24</sup>Kartini Mulyadi dan Gunawan Widjaya, *Kebendaan pada Umumnya*, ( Jakarta: Kencana, 2003), p. 191

<sup>25</sup> Dr. S. M. Yusuf, *Economic Justice in Islam*, (New Delhi: Nusrat Ali Nasri, 1784), p. 23.

d. The right to exclude others from the property.

Traditional property rights do not include:

- a. That interferes with fair use rights of another party's private (quiet enjoyment of the rights)
- b. Interfere with the reasonable use of public property rights, including the use of disturbing the public, health peace safety, or comfort.

## **B. Private Property Rights**

Private its mean is personality, individually, especially for one people not for group. From this statement can be understood that private property is ownership of property in private or individually. This property can not be claimed and used by some people without his permission. He also has the right to protect to other who wants to take or disturb his property and this right was legal under law fully.<sup>26</sup>

The freedom of using property by the owner is basically unlimited. Every people are free to have property right and use it for his interest. In other side, the law has regulated in order to this using not disturb to the right of other as the result of life in society and for the goodness of property its selves. For example, the rule has decide to the driver to use helmet, STNK, SIM and many others rule also for the goodness of his life in his property. So that why this requirements is must be understood by every people (owner).<sup>27</sup>

The system of private ownership of property market values reflect the preferences and demands of the entire community. No matter whom the owner is, the use of resources affected by what the rest of the public thinks is the most valuable. The reason is that an owner who chose some other use must abandon the use-and other high-value price he will pay for resources or to use it. This creates an interesting

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<sup>26</sup> Muhammad Baqir Ash Shadr, *Buku Induk Ekonomi Islam*, (Jakarta: Zahira, 2008), p. 149

<sup>27</sup> Prof. Abdulkadir Muhammad, SH, *Hukum Harta Kekayaan*, (Bandung : Citra Aditya Bakti, 1994), p.64

paradox: although this property is called "private," personal decisions based on the evaluation of the public, or social.<sup>28</sup>

The fundamental purpose of property rights and their fundamental performance is that they eliminate the destructive competition for control of economic resources. Well defined and well-protected property rights replace competition by violence with competition by peaceful means.<sup>29</sup>

Private property rights do not conflict with human rights. They are human rights. Private property rights are human rights to use certain items and exchange them. Any restraint of private property rights to shift the balance of power of personal attributes and personal attributes to the approving authority to conduct politics. That is the fundamental reason for the preference of a system of strong private property rights: private property rights to protect individual liberty.<sup>30</sup>

### **C. Collective Property Rights**

Property right is known in the society since long time ago when people called as the social creature. He can not stand and life by his owns self. People always need to the other to fulfill his need. Start from this condition then there are object that must be dominated collectively so known the collective property. Definition of collective property that is every object that every people have the right to joint in using it and this property impossible if just under control of some people only. We can give the example that it is impossible some objects under control of few people like road, transportations, water, gas oil and many others beside that. Those objects must be under control many people or collectively so some people can not sell it without any permit of the society.<sup>31</sup>

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<sup>28</sup> Syed Nawab Haider Naqvi, *Ethics and Economics: An Islamic Synthesis*, translated by Husein Anis and Drs. Asep Hikmat, (Bandung: Mizan, 1985), p. 108.

<sup>29</sup> *Ibid.*, p. 101.

<sup>30</sup> Dr. Zaki Fuad Chalil, MA, *Pemerataan Distribusi Kekayaan dalam Ekonomi Islam*, (Jakarta: Erlangga, 2009), p. 140.

<sup>31</sup> *Ibid.*, p. 164.

Collective property has two important components of the social control and production to maximize the fulfillment of human needs. With social control, under socialism the economy is no longer something with my own life can spin out of control. As a result there will be no more booms followed by recession. Basically the reason is that the unified ownership ensures that there will always be an effective demand for full economic output.