



Research Article

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Legal Arrangements and Implementation of State Ownership Rights Over Land in Indonesian Constitution

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Abstract

The lack of clarity and firmness in Indonesian Basic Agrarian Law (BAL) in explaining the meaning and substance of state ownership rights to land based on the nation's view of life and its implementation based on the concept of a rule of law based on the principle of people's sovereignty is a fundamental and urgent matter. This study used a normative research method of the explanatory-analytical type with a normative, comparative and historical juridical approach, while the data analysis was carried out qualitatively. The results of this study include: first, the original state tenure rights over land imply the demands of community rights and obligations regarding the use of land rights for the welfare of the people. Second, the implementation of the meaning and substance of state tenure rights over land has not been fully reflected in statutory regulations so that state administrators (executives) experience difficulties in carrying out these functions of authority. Third, the weak implementation of regulations is caused by the lack of political will in power to carry out agrarian politics consequently characterized by a single interpretation of state tenure rights over land based on the regime's political interests.

Keywords: Basic Agrarian Law, Indonesia, explanatory-analytic, normative juridical, executive

1. Introduction

Law Number 5 of 1960 concerning Basic Agrarian Law (hereinafter referred to as BAL) is an elaboration of Article 33 paragraph (3) of the 1945 Constitution (Hidayanti et al., 2021). BAL contains basic regulations which contain basic rights regarding the basis and direction of agrarian political policies national, especially human relations with land (Lee Peluso et al., 2008; Sihombing, 2019). The main provisions in the BAL still have to be spelled out in laws and regulations as well as systematically and synchronously in a system of laws and regulations to be able to regulate, manage and supervise every allotment and supply of land in relation to humans, aware of good and correct legal norms and intended for the greatest prosperity of the people. The problem is what basic norms can be used as the basis or principle for the state to exercise its authority over land so that all people can obtain land use for the greatest possible prosperity. Such a statement is important considering: a) the earth and outer space are the main natural resources that guarantee the life and welfare of the nation; b) the nature of natural resources, especially land, is limited; and c) the need for land

continues to increase along with human nature and development.

Not comprehending the significance, essence, intention, and objective of the government's authority to regulate land may result in its misuse and misinterpretation. This may lead to the perception that the state is an autonomous body of control, regardless of its intended function and purpose (Resosudarmo et al., 2009). If so, then the state distances society from its ideals of forming a just and prosperous society which should be spelled out in every regulation, policy and attitude of action. An understanding of the concept, meaning and substance of the state's right to control over land is important for rectifying authority as a means of preventing confusion, regulation, management and oversight. Likewise, in the current reform era, the political affirmation of land law in legislation and the attitude of the government to ensure the acceleration of increased prosperity by taking into account regional aspects, pluralism of legal communities including indigenous and tribal peoples and guarantees of legal protection for holders of land rights (Lukman, 2021; Nasir et al., 2019; Hammar, 2019). Meanwhile, in facing the free market era of the 21st century, it demands legal readiness in every field of development, because development contains major changes, which include changes in economic structure, physical changes in areas, changes in natural resources and the environment, changes in technology and changes in the value system, it is not impossible that the people will absolutely be left behind (Watkins, 2006).

Based on the description above specifically, this research will answer three main issues, namely: first, what is the definition, meaning and substance of state control over land according to the 1945 Constitution? secondly, How are the state's right to control over land regulated in statutory regulations and their current implementation? third, How should the state's right to control over the land be regulated in statutory regulations so that the greatest possible prosperity for the people is just and equitable?. The method used is normative legal research, namely research that departs from the postulates called positive law and developing doctrines. The normative aspect as a research characteristic is focused on normative legal postulates relating to the state's right to control over land. To complement this study, an in-depth study of philosophy, politics, and a comparative historical study of land law in Indonesia was carried out (Soekanto, 1990). This research will also examine the extent to which written positive laws in Indonesia are synchronous or harmonious in regulating the issue of state tenure over land both vertically and horizontally, as well as the social, political and cultural aspects that support and hinder the making and implementation of regulations in Indonesia.

2. Substance of State Control over Land

The state's views on land ownership stem from the understanding of the fourth paragraph in the preamble of the 1945 Constitution, which outlines the creation of an Indonesian State Government that safeguards the entire nation and works towards promoting public welfare, educating the population, and contributing to global peace and social justice (Pinilih, 2018). This led to the drafting of the Indonesian National Independence Constitution, establishing the Republic of Indonesia as a sovereign state governed by the people's belief in one God, a just and civilized humanity, and unified by wisdom in deliberation/representation and social justice for all citizens (Usman, 2020).

The excerpt from the 1945 Constitution states that it is the responsibility and primary obligation of the Government to safeguard the Indonesian nation and its "homeland". "bloodshed" is a metaphor for "homeland", which encompasses the land, waters, and resources within. These resources are intended to enhance the well-being of the public, develop the nation's way of life, and collaborate in the establishment of global harmony (Lisdiyono, 2017). The state, under the jurisdiction of the Government, aims to utilize the natural resources found in the earth, waters, and other resources in the interest of serving the betterment of the Indonesian people. A more detailed explanation of this statement is included in Article 33, paragraphs (2) and (3) of the 1945 Constitution. Article 33 paragraph (2) indicates that the state has control over production branches that hold significance for the country and have an impact on the livelihoods of a large number of individuals. This is reiterated

in paragraph (3), which states that the state holds control over the earth, water, and the wealth that is contained within dams, with the goal of utilizing them for the utmost benefit of the people. These two outlines constitute the primary messages conveyed by the article, namely that the state exercises authority over natural resources and ensures their usage for the betterment of the populace.

The principle of having authority over the state is rooted in the idea that the state represents the collective power of its citizens. Those who hold power concentrate on influencing other groups, particularly through the state. The state's primary objective is to manage natural resources in order to create the highest possible standard of living for the population. Due to its right to control land, water and other natural resources, the state bears the responsibility of fulfilling this objective. This is also a guarantee and a form of protection for the greatest prosperity of the people and general welfare on the basis of social justice for all Indonesian people. Land as the main factor of production must be under state control. This means that the state has the right to control land through the state function to regulate and manage (*regelen en besturen*) even though the state does not have to own the land in question.

The state has the authority to determine the arrangement and administration of its allocation, use, supply and maintenance. In addition, the government is empowered to establish and oversee the ownership rights of various elements such as land, water and space. It also has the responsibility to regulate the legal connections and actions between individuals with respect to these resources (Dharsana et al., 2018). The state through the government strives for the existing natural wealth including those contained in the earth, water and minerals to be used primarily for the welfare of the Indonesian nation. To achieve this goal, the state is given the right to control land through legal institutions, which are detailed in the contents and objectives of BAL Article 2 paragraph (2). The authority of the state in the field of land is the delegation of the task of the nation to regulate and lead the control and use of the common land it owns.

Article 2, paragraph (2) of the BAL outlines the restrictions imposed on the authority of states when it comes to land. These include the ability to manage and oversee the allocation, utilization, distribution and upkeep of land, water and space. Additionally, states are empowered to determine and regulate the legal connections between individuals and land, water and space, as well as legal proceedings revolving around the same (Widiyono, 2022). Understanding that lower regulations must have a source or basis on higher regulations; legislation is a source of legal order; and laws and regulations to guarantee that order in an orderly system is applied in the regulation of state control rights over land in Indonesia. The basis for regulation of the state's right to control land in the BAL is the Preamble to the 1945 Constitution and the Body of the 1945 Constitution as stated in Article 33. The preamble to the 1945 Constitution originates from the lofty ideals of the founding fathers of this nation in the form of a *grundnorm* or basic norm which is not a legal norm but a norm thought. Thus, the whole becomes a legal order for the greatest goal of people's prosperity.

The right to control the state according to the 1945 Constitution must be seen in the context of the rights and obligations of the state as the owner (domain) which are public in nature, not as *eigenaar* which are private in nature (Syaff'i et al., 2019). The significance of this concept is that the government holds power as a controller, strategist, executor, and also as an overseer for the administration, application, and exploitation of a country's natural resources. The consequence of this understanding is that the state has an obligation to all forms of utilization of land and water as well as the results obtained therein (natural wealth), must significantly increase the prosperity and welfare of the people; to protect and guarantee all the rights of the people contained in or on the earth and water which can be produced directly or directly enjoyed by the people; and to prevent any action from the parties or that will cause the people to not have the opportunity or to lose the rights contained in and on the earth and water.

The greatest goal of people's prosperity has a relationship with economic aspects, so the state can intervene in the form of four alternatives, including the state can grant monopoly rights to state companies; the state creates competitive conditions between state enterprises; the state can make a set of laws and regulations that can create competition; and, the state can regulate private

monopolies (Rachbini, 1996). State interference, in this case the government in the economic sector, is not always without problems, meaning that potential problems may arise due to excessive state interference. This can be avoided with the support of adequate political stability. The right to control the state refers to the state's capability to oversee, govern and direct crucial production sectors that impact the lives of the citizens, including the use and management of natural resources such as land and water.

Based on the main ideas contained in the Indonesian economic plan, the right to control the state contained in Article 33 of the 1945 Constitution is contained in paragraphs (2) and (3), namely: Article 33 paragraph (2) states: "Important branches of production for the state and those who control the livelihood of the public are controlled by the state." Then in Article 33 paragraph (3) it is stated again: "Earth and water and the natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people."

There are two key points regarding the meaning of its content. Firstly, it highlights that the state has authority over the land, water, and other natural resources present within its territory. Secondly, it emphasizes that these resources should be utilized in a manner that benefits the population as a whole. The idea of state control is founded on the notion that the state represents the collective power of its citizens, and therefore has the right to exercise control over the resources and influence others. The state's management of natural resources aims to maximize prosperity for the people, which is its responsibility as it possesses the right to regulate the land, water, and resources available. This endeavor ensures the protection and guarantee of the people's welfare and social justice, ensuring that all Indonesians benefit. There are three main focuses that can sustain the use of land for the greatest prosperity of the people. The firmness of the state in carrying out land levies on lands directly controlled by the state, including in this case increasing the functions of land management institutions. The government's efforts to create as many people as possible to have land rights. The ability of the state to apply law enforcement to fulfill the obligations of landowners, to fulfill the social function of land and to fulfill public interests in land.

An authentic interpretation of the state's right to control as referred to in Article 33 paragraphs (2) and (3) of the 1945 Constitution is contained in Article 2 of the BAL, which is a purely public legal relationship. When viewed from a theoretical perspective, with the various privileges attached to the state, the right to control the state contains an element of ownership, especially when it is related to the object of ownership. An understanding can be drawn regarding the right to control land by the state according to Article 33 of the 1945 Constitution, namely as the authority granted by the nation to the state to regulate, manage and supervise production branches which are important for the state and affect the livelihood of the people at large. as well as the earth, water and natural resources contained therein, in order to create the greatest possible prosperity for the people. The state's authority over land signifies a call for shared or collaborative rights among individuals, communities, and the government to promote the utmost success of the populace. The core essence of this power is to attain the highest level of well-being for every person in Indonesia.

3. Basic Thoughts Behind the State's Controlling Rights over Land

From birth, humans are personal beings composed of body and spirit with reason and will. The human element has the potential to continue to develop in order to achieve its existence. On that basis, humans perceive that there is a natural right to develop potential which is called human rights (De Benoist, 2011; Tasioulas, 2013). To achieve personal development, humans see that it is impossible to be able to meet their own needs without the help of other humans in society. This has the consequence of mutual assistance and complementarity between humans and society. In the context of state life, humans also need the role of the state.

According to Cooley (1902), individual and society are not two separate realities, but two sides of one reality. So, humans as citizens of society are at the same time as individuals. Humans have a natural position as independent beings, namely humans as autonomous creatures of God who have

their own existence and have their own personality. However, humans also have a natural position as God's creatures. The elements of human nature (individual creatures and God's creatures) are monodual, which is a unity of body and soul, a unity of individual and social beings and creatures that stand alone and also creatures that have Godhead, all of which are intact and have a single compound nature. Thus, humans must be able to incarnate the elements of human nature that are monoproral in the actions of everyday life. The journey of human life in its long history has produced a way of life in the form of crystallization of the values that exist in the nation itself which is a view of the soul and personality and is the main core of Pancasila (Basri et al., 202). So it can be concluded that humans are naturally individual and social creatures. The basis of human existence as an individual and social being is the nature and nature of human beings as divine beings. According to Titahelu (2016), on the basis of humans as God's creatures and a just and civilized attitude in human relations, land is God's gift to individuals, families, communities and nations. Owning land is a right that is inherited because of God's gift. However, in line with that, the obligation to own land is also reduced, because God wants the implementation of obligations with rights in a balanced, fair manner, by civilized humans, humans who have nobility and dignity as human beings created by God. Thus those who have a relationship with the land are natural humans, namely individuals, families and communities. The collection of these holdings is referred to as the property of the nation.

The State of Indonesia is a state which is defined as an organization of power that originates from the sovereignty of the people. State power has both internal and external characteristics. Exit is applied to non-citizens or to other countries that occupy or use state territory, while inward power is based on the formal and structural nature of the state as an organization of people's power that is more dominant than any group in society in that country. The state in this sense is a state that has an institutional character that has the authority to regulate or has the power to regulate. The Indonesian state which has the power to regulate is based on the view that the state carries out human values in human relations which are based on the nobility of human dignity. Van Apeldom (1985) states that the governing power of the state is synonymous with a state right, namely a power (*macht*) that is regulated by law based on decency. The right to regulate that is owned by the state or the power exercised by the state shows the existence of a special task that belongs to the state. State duties include carrying out regulatory functions; carrying out the function of resolving disputes between communities; carrying out life development functions, especially in the economic sector; and, carrying out the function of procuring public facilities for the benefit of the community.

Article 33 paragraph (3) of the 1945 Constitution declares that the state has authority over the land, water, and resources within it and that they should be used for the people's maximum benefit. The question raised here pertains to whether control forms the foundation of the state's connection with the land and its implications for enhancing people's prosperity. In Article 2 paragraphs (1), (2) and (3) of the BAL it is stated that the earth, water and space, including the natural wealth contained therein, are controlled at the highest level by the state as the organization of the power of all the people. According to Article 2, the state has the authority to oversee and manage the distribution, utilization, provision, and upkeep of land, water, and airspace. It is also responsible for establishing and enforcing laws governing the relationships between individuals and these natural resources, as well as legal proceedings involving them.

Land as an object for sacred purposes is based on natural law (Claeys, 2002). This means that the state is not the owner of the objects it is used for public. In this view, natural humans have a special position where land, one of them, deserves to be naturally owned, in which the right to own is inherent so that it is basic. This view of the strength of property rights as a natural right does not clearly explain whether the state has reasons not to own land. In the problem that arises is how is the ownership of land for the public interest, objects that were used for the public, called *res publicae*, belonged to the state and ownership by the state was false because the state could not prohibit other people from using them.

Furthermore, customary land law, the element of individual ownership of land is respected.

However, the main value that is put forward is the use of community land as a benchmark for respecting land ownership. Thus the role of the head of the association and the members of the local unit is very important to protect and maintain land products and the balance between ownership and utilization. This is illustrated by the nature of the ups and downs of the relationship between individual rights and partnership rights and the prominence of land use rights attached to individuals. This has the meaning that individual rights are recognized when in addition to obtaining permission from the head of the association, the land owner has used it.

Customary law, individual rights are limited by customary rights. Individual ownership rights to land can be obtained if there are community members who clear the land and then manage the land continuously. If later the land is no longer managed by the person concerned, then the land is again affected by customary rights. The continuation of the land ownership rights of the community members depends on the strength of the village lordship rights. That is, if the village ownership rights are strong enough, then there is a possibility that individual ownership rights to land are limited in time and can then be transferred to other fellowship members. Another possibility is that the individual property rights will be transferred upon the death of the land owner (Anggraeny & Pramithasari, 2020). The strength of these property rights depends on the patterns of relations created between the association and its citizens. In reality there are property rights that are limited in time, where these rights are limited by the right of lordship. Thus, it can be said that land within the territory of a legal alliance is communal land. The head of the association performs the function of regulating, managing and supervising the use of land. Ownership of land by individuals is recognized, but ownership is also determined by the levels of land use so that in addition to the aspect of freedom in land use it also contains the possibility of creating broad legal relations in land use. Thus, it can be concluded that customary law contains values of prioritizing land use/utilization, not land status; recognizing individual rights; acknowledging the existence of Traditional Leaders/Heads of Association to regulate, manage and supervise the use of land. Moreover, the values adhered are that it does not recognize the existence of absolute ownership. Finally, it is known that there is a social function of land ownership by individuals.

4. Synchronization of Control over Land in Synchronization of Laws and Regulations

Law regulates its formation because a legal norm determines the way in which other legal norms are made, and also, to a certain degree, determines the content of those other norms. A norm is said to be valid because and as long as the norm is created or formed in a certain way, namely in a way determined by another norm; and the norms that determine the manner of creation describe the basis for the validity of the norms created.

The relationship between the norms that determine the creation of other norms and the norms that are created according to this determination, can be visualized by describing the organization of norms at high and low levels. The norms that determine the formation of other norms are higher norms, while the norms formed according to these regulations are lower norms (Kelsen, 1995). The legal order, especially the legal order which is personified in the form of a state, is not a system of norms which are only coordinated with each other, which stand parallel or equal, but rather a sequence of norms from different levels.

The relationship between the higher and lower levels of the legal system, as between the constitution and laws, or between laws and regulations, is a determining or binding relationship. Higher-level norms govern the actions that create lower-level norms (or only regulate the realization of coercive acts if pure implementation of higher-level norms is what is required). In regulating the creation of norms at lower levels, higher-level norms determine not only the process of creating norms at lower levels, but perhaps also the creation of the content of these norms. The Constitution of a country is the highest form of legislation, because it is the basis and source of all laws and regulations that can be issued according to the Constitution itself, so that all laws and regulations below the level of the Constitution may not conflict with the Constitution. Base. Furthermore, in

accordance with the principles of the rule of law, every law and regulation must be firmly based and sourced from the applicable laws and regulations, which have a higher level. If the material of the law at a lower level conflicts with the material of the law at a higher level, then in principle the law at the lower level can be declared as having no legal force. If the conflicting rules and regulations are of the same level and degree, then in principle the younger regulation wins, meaning the one that is enforced. Meanwhile, it should be noted that a law sometimes regulates a material only in general, and besides that there are also laws and regulations that specifically regulate this material, so in this case theoretically what is applied is the law and regulation that specifically regulates this material: *lex specialis derogat legi generali*.

Vertical synchronization is conformity between laws and regulations that are lower in relation to higher regulations on which they are based. Vertical synchronization can be formal in the sense of conformity in the degree of regulation or material in nature, namely the contents of the regulations as meant by the regulations that form the basis. For example, between Laws and Government Regulations (Law Number 5 of 1960 concerning Basic Agrarian Regulations (BAL) and Government Regulation Number 40 of 1996 concerning Business Use Rights, Building Use Rights and Land Use Rights). In the case above, we can analyze whether the contents of the regulation materially contain an elaboration of the object of regulation as referred to in the BAL. Vertical synchronization in several land rights and legal relations related to land was not achieved both formally and materially because there was no legal regulation made for this. Besides that, there are also regulations that are formally or materially out of sync with the regulations. Horizontal synchronization is conformity between regulations of the same degree, for example between laws and regulations or government regulations and government regulations. The first synchronization that will be appointed is between the law and the law, namely between Law Number 5 of 1960 concerning Basic Agrarian Regulations and Law Number 4, 1996 concerning Mortgage Rights on Land and Objects Related to Land. Articles governing property rights, usufructuary rights and building usufructuary rights stipulate encumbrance with mortgage rights on the three land rights, namely Article 25 for property rights, Article 33 for usufructuary rights and Article 39 for building use rights.

Indonesia as an archipelagic country with a heterogeneous society both in terms of geography and culture, it is impossible for all matters to be carried out by the central government. On this basis, the delegation of authority to carry out the tasks of the central government is a barometer of the success of government tasks, especially those related to people's welfare. In the literature, decentralization is synonymous with autonomy (Syarifuddin, 2021). According to the author, decentralization is the process or method of distributing authority, while autonomy is the nature of the authority given. Autonomy is the implementation of the principle of rule of law in the form of limiting powers so that the effectiveness of goals can be achieved immediately while the principle of democracy is manifested in the form of freedom of action to plan and carry out self-determined tasks. It is impossible and risky when state power is exercised solely by the Central Government. Such a thing aside from keeping away from the goal also denies the freedom to act as an element of democracy. Likewise in the implementation of the concept of state control over land in Indonesia. In the context of the state's right to control over natural resources, there is a 'state obligation' to protect, preserve and restore the environment as a whole and in its entirety. This means that existing development in general must be sustainable by prioritizing present and future interests.

5. Conclusion

This study concludes that first, the state's right to control over land contains the authority to regulate, manage and supervise the acquisition and use of land. The emergence of the right to control the state stems from the realization of community rights and obligations to land in the context of state life based on the principle of the pattern of human relations with land which contains human rights and obligations towards themselves and their people in a balanced way to create a just and equitable welfare of life. The meaning of the state's right to control means the demands of the rights

and obligations of the state on land in relation to the control of community land rights in order to achieve the desired goals together.

Second, the aforementioned principles have not been implemented clearly and unequivocally in the BAL as the basis, direction and objectives of state power holders in carrying out agrarian law politics in Indonesia so that their implementation is weak. The limited reach of state law can be seen in the political color of legislation, which is still oriented towards the interests of foreign investors on behalf of developments in the investment climate. In practice, there is a regulatory vacuum in implementation as mandated by the BAL, such as regulations on land rights. Likewise, there are inconsistencies or out of sync with the current regulations, both vertically with respect to the regulations above them and horizontally in conformity with other regulations of equal stature, such as regulations regarding the delegation of the authority of the state's right to control land to (autonomous) regions and regulations. management rights over land, so that in practice agrarian politics is easily reduced to the political interests of the authorities.

Third, the ideal future concept of regulating state control over land is: (1) affirming the relationship between national rights and state control rights over land so that the powers, duties and obligations of the state can be divided proportionally; (2) confirms the application of the principles in the use of rights for each owner of land rights, including the principles of benefit, maintaining land, appropriateness, balance and prioritizing the public interest. Such conclusions have broad implications at least in three aspects: a) be used as a guideline for the state in carrying out national land law politics; b) provide a legal political umbrella for the people or the nation in order to meet the needs of land as the basic capital of livelihood in accordance with their rights; c) the state can carry out careful planning regarding the availability, allotment, utilization of land and the state can be maintained in carrying out its governmental attitude to avoid violations of the law and the basic rights of the community.

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