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Juridical Review and Consistency of Land Management Rights in Two Government Policies

(UUPA No. 5 Of 1960 And Government Regulation No. 18 of 2021)

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Abstract: The regulation of management rights to land has undergone very significant changes and developments in the Indonesian land system from the initial establishment of law No. 5 of 1960 concerning Basic Agrarian Regulations by the minister of land in 1958 to now the latest government regulation number 18 of 2021. Of course, in its development it has obstacles to challenges faced and this has become a very important history in the land system in Indonesia. In its regulation, there are many changes, one of which is the renewal of government regulation number 18 of 2021 and this regulation also clarifies the previous law. After the latest government regulations, the government has an important role for the community in regulating and managing land rights in order to create benefits and welfare for the people of Indonesia in the land system. So in this case it is very important to examine how the juridical review and harmony between the two regulations in order to know its development by using the normative juridical method.

Keywords: Land Management Rights, Government Regulations, Basic Agrarian Law, Job Creation Law.

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1. Introduction

Agrarian law is the law that regulates the use and utilization of natural resources. The Law Number 5 of 1960 on the Basic Agrarian Law explains that agrarian matters include land, water, and space as well as the natural resources contained within them. In Article 33 of the 1945 Constitution of the Republic of Indonesia and Article 2 of Law Number 5 of 1960 on the Basic Agrarian Law, these become normative provisions regarding the regulation of natural resources (SDA). And in Law Number 5 of 1960 on the Basic Agrarian Law, specific land legislation is also regulated in that law. (Devita, 2021)

In the modern era, government regulations play an important role in the regulation and management of land rights. Following the implementation of government regulations, the development of land management rights has become a focal point, particularly in

the legal, economic, and social realms of society. With the continuous evolution of regulations related to land ownership and utilization, various dynamics have emerged that influence how people understand, acquire, and use land rights.

Regarding government regulations, land management rights not only impact legal aspects but also serve as a key factor influencing infrastructure development, economic growth, and changes in settlement patterns. Government regulations related to land rights in recent years have undergone very significant evolution, both in terms of updating land ownership regulations, agrarian reform, and efforts to address agrarian conflicts that occur. In addition, environmental aspects are also becoming increasingly important in land rights regulations, where the government plays a crucial role in ensuring that land use is not only economically beneficial but also environmentally sustainable.

The land owned by the Republic of Indonesia is one of the most important natural resources for the survival of the Indonesian people. In addition to having profound intrinsic value for the Indonesian people, it also plays a very strategic role in meeting the increasingly diverse and growing needs of the country and its people, both at the national level and in relation to the international world (Harsono, 2002). Land is very important for the survival and livelihood of humans, so land must be used to achieve the prosperity of the people. In addition, rules are also needed to regulate the relationship between humans and land. (Adrian Sutedi, 2023)

In Government Regulation No. 18 of 2021, there have been significant changes and developments, especially in terms of the implementation system, which has been renewed and simultaneously clarified the definition of Management Rights (HPL) as stated in the Basic Agrarian Law No. 5 of 1960. In this case, it is certainly very important to know and analyze the developments that the government has made in the regulations on land management rights in order to compare the differences and identify the strengths and weaknesses of both after the issuance of the government regulation.

What the author will discuss in this paper is the development of land management rights regulations after the issuance of government regulations. Therefore, it is interesting for the author to examine the developments, weaknesses, and strengths, as well as the implementation system of land management rights after the government regulations. Then, two problem formulations can be drawn as follows: "how the Basic Agrarian Law of 1960 regulates land management rights, and how Government Regulation Number 18 of 2021 regulates land management rights."

2. Method

This research uses a normative juridical method conducted thru a literature survey by collecting literature and written sources such as books, previous research, journal articles, reports, and journals relevant to this study. This methodology aims to obtain more in-depth information about the development of land management rights regulations in the Basic Agrarian Law of 1960 and Government Regulation No. 18 of 2021.

3. Result & Discussion

3.1. The Basic Agrarian Law of 1960 on the Regulation of Land Management Rights

The history of the formation of UUPA began in 1945-1959, or more precisely in 1958, when the government, thru the Minister of Agrarian Affairs Soenarjo, submitted the draft Agrarian Law (RUU) to the DPR, which, after being discussed in the first plenary session, was handed over to the ad hoc committee for finalization. with a unanimous vote, the DPR-GR finally approved and accepted the bill on September 14, 1960. The bill that was approved by the DPR-GR was then enacted on September 24, 1960, as Law No. 5 of 1960 concerning the Basic Agrarian Principles, which according to its fifth dictum can be referred to as the Basic Agrarian Law (UUPA). (Mahfud MD, 2011)

The right to govern the state is part of the nation's rights that have a public aspect. The public aspect positions the state as the highest power organization in the Unitary State of the Republic of Indonesia. A further elaboration of the state's right to control land is found in Article 2 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), which states that the earth, water, and space, including the natural resources contained therein, are at the highest level controlled by the State, as an organization. The state's right to control land is detailed in the form of specific authorities for the administration of that right. The authority granted by UUPA is classified into three parts, namely, regulation of land use, regulation of relationships between people and parts of land, and regulation of legal relationships between people and legal acts. These three aspects are the essence of the provisions of Article 2 paragraph 4 (2) of UUPA concerning the authority delegated by the State to the Government. (Ratnasari, 2020)

Law Number 5 of 1960 as the National Agrarian Law, the main principle in the UUPA related to the formation of Land Law is the principle of nationality, which can be viewed from both formal and material aspects. From the formal aspect, the national character of the UUPA can be seen in its considerations under the word "considering," which mention the shortcomings and deficiencies in the agrarian law that was in effect before the UUPA. These shortcomings include the statement that colonial Agrarian Law had a dualistic nature and did not guaranty legal certainty for all Indonesian people. With

these shortcomings, the colonial agrarian law must be replaced with the National Agrarian Law created by the Indonesian National Law Makers, drafted and composed in the Indonesian language. With the establishment of the UUPA by the People's Consultative Assembly–Gotong Royong (DPR-GR) together with the President, which was drafted in Indonesian and applies within the territory of Indonesia, the UUPA in this case has a formal national character. Regarding its material aspect, the new agrarian law must also be national in nature, meaning that its objectives, principles, and content must align with national interests. (Yazid, 2020)

Agrarian Rights According to Law Number 5 of 1960 Agrarian rights according to the Basic Agrarian Law (UUPA) are as follows: 1) Land rights, which are rights that authorize the use or cultivation of certain land. 2) Water Use Rights. 3) Rights to Maintain and Capture Water. 4) Rights to Use Airspace. Types of land rights according to Article 16 paragraph (1) of the UUPA: 1) Ownership Rights. 2) Right to Cultivate. 3) Right to Build. 4) Right to Use. 5) Lease Rights. 6) Right to Open Land. 7) Right to Collect Results. 8) Other rights not included in the above rights that will be stipulated by law, as well as temporary rights as mentioned in Article 53 of the UUPA: a. Pledge Rights. b. Profit-Sharing Business Rights. c. Rights to Lodge. d. Agricultural Land Lease Rights. (Yazid, 2020)

The concept of state control essentially originates from the existence of the nation's right over the land, as it has been adhered to since ancient times, with the essence being the authority of the Indonesian nation to manage the land thru its implementing body, the government (Wardhani, 2020). Maulana Syekh Yusuf said that the state power in question pertains to all land, water, and airspace, whether already owned by someone or not. The state power over land owned by someone with a right is limited by the content of that right, meaning to what extent the state grants power to the owner to use their right, up to that point is the limit of the state's power (Yusuf, 2020). then, it is explained that when a piece of land is accompanied by ownership status (HM) which has the strongest power as part of land rights, it does not become absolutely controlled by the HM holder because if the state requires the land for public interest, the HM status can be revoked for collective benefit. That principle is outlined in Article 2 paragraph (2) of the UUPA:

1). Regulate and manage the allocation, use, supply, and maintenance of the earth, water, and space. 2). Determine and regulate legal relationships between people and the earth, water, and space. 3). Determine and regulate legal relationships between people and legal actions concerning the earth, water, and space.

The state, as the holder of rights, and the government, as the bearer of the mandate, act as the executor of the state power organization on behalf of all Indonesian people

thru HPL. The right of management (HPL) is not explicitly stated in the UUPA normatively, as the term HPL is included in the General Explanation II number 2 of the UUPA. According to Dwi Kusumo Wardhani, the General Explanation II of the UUPA is based on the premise that in order to achieve and realize the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the state is not the owner of the land, but only acts as the highest power organization of all Indonesian people (nation) as the governing body that regulates the allocation, use, and utilization of lands in Indonesia (Wardhani, 2020). Referring to the explanation, it can be understood that HPL is part of the state's right to control matters concerning public interest, one of which is the state's right to control land with HPL status as a form of certainty and protection for lands in the territory of Indonesia. This is very different from the principle adopted during the Dutch colonial period, namely the domein verklaring principle, where the government was the sole owner of the land and the people had no right to own land privately.

The ambiguity in the regulation of HPL in the UUPA was then exploited by the government to legitimize the state's right to control land by issuing several regulations, including "Law Number 16 of 1985 on Apartments, Law Number 21 of 1997 on the Acquisition of Land and Building Rights, Government Regulation Number 40 of 1996 on Business Use Rights, Building Use Rights, and Land Use Rights, Government Regulation Number 24 of 1997 on Land Registration, and Minister of Agrarian Affairs Regulation Number 9 of 1999." However, all these regulations do not explicitly define HPL and only briefly mention its existence. (Arrizal & Wulandari, 2021)

The Minister in charge of land affairs issued a regulation, namely Permenagr No. 9 of 1965, which regulates the process of HPL (Land Management Rights) thru two methods: the conversion method and the government designation method. "First, based on Conversion: the conversion process is the change in the status of land rights to land management rights that occurs after the enactment of the Minister of Agrarian Affairs Regulation No. 9 of 1965, which is the right of control granted based on Government Regulation No. 8 of 1953, which is then converted into land management rights on lands that are actually or really controlled by government agencies, offices, and autonomous regions granted with the right of control over state land based on Government Regulation No. 8 of 1953 (Pasambuna, 2017). "Second, based on Government Regulation: the management rights occur due to a government decree if a government agency wishes to obtain management rights by submitting a rights application to the state thru the government, specifically the National Land Agency (BPN), as referred to in Government Regulation Number 8 of 1953 Jo Minister of Agrarian Affairs Regulation Number 9 of 1965. (Pasambuna, 2017)

Although it has been stipulated in the Ministerial Regulation, it should be noted that the Ministerial Regulation is not from a legal source as determined in the Law on the Formation of Legislation based on the hierarchical system of legislation (Yustiana, 2017). Therefore, the Ministerial Regulation is not valid as an umbrella act of HPL due to the ambiguity and/or vagueness of its norms when viewed from the hierarchy theory.

Based on the explanation, it can be said that the provisions regarding HPL have not been formulated in clear and definite norms in the UUPA or the regulations still in effect before the enactment of the Job Creation Law. Moreover, the ambiguity regarding the formulation of HPL regulation in the UUPA, according to Rafiqi, is that "there are differing opinions among experts, some stating that HPL is the state's right to control land and others arguing that HPL is a right to land." (Rafiqi, 2017). For that reason, it is important to clearly regulate the definition of HPL so that its existence remains as mandated by the founders of this nation. And to establish the fundamental principles of state control over land to be utilized correctly and appropriately for the benefit of the people.

3.2. Government Regulation Number 18 of 2021 Concerning the Regulation of Land Management Rights

In Government Regulation Number 18 of 2021 concerning Management Rights, land rights, land registration, and apartment units, it was officially signed by President Jokowi Dodo on February 2, 2021. The government regulation is actually a derivative or continuation of Law Number 11 of 2020 concerning the Job Creation Law (UU Ciptaker), which is related to the management rights over land by the government (Amirullah, 2021). In the Job Creation Law and Government Regulation No. 18 of 2021. Ezra Tambunan (2019) said that "The element of ownership that the lands in the Indonesian territory belong to the Indonesian nation and are used for the greatest prosperity of the people, and the element of authority that the regulation of these lands is in the hands of the state to manage them fairly."

The enactment of the Job Creation Law and Government Regulation Number 18 of 2021 aims to strengthen regulations regarding management rights, which were previously not explicitly regulated in the Basic Agrarian Law (UUPA), the fundamental land regulation in Indonesia. Although management rights were included in other regulations, their Regulation Number 18 of 2021 by emphasizing Article 136 of the Job Creation Law, which states: "Management rights are the rights of the state to control, the authority of which is partially delegated to the right holder." (Maufiroh, Rachman, & Purnaningrum, 2021)

Nurhasan Ismail stated that Government Regulation Number 18 of 2021 was issued solely based on the Job Creation Law (UUCK) and did not mention the Basic Agrarian

Law (UUPA) as the main reference. Although UUPA was not mentioned as the basis for managing rights, it should still be referenced with the consideration that, formally, legal politics may allow the formation of Government Regulation Number 18 of 2021 without including or disregarding UUPA as the main reference. However, materially, the government regulation must pay attention to the legal principles in UUPA because there is no provision in the Job Creation Law (UUCK) that nullifies or abolishes the validity of Law No. 5 of 1960. Previously, the UUPA contained legal principles as special law (Lex Specialis) while the UUCK is positioned as general law (Lex Generalis), so consequently, the UUCK should not contain legal substance that contradicts the UUPA, and the same applies to Government Regulation Number 18 of 2021. Andari & Mujiburohman, 2023)

In the provisions of Government Regulation Number 18 of 2021 concerning Management Rights, it is stated that what is meant by management rights is the right to control by the state, where the authority and its implementation are partially granted to the holder of management rights. In Chapter 3 of the government regulation, it is explained that the land that can be granted management rights is obtained from state land and ulayat land. The Central Government Agency referred to, whose main duties and functions are not directly related to land management, may be granted Management Rights after obtaining approval from the ministerial affairs in the financial sector. The subjects can be granted to the central government, regional government, state-owned enterprises and regional-owned enterprises, state legal entities and regional legal entities, or legal entities appointed by the central government. As for the management rights of ulayat land, the central government grants authority to customary law communities.

In land management rights, the holder has the authority to use, plan the allocation, and utilize the land in accordance with the spatial planning. The holder is also authorized to utilize and use the land under management rights partially or entirely for their own use, which can be done in collaboration with other parties, and to determine wages or mandatory fees from other parties according to the agreement. The plan for the use, allocation, and utilization of land in accordance with the spatial planning is the main plan that can be prepared by the holder of management rights.

The term "Hak Pengelolaan" as mentioned by various experts, is explicitly not found in the UUPA in the field of agrarian law (Soerodjo, 2014). Furthermore, Maria Sumardjono emphasizes that the mention of "Hak Pengelolaan" is not explicitly found in the UUPA. Implicitly, the concept is derived from Article 2 paragraph (4) of the UUPA. The right of land management is conceptually granted as long as there are duties related to the management rights. Whereas those that are not directly related can be granted management rights after obtaining approval from the ministers who carry out

government duties. In this case, legal entities play an important role, which must be established by a presidential regulation.

Regarding the provisions of land utilization agreements, Government Regulation Number 18 of 2021 stipulates that if land management rights are cooperated with other parties, the land utilization agreement provisions must include regulations on the land agreement and the amount of wages given or the mandatory annual fee. The management rights must be registered with the land office to be processed. From the moment it is registered and approved by the land office, the management rights become effective, and the holder of the management rights receives a certificate from the land office as proof of legality and ownership of the management rights.

In its regulations, the management rights cannot be used as collateral for debt with a mortgage. Management rights also cannot be transferred to another party. In fact, management rights can only be granted or released when ownership rights are given, for public interest as regulated by government regulations. The release of management rights is usually made by the authorized party and reported to the minister.

The revocation of land management rights under government regulations can occur due to the annulment of rights by the minister, usually because of administrative defects or a court ruling that has obtained permanent legal force, voluntarily relinquished by the holder of management rights, released for public interest, revoked based on applicable laws, granted ownership rights, designated as abandoned land, and designated as destroyed land.

The consequence of the revocation of land management rights is that the land becomes state land, meaning the land is returned to the state due to certain circumstances that can lead to the revocation of land management rights, and in accordance with the court's ruling, it means that the holder of the revoked land management rights can receive the court's decision.

There is something new in the regulation of government regulation number 18 of 2021 as follows;

1). The land bank is a special body that is a legal entity of Indonesia formed by the government, with authority specifically granted for land management rights. According to its regulations, land management rights can be granted to the land bank. Additionally, it can regulate that reclamation land can be granted land management rights on the condition that reclamation permits have been obtained, where reclamation is defined as land expansion carried out by utilizing previously unused areas.

2). Air space is the space above the ground surface used for certain activities, the control, use, and utilization of which are separate from the control, use, and utilization of the land area. The use and utilization of land areas essentially have certain limitations defined by: Height limits according to the building base coefficient and building floor coefficient regulated in the spatial planning, and Depth limits regulated in the spatial planning or up to a depth of 30 (thirty) meters from the ground surface if not regulated in the spatial planning.

In the event that there is land that is structurally and/or functionally separate from the holder of the Land Rights as referred to in the explanation above, then the land is classified as Above-Ground Space or Below-Ground Space directly controlled by the state. In the utilization of Above Ground Space or Below Ground Space, it is mandatory to obtain spatial utilization activity conformity issued by the Minister in accordance with the provisions of the legislation.

The Above-Ground Space or Below-Ground Space can be granted Management Rights, building use rights, or usage rights after the Above-Ground Space or Below-Ground Space is utilized, which is granted by a decision of the Minister. The granting of Management Rights, building use rights, or usage rights on the Above-Ground Space or Below-Ground Space must be registered at the Land Office, which will later issue a certificate as proof of ownership.

3). Basement space The basement space and the above-ground space actually have almost the same regulations. However, there are differences that are explicitly mentioned in PP 18/2021, including definitions, types, and resource utilization. The Underground Space is an area located beneath the surface of the Earth used for specific activities, with its control, ownership, use, and utilization being separate from the control, ownership, use, and utilization of the land surface. The Underground Space consists of: shallow Underground Space; and deep Underground Space. These types of underground space can be granted Management Rights, Building Use Rights, and Usage Rights. Shallow Underground Space is land owned by the land title holder with a depth limit. Meanwhile, deep Underground Space is land that is structurally and/or functionally separate from the land title holder.

In the case where shallow Underground Space interferes with public interest and/or the interests of the Surface Land Rights holder, the approval of the Surface Land Rights holder is required, which must be made in the form of an authentic deed. Any form of interference as mentioned and accepted by the Surface Land Rights holder will be compensated, which can be valued in monetary form or other forms as agreed upon with the party who will use and utilize the Underground Space. The calculation of the compensation value will be conducted by a land appraiser.

4). Small Islands in the granting of Management Rights or Land Rights over a piece of Land that is entirely a small island, it is mandatory to consider public rights. The granting of Land Rights in the waters area is carried out based on permits issued by the ministry that handles government affairs in the field of maritime and fisheries, in accordance with the provisions of the legislation.

4. Conclusion

The state power referred to encompasses all land, water, and airspace, whether already owned by someone or not. The state's power over land owned by individuals with certain rights is limited by the content of those rights, meaning the extent to which the state grants power to the owner to use their rights is the limit of the state's power. Then the state is not the owner of the land, but only acts as the highest power organization of all Indonesian people (nation) as the governing body that regulates the allocation, use, and utilization of lands in Indonesia. Referring to this explanation, it can be understood that HPL is part of the state's right to control matters concerning public interests, one of which is the state's right to control land with HPL status as a form of certainty and protection for lands in the Indonesian territory. This is very different from the principle adopted during the Dutch colonial period, namely the domein verklaring principle, where the government was the sole owner of the land and the people had no right to own land privately.

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