The Problem of State Land Regulation in Indonesia and Comparison of Its Regulation with Malaysia

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Abstract. In the national land law system, all land and other natural resources are controlled by the state. The concept of the right to control the state actually comes from the concept of customary law which was carried out by the indigenous people before the formation of Indonesia as a state. Customary law prioritizes public interests over individual interests. Therefore, customary law still prioritizes the principle of protecting the public interest. However, in reality, customary land management policies are carried out sporadically and are not integrated in a system. It cannot be denied that the national defense policy still inherits the colonial defense policy which prioritizes land management in order to exploit natural resources in Indonesia.

Keywords: State Land Problems · Regulatory Comparison · Malaysia

1 Introduction

The property rights of the Indonesian state can be seen in the legal basis in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution [1]:

(2) Sectors of production which are important for the state and affect the livelihood of the people at large are controlled by the state.
(3) The land, water and natural wealth contained therein are controlled by the state and used for the greatest possible prosperity of the people.

In the national land law system, all land and other natural resources are controlled by the state. Thus, the state is the subject, land is the object, and the legal relationship between the subject and the object is conceptualized as the right to control the state. The two paragraphs of the 1945 Constitution which constitute the constitution of the Indonesian state give the state a right called the Right to Master or what is commonly called the Right to Control the State is the only material right that has been explicitly granted by the constitution to the Indonesian state. The state's right to control land, water, natural resources, and vital production branches must be used solely to provide prosperity to the Indonesian people [2].

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The concept of the State's Right to Control actually originates from the concept of customary law which has long been carried out by indigenous people long before the formation of Indonesia as a state. Customary law prioritizes public interests over individual or private interests, or in other words customary law is based on the concept of protecting public interests or communal interests. Thus objects or *property* that are important for the public interest, such as water, natural resources, land, to science must be jointly owned or at least jointly controlled by the community, even though customary law actually recognizes individual rights over objects, customary law still prioritizes the principle of protecting the public interest and the principle that an object has a social function [3]. This is because according to customary law, individuals and their assets are an integral part of the surrounding environment which can have both good and bad impacts.

Maria SW Sumardjono in her book "*Land for the Welfare of the People*" states that "based on the conception of the relationship between the state and land, 3 (three) land entities are produced, they are: (1) state land, (2) communal land, (3) private land" [4]. State land is land that is not granted with any rights to other parties, or is not attached with any rights, namely ownership rights, usufructuary rights, building use rights, usufructuary rights, land management rights, communal land, and waqf land. Land with the members of the customary law community concerned, and private land is land that is owned by the person concerned and has the authority to use the land, water, and the scope existing on it for purposes that are directly related to the use of said land in the limits according to laws and other higher legal regulations. Against these three entities there are different land policies, where until now the policy regarding the management of state land has not been realized [5].

Meanwhile, customary land management policies are carried out sporadically and are not integrated in one system. Private land including rights granted by the forestry and mining authorities is still sectoral in nature. It is undeniable that the national land policy still inherits the colonial land policy which is more concerned with the regulation of land use rights in order to exploit natural resources in Indonesia. The difference is that colonial land politics is based on the domain principle *with* all its complexities and debates [5]. Where *Domein* is a statement affirming that all land where other people cannot prove that the land belongs to them, then the land belongs to the state *(eigendom)* [6]. This principle neglects people's rights, the neglect of people's rights is carried out in areas where it cannot be formally proven for land parcels or land that is considered owned by the state, this principle is a basic problem in agrarian inequality, especially in lands belonging to people who are subject to and rooted in customary law or original *law (indigenous people law)* of the Indonesian people [7].

In his book "*Comprehensive Study of Agrarian Law*", Urip Santoso states that; "The basis of colonial agrarian politics is the principle of trade, namely obtaining crops/raw materials at the lowest possible price, then selling them at the highest possible price. The aim was none other than to seek maximum profit for the colonial rulers who were also entrepreneurs. This advantage was also enjoyed by Dutch and European entrepreneurs. On the other hand, for the people of Indonesia, it caused very deep suffering. The colonial system is marked by four main characteristics, namely domination, exploitation, discrimination, and dependency [8]. The reasons for the non-realization of the state land

management policy are: (a) differences in perceptions of state land because the provisions regarding state land (PP No. 8 of 1953) were issued before the UUPA; (b) differences in perceptions between state and state forests; and (c) customary land which is often considered as state land [4].

This resulted in the determination and administration of state land to be difficult. In practice, the administration of private land is more prominent, so that the identification and inventory of state land is hampered [4]. Due to the existence of regulations and problems, it is interesting to look further at the comparative arrangement of state land with other countries, for example Malaysia, which will be discussed below.

2 Research Methods

This type of research is *Normative Juridical*, namely the research is carried out by studying and analyzing the substance of the laws and regulations on the subject matter. This research approach uses four kinds of approaches, namely *Statute Approach*, *Conceptual Approach*, *historical* approach and *Comparative Approach* [9].

There are two sources of legal material used in this study, namely primary legal material sources and secondary legal material sources. *First,* the source of primary legal material is legal material that is authoritative, meaning that it has authority consisting of statutory regulations, official records or treatises in making statutory regulations, or court decisions. *Second*, secondary legal material sources are all publications about law that are not official documents, such as text books, legal dictionaries, legal journals, including sources of legal materials in the form of publications using internet media related to research material [10].

The procedure for collecting legal materials consisting of primary legal materials and secondary legal materials is carried out through the following stages: *first,* systematizing legal products in the form of statutory regulations concerning agrarian law, especially regarding the legal issues studied. The systematization of these laws and regulations was carried out to explore and at the same time carry out an inventory of regulations concerning Indonesian and Malaysian state land. *Second,* do classification of statutory regulations relating to the regulation of state land. This classification is carried out on the basis of a hierarchical approach which aims to facilitate the process of reviewing and analyzing the suitability of state land arrangements. *Third,* analyzing, namely analyzing the laws and regulations related to state land arrangements between Indonesia and Malaysia, including the legal basis and other provisions related to legal issues including several related cases as factual justification. Activities in this stage are carried out to answer legal issues in this research.

3 Results and Discussion

3.1 State Land Management and Problems in Indonesia and Malaysia

The term state land was first raised by the Dutch Colonial Government with the title *Staats lands domain* as contained in Articles 519 and 520 *Bugerlijk Wetboek* (BW)

and *Agrarisch Wet* (*Statsblad* 1870–55) and all implementing regulations, among others: *Agrarisch Besluit* (*Statsblad* 1870–118, *Staatsblad* 1875-199a), *Koninklijk Besluit* (*Statsblad* 1872–117) and *Zelfsbestruurs Regelen* [2].

According to experts, state land is termed differently, but in principle the same basis, including:

a) Maria SW Sumardjono: State land is land that is not granted with any rights to other parties, or is not attached with any rights, namely property rights, usufructuary rights, building use rights, usufructuary rights, land management rights, customary lands, and waqf lands [4]."
b) Boedi Harsono: state land are parcels of land directly controlled by the state [5].
c) Soegiarto: state land is land that has not been attached to any land rights [2].

In principle what is meant by state land according to the experts above is land that has no rights attached to it and is only controlled by the state to be used as much as possible for the interests and prosperity of the people.

3.2 Model of State Land Administration and Its Problems in Indonesia

The emergence of economic inequality and social inequality that leads to problems of legal certainty for the community. This failure began with the emergence of a welfare paradigm, which promised prosperity and justice, and tended to see the people as objects of development. In fact, in the implementation of welfare-oriented development it is still inherent that the people are seen as the object of development, not as the subject of development. This causes people to become very dependent on the government in protecting, saving, and improving their lives. This will weaken the people's fighting power in solving their problems or fostering participation in sustainable development. Green economy development principles are based on harmonizing economic with the achievement of medium and long term climate change mitigation and sustainability goals [11]. In an effort to respond to the threat of a recession in 2023, the antidote that can be offered is the Green Economy. The green economy is defined as an environmentally friendly economy for the community [12].

Green Economy offers a development strategy that does not have to cause conflict between economic development goals, social goals and environmental preservation. Currently, Indonesia is taking concrete and important steps towards implementing the Green Economy. The core of the Green Economy principle has been mainstreamed into the National Long Term Development Plan. Development in accordance with Law Number 32 of 2009 concerning Environmental Protection and Management which is also a strategic start in achieving safe environmental management without sacrificing economic growth. The concept of sustainable development is the result of a growing awareness of the global relationship between increasing environmental problems, socio-economic problems related to poverty and inequality, and concerns about a healthy future for humanity. It links economic and social environmental issues.

The concept of green economy can be interpreted as a form of environment-level economy in which there is alignment between development and economic development without disturbing the environment by always prioritizing the principle of *sustainable*

development (prolonged development). The concept of green economy is used as an operational standard or guideline in achieving progress in environmental economics as a pillar of the implementation of sustainable development by leading to a low-carbon and green economy [12].

One of the main actions pursued by a green economy is poverty alleviation so that a better quality of life is ensured without affecting natural resources. Spreading the concept of a green economy without considering the needs of vulnerable groups and natural damage is a mistake considering that recovery of environmental and social dynamics is not guaranteed in the short, medium and long term. Another role that can be played as a solution is intervention using an adequate set of rules for the use of land and land that pays attention to its sustainability. In the national legal system, land and other natural resources are controlled by the state. So that land management by the state in achieving a green economy can be realized in maintaining welfare and prosperity for the people. Regulation and management of land by the state must be carried out regularly and optimally and not sporadically. As mandated by the constitution in article 2 paragraph (3) of the UUPA that it is for the greatest possible prosperity of the people.

Post-independence state land administration continued the conception and provisions regulated by the Dutch East Indies Government. PP No. 8 of 1953 concerning Control of State Lands was issued seven years before the BAL. Thus, the philosophy on the relationship between the state and land that forms the basis of the Government Regulation is based on *domain*, namely the state as the owner of the land in civil relations. This is of course very different from the principle of land control by the state according to Article 33 paragraph (3) of the 1945 Constitution and the UUPA [2].

Government Regulation Number 8 of 1953 does not revoke the previous provisions governing state land (*Stb.* 1911 No. 110). This is because the previous provisions not only regulate the control of state lands, but also other immovable objects. In addition, provisions regarding state land are regulated by government regulations because previously the regulations used as the basis for transferring (state) land tenure were also regulated in government regulations (*Stb.* 1911 No. 110). Regarding this Government Regulation, it has been subsequently converted with the Minister of Agrarian Regulation Number 9 of 1965 concerning the Implementation of the Conversion of Tenure Rights over State Land and Provisions concerning Subsequent Policies, in *conjunction* with the Minister of Agrarian Regulation Number 1 of 1966 concerning Registration of Use Rights and Management Rights.

Then further arrangements, related to the contents of the authority of the state's right to control over land, are contained in Article 2 Paragraph (2) of the BAL [8].

3.2.1. Regulate and administer land allotment, use, supply, and maintenance. Included in this authority are:

a) make a general plan regarding the supply, allotment, and use of land for various purposes (Article 14 UUPA in conjunction with Law No. 24 of 1992 concerning Spatial Planning which was declared no longer valid by Law No. 26 of 2007 concerning Spatial Planning).
b) obliges holders of land rights to maintain the land, including increasing its fertility and preventing its damage (Article 15 UUPA).

c) oblige holders of land rights (agriculture) to work or cultivate their own land actively by preventing extortion (Article 10 UUPA).

3.2.2 Determine and regulate legal relations between people and land. Included in this authority are:

a) determine land rights that can be granted to Indonesian citizens either individually or jointly with other people, or to legal entities. Likewise, land rights that can be granted to foreign nationals (Article 16 UUPA).
b) stipulate and regulate restrictions on the number of parcels and area of land that can be owned or controlled by a person or legal entity (Article 7 in conjunction with Article 17 UUPA).

3.2.3 Determine and regulate legal relations between people and legal actions concerning land. Included in this authority are:

a) regulates the implementation of land registration throughout the territory of the Republic of Indonesia (Article 19 UUPA jo. PP No. 24 of 1997 concerning Land Registration).
b) regulate the implementation of the transfer of land rights.
c) regulate the settlement of land disputes both civil and state administration, by prioritizing deliberative methods to reach an agreement.

According to Oloan Sitorus and Noadyawati, the state's authority in the land sector as referred to in Article 2 paragraph (2) of the UUPA above is the delegation of the nation's task of regulating control and leading the use of shared land which is national wealth. Strictly speaking, the right to control the state is the delegation of public authority from the rights of the nation. Consequently, this authority is only public in nature [13].

The purpose of the state's right to control over land is contained in Article 2 Paragraph (3) of the UUPA, namely to achieve the greatest possible prosperity for the people, in the sense of happiness, prosperity and independence in society and the legal state of Indonesia which is independent, sovereign, just and prosperous [8].

The implementation of the state's right to control over land can be authorized or delegated to autonomous regions (regional administration) and customary law communities, only as necessary and not contrary to national interests according to the provisions of government regulations (Article 2 Paragraph (4) UUPA). The delegation of the implementation of some of the state's authority can also be given to authority bodies, state companies, and regional companies, by granting control of certain lands with Management Rights (HPL) [8].

However, matters relating to the right to control from the state which are very important and occupy a central position, as is the position of property rights in the civil law system, are not regulated further by law. As a result, the boundaries, content and scope of the state's right to control become less clear. Whether the exercise of the right to control exceeds the limit or not is also not clear, although it is stated in the Elucidation of the BAL that the state's power over land that is already owned by a person with a right is limited by the contents of that right. This means how much the state gives power

to those who have it to use their rights, that's where the limit of the country's power is. Precisely the opposite can happen, not the power of the state is limited by the contents of the right, but the content of the right is what is limited by the power of the state [14].

There are no statutory provisions regarding the right to control from the state, including provisions on the right to control from the state that can be delegated to autonomous regions and customary law communities, finally people see the solution in the provisions of Article 58 UUPA that: "As long as the regulations implementing this law have not been formed, then the regulations, both written and unwritten regarding the earth, water and the wealth contained therein and land rights, existing at the time this law comes into effect, remain in effect, as long as they do not conflict with the spirit of the the provisions of this law and an interpretation accordingly [13]."

3.3 Models of State Land Management in Malaysia that Can Be Adopted to Indonesia

All land in Malaysia is royal land, so that state land is called royal land with the authority control rests with the state. According to the Kanun Tanah Negara, royal land is all land within the country (including riverbeds, seashores and seabeds within the territory of the state and national boundaries), except for private land, *rizab*land *stope*, and forests [2].

Rizab is land that is in a certain area determined by the state as land that may be controlled/claimed by the Malays, which is recognized in Article 89 of the Constitution of the State of Malaysia Territory which is determined by the state as *rizab* is not valid forever. In other words, the area can be revoked as *rizab* and then the *rizab* is determined in another area.

Perizapan land is regulated in *Perizapan* (Allied Malay States) and the Johor, Kedah, Kelantan, Perlis, and Trengganu State Malay Perizapan Laws. The *stope* lands are lands designated as mining areas as stipulated in the Mineral Law of each state.

Also excluded from royal lands are *traditional*, which are occupied and operated by *native people* and subject to *customary law*, governed by each state. This land may only be controlled by *native people*, which in the *Land Code* 1958 *native land area* [2].

In Article 51 of the State Land Code (1966) it is regulated based on class, so state land (kingdom) is divided into:

3.3.1 Land that is higher than the seafront, which is divided into classes:

a) land *city* (big city);
b) township *town*); and
c) village land.
d) Beach and seabed.

Based on usage, land in Malaysia is divided into agricultural land, building land, and industrial land [2]. In order to regulate the use of land nationally, in Malaysia a State Land Council was formed which was tasked with establishing guidelines for land use for mining, agriculture, forestry and other purposes, and also tasked with administering laws regarding these matters. The State Land Assembly has the role of advising the Federal Government and the State Government relating to the use of land or regarding laws

reserved to be enacted regarding land or regarding the administration of laws relating to land matters [15].

From this it can be seen that the regulation on state land in Malaysia is strengthened by using the rules of the law independently, in contrast to Indonesia, where the regulation is still left to the UUPA derivative regulations similar to PP (government regulations). In fact, according to Julius Sembiring, even though the Government Regulations Number 8 of 1953 intended to regulate and regulate state lands, in reality the chaos over control of state land inherited from the previous era could not be resolved. And after the issuance of the BAL, the provisions governing the procedures for awarding state land were regulated in several regulations at the ministerial level, such as ministerial decrees, regulations and ministerial decrees [2].

Alan Watson defines legal transplantation as the transfer of a rule or legal system from one country to another, Watson who is considered the father of legal transplants who fully devotes his knowledge to this study says *"legal transplants are alive and well as they were in the time af Hammurabi"* [16].

In the context of legal transplantation, it means the transplantation of law from one country to another, which differs from the reality of its social system and legal system. Legal transplantation is not only the process of adopting law as a written rule, but also of adopting the legal institutions that cover it [17].

Related to what is the possibility of transplanting Malaysia's land regulation law into Indonesian law, our group thinks that Malaysia's state land regulation law has several advantages compared to Indonesia, including that Malaysia has several laws and regulations that are more adequate or more specific regarding ta well, countries such as the Perizapan Tanah are regulated in *Perizapan* (Negeri Melayu Beralli) and the Johor, Kedah, Kelantan, Perlis, and Trengganu State Malay Perizapan Laws, and Tanah Lombang is regulated in the Mineral Law of each state [18].

By following the laws of the Malaysian state, the Indonesian state can reform legislation that regulates more specifically related to state land, such as plantations, mining, land for development or public interest, both those made by the central government and regional governments and of course must be synchronized. With the 1945 Constitution and UUPA as legal protection, where the two legal protections have been drafted with the concept of the state's right to own land, to be used for the prosperity of the people, including Indonesia's indigenous peoples.

But of course, in carrying out legal transplants this must be done very carefully. A lecturer at the Faculty of Law, Padjadjaran University said that in legal transplants we have to make comparisons, and this comparison has to be done with the right method, if we choose the wrong method then the conclusion will also be wrong. Another factor that must be considered in adopting a law is the legal culture factor, apart from that, Alan Watson, who is a professor of comparative law, also stated "whether or not the transplantation of law is successful, if the law functions properly in its original place".

4 Conclusion

State land is land that is not attached to rights and is controlled by the state and is managed for the benefit and greatest prosperity of the people. The birth of the UUPA

became the basic norm of agrarianism in Indonesia, however, it still leaves deficiencies, for example, the lack of strengthening derivative regulations which more or less results in non-optimal agrarian activities. In terms of the regulatory system, Malaysia compared to Indonesia is not much different, where apart from being known as royal land, there are also *traditional land* and *customary law*, which of course are managed separately. Related to state land which has been regulated in separate canons (UU). Therefore, in our opinion, Indonesia itself still needs to perfect its derivative regulations, especially the regulation of state land, for example, a separate law is made, meaning that it is not only regulated by PP because we know that *the scope of* PP tends to only be rules that are technical in nature. This of course could be done while still synchronizing the UUPA as Law no. 4 of 2009 concerning Mineral and Coal Mining and Law no. 26 of 2009 concerning Spatial Planning, which applies *lex specialis* while taking into account Law no. 5 of 1960 concerning Basic Agrarian Provisions (UUPA).

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References

1. The 1945 Constitution, Article 33.
2. Sembiring, Julius. 2018. Definition, Regulation and Problems of State Land, Prenadamedia Group: Jakarta.
3. Kusumadara, Afifah. 2013. Perkembangan Hak Negara Atas Tanah: Hak Menguasai Atau Hak Memiliki?. Jurnal Media Hukum, 20(2).
4. Sumardjono, Maria SW. 2010. Land for People's Welfare, UGM Faculty of Law: Yogyakarta.
5. Harsono, Boedi. 2007. Towards Completion of National Land. Development of Thought & Results Toward the Birth of UUPA on September 24 2007, Trisakti University: Jakarta.
6. Maladi, Yani. 2012. Dominasi negara sebagai sumber konflik agraria di indonesia. Masalah-Masalah Hukum, 41(3), 432-442.
7. Asshiddiqie, Jimmy. 2006. Theory and Stream of Constitutional Law Interpretation, Limited Liability Company Publisher PT. Inhilco Press and Publisher, Jakarta.
8. Santoso, Urip. 2020. Comprehensive Study of Agrarian Law, Kencana: Jakarta.
9. Marzuki, Peter Mahmud. 2005. Legal Research. Jakarta: Prenada Media.
10. Danandjaja, J. 2014. Metode penelitian kepustakaan. Antropologi Indonesia.
11. Kristianto, Aloysius Hari. 2020. Sustainable Development Goals (SDGs) in the Green Economy Concept for Ecology-Based Quality Economic Growth, Journal of Business Economics and Entrepreneurship.
12. Hutagaol, Jubel Rayfinando Tua, Ronaldo Putra Pratama Sinurat, and Sulthan Muhammad Salahuddin. 2022. Strategy for Strengthening State Finances in Facing the 2023 Global Recession Threat through Green Economy**,** Journal of State Tax and Finance Vol.4. No.15.
13. Sodiki, Achmad. 2013. Politics of Agrarian Law, Constitution Press: Jakarta.
14. Sitorus, Oloan, and Nomadyawati. 1994. Land and Condominium Rights, Dasamedia Utama: Jakarta.
15. Awang, Ridzuan. 1994. Islamic Land Law, Comparative Approach, Language and Library Council, Ministry of Education Malaysia: Kuala Lumpur.
16. Isharyanto. 2020. Vietnam's Experience of Legal Transplantation: Competition Against Local Domestic Conditions, Journal of Law IUS QUIA IUSTUM No1 Vol 27 Januari.

17. Zuhdi Muhdlor. 2016. Legal Political Study of Legal Transplantation in the Global Era, Journal of Law and Judiciary, Vol 5 No 2, Juli.
18. Napoh, Datu Bua. 2015. Recognition of the customary land law in the constitution of indonesia and malaysia. Brawijaya Law Journal, 2(2), 1.