THE SOCIAL FUNCTION OF LAND RIGHTS IN INDONESIA: THE BASIC AGRARIAN LAW AND CUSTOMARY RIGHTS BY THE STATE

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ABSTRACT

This paper examines Basic Agrarian Law's philosophical principle of the personal relationship between land and society and the social function of land rights through the application of customary rights by the state. State-owned land is derived from the conception of Public Code. Therefore state-owned land does not mean land ownership by the state, but rather leads to the state's authority to organize, use and manage the land. In this context, land in Indonesian agrarian law philosophically has a social function, which seeks to secure a personal relationship between land and society. Land rights are regulated to ensure that social functions in every land use can work well. The concept of the customary (ulayat) land of the state is an original legal concept to ensure that the state guarantees the community to control or occupy and work on the land under customary law. This reinforces the position of the people to implement customary law, as the law that existed before the birth of the nation state system of Indonesia. The State also ensures that land ownership rights must function socially, and the position of property rights with the concept of customary rights by the state is in line with other legal objects, such as mining rights, use rights, right to build, the right to manage and other rights. Here, philosophically, the Basic Agrarian Law (BAL) strengthens the constitutional basis of social justice by introducing the use of land to maximize social function as well as people's welfare. On the other hand, the conception of the customary right by the state can be useful to be adopted in law with other proprietary systems such as air law, space rights, and marine rights to ensure national sovereignty and resilience.

Keywords: Land Rights, Social Function, Basic Agrarian Law, Material Law, Customary Land by the State.

INTRODUCTION

Land rights have been growing periodically for centuries to the present day. Generally, lands are categorized as objects or goods, either owned by the state or society, or which can or cannot be owned at all. Each of these tenure provisions is based on the legal philosophy prevailing in a country. In the past, there were things that could not be owned like air, space, water, and rivers. In modern law conception, the objects eventually turn into objects that can be owned. Specifically according to Indonesian law, land is defined as objects or goods, as contained in the Book Civil Code II of the Object (*van zaken*). More details, these provisions are listed in Chapter I of Goods and Distributions and Part 1 of the Goods in general. Under the

provisions of Article 499, objects (*zaken*) are goods (*goederen*) and any right (*rechten*) which may be the object of property rights. The provisions of Article 500 of the Civil Code stipulate that everything that is included in the goods is something tangible natural products or craft industry products attached to branches or roots, or floating on the ground. Consequently, land and land rights are included in material rights in general. More broadly, material law is a division of property law.

In Indonesia, the right to land basically has got the main regulation that refers to Basic Agrarian Law (BAL) (Lucas & Warren, 2003). However, since the land is also part of the law of property and material law in general, the investigation of land rights is not enough simply by referring to BAL, but also considering the law of things as part of the property law in general. According to Hasan (1996), the regulation of land rights in the BAL has indeed been arranged in such a way that embodies the principal relationship between land and society. BAL states that the relationship between the people of Indonesia and the land is eternal. In this context, this paper seeks to investigate whether the principle of relationship between land and society can occur well in the context of customary (*ulayat/adat*) lands (mode detail of Adat law in Utrecht, 1969). This refers basically to the fact that lands are owned by customary groups, which after the BAL is regulated, the land is regulated by itself, and under state law, in this BAL itself (Budiartha, 2018). In principle, agrarian law also covers the contexts of customary law, as long as it does not conflict with national and state interests. The growth of customary law, including the right to land, is itself inseparable from the development and political influence of the law. More complex, the relationship between customary rights and state rights is becoming increasingly complex with the presence of companies exploiting land for industrial, mining and plantation interests in or around customary lands. This implies that state-owned authorities for the regulation of land, especially customary land, cannot be based solely on the articles of law which govern them but must take account of the contemporary context that arose in the making of the law articles. This paper henceforth seeks to analyse the ideal ground of land rights in Indonesia along with the provisions on customary rights that pertain to commercial rights by industry and companies by entailing other land rights such as mining rights, property rights, and utilization rights. More broadly, this paper examines whether the BAL philosophical principle of the personal relationship between land and society and its social function through the application of customary rights by the state will continue to be strong in the midst of strong industrial interests and the other commercial purposes in Indonesia.

Ideal Basis of the Rights of Ownership in Indonesia

In essence, the ideal basis of property rights, land rights or goods and other rights in Indonesia refers to Pancasila and the 1945 Constitution of the State of the Republic of Indonesia. This ideal basis is based not only on the basis of one of the articles of the Constitution of the Republic of Indonesia, notably article 33 of the Constitution which stipulates that the earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people (Butt & Lindsey, 2008; Sihombing & Lisdiyono, 2018), but also must be based on the ideas contained in Pancasila and related to the Constitution 1945 as the only

systematic, constitutional and ideal structure in the legal, political and social system in Indonesia (Wicaksono, 2018; Prayogo, 2018).

In the context of property rights, it should be remembered that the right is derived from the reality of life and the existence of the authority to empower individuals to become self-reliant and capable persons, so that certain goods must be owned. This is philosophically related to the idea that there are certain groups of goods that must be used as natural media where human existence and existence depend on and take place. In a primitive system, traditional societies recognize only nature ownership (*bezits*), which then belong to nature, based on a juridical perspective. This idea is constitutionally protected in Indonesia where property rights are directly included in Article 7 paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia which states that every citizen is entitled to the right to work and to live a prosperous life. If ideology, the constitution states that property rights have a social function to be applied in Indonesian law, then the provisions of article 33 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia, which states that the earth and water and natural resources contained therein recognized by the State and used for the greatest prosperity of the people, should be interpreted about the need for rights and authority to determine the use and management of resources including land.

The Customary Rights and the State

Under Indonesian law, it is necessary to consider a more systematic system, especially on state law within the framework of Pancasila philosophy, in which property rights are considered capable of improving the welfare and life, both material and non-material. In other words, property rights in the context of Indonesian law and constitution have a social function as a tool for prosperity. Another starting point of this idea is also supported by the Indonesian legal system, namely Article 27 Paragraph (2) of the 1945 Constitution which emphasizes maintaining a balance between public interest and self-interest. Thus, the two provisions of the two articles of the 1945 Constitution are jointly and entirely the core of the implementation of the Pancasila state philosophy, namely the fifth point of Social Justice. More specifically in the regulation of land rights for social justice, Indonesia has long legislated the Basic Agrarian Law (BAL) as the basis of land rules and terms of use.

More interestingly, in fact BAL refers to customary law as one important part. Consequently, customary law, and customary systems of land, are recognized and safeguarded by the state. This is stated in Article 5 of the Basic Agrarian Law (BAL) which stipulates that BAL is based on customary law, both in law and in its implementation. Although in practice, the BAL is still less attention to the rules of customary law. That is because there are customary law rules that are difficult to apply in the modern national atmosphere. In addition there is a tendency to adapt customary law to the needs of the times, or to rule out altogether or to replace with other rules (Lucas & Warren, 2003). Although in fact, customary law is still strong in Indonesia. This is reinforced by the field research conducted by the 2014 National Legal Development's research project on Land Tenure proving that customary rights are still strong enough to be recognized in the islands outside Java, although in Java the right is lacking, due to the lack of indigenous

groups (Moniaga, 1993). Taking into account such facts, under Article 5 of the BAL, customary rights shall still be recognized.

The Customary Land by the State in Basic Agrarian Law

Customary people (*adat*) rights are related to state land, and are included in the authority of the state to control, including land already owned by persons with rights or not. If the land is not owned, the BAL states that the land is directly controlled by the state. On the other hand, land that has rights cannot be called 'land which is under the control indirectly by the State', or 'state land which is not free', but it calls each *"land"* only. Thus, the definition of state land has a narrower scope than the definition of "*landsdomein*" in the old concept because it covers only land that is not owned by any party (Bachriadi & Sardjono, 2006; Pranoto, 2017). Furthermore, Indonesia does not follow the principle of "*Domein Verklaring"* where a statement confirming that all land that other people cannot prove that the land is his property, and then the land is the property (*eigendom*) of the state (Woruntu et al., 2016; Parlindungan, 1987). Here, the principle of "*domein"* is strongly criticized by BAL as opposed to the legal consciousness of Indonesian society with the principle of an independent and modern State. In the context of customary law that existed in Indonesia before the modern nation state was born, the thought and implementation of "*domein"* is considered to be miserable customary rights and state rights to control over the earth and water. The principle of "*domein"* is only partially adopted in the form of state land covering only lands not possessed by one party, formerly known as "*onvrij landsdomein*". "*Onvrij landsdomein*," is a state land on which there is the rights of people or land that is occupied and tilled by the people based on customary law. This strengthens the community's position to implement customary law, as well as guaranteed by the state.

Although the concept of state land is consciously or unconsciously still based on the dominant principle of thinking, recent developments want to re-implement the principle of "*domein"* within the framework of the release and abolition of property rights to land for development and commercial purposes. This, in addition to reducing the possibility of the state's right and authority to control the earth, water and natural resources contained therein as stated in Article 33 of the 1945 Constitution, the principle of "*domein"* shall not be applied in Indonesia as it is contrary to constitutional principles and contrary to social justice and justice guarantee of life for indigenous peoples with their lands. In this context, given that "*ulayat"* rights are still adequately adhered to by Indonesians, it would be better that the right to control the state is based on an understanding of customary rights, which has been adapted in the BAL.

However, since customary rights involved in Customary Law are the right of local customary law communities, that after local indigenous and tribal peoples explicitly join the Indonesian state, "*ulayat"* rights are transferred and forwarded by the Republic of Indonesia. Thus, the state's right to control has become a permanent right of the state's "*ulayat"*. The country's communal land rights are superimposed on property rights, forestry rights, the right to build, the right to exploit, the right to manage, the right to use and other rights. The way of thinking as mentioned above seems to be more basic and closer to the BAL statement that the current customary law is not a "*disaneer*" customary law, but must be modernized, in accordance with the atmosphere of national law, since the subject of customary rights shifts from customary

law society to State. Moreover, the above thought at the same time discarded the principle of "*domein"*, since it has nothing to do with the differentiation between land that has been owned by people (*onvrij lansadomein*) and that has not, without overriding the right of state control.

Since state land contains the definition of property rights, the land of the communal right of the state irrespective of the definition of property rights. As a result of this differentiation is that based on the principle of "*domein*," the wider the land becomes state land, the fewer the land of private property. Meanwhile, according to the customary (*ulayat*) right of the state, the vast land owned entirely apart from the state's need to regulate land use, since its property is taken over by the customary rights by the state. Thus the term state land should be converted into the customary rights by the state. Nevertheless, the concept of the customary right by the state still has a weakness when compared with the concept of state land, because of the philosophy and way of thinking of customary law which continued philosophy and thought in Indonesian national law (Lisdiyono & Suatmiati, 2017). Legal conceptions are modernized from the old legal philosophy and apply it for new legal situations as in the case of the philosophical shift of customary lands to the customary lands by the State, not only in Agrarian Law but also in other legal fields, such as in Code Law, the Law of the Sea and the Law of Air and Space.

In the field of the Law of the Sea, for example, the concept of customary land rights over the sea and coastal areas and Indonesia islands can be more easily combined with Kusumaatmadja's (1982) conception of the archipelagic state system which assumes that the seas among the islands are an inseparable part of the sovereignty of the owner country the islands. It differs from the conventional perspective adopted by the developed countries, that the territory of the country is a land enclosed/surrounded by the sea (*territoriale wateren*). Indonesia tends to consider the concept of an archipelago composed of oceans with islands (Pratomo, 2016; Pratomo, 2018). Referring to such conceptions, the concept of the "*ulayat"* rights by the state further supports the conceptual form of the archipelago, and can provide a strong foundation and more important for the recognition of sovereignty and the right of passage for foreign vessels. Likewise, "*ulayat"* rights can be extended to airspace and space over waters and lands entitled to Indonesian customary rights, in relation to the development interests of the Indonesian Water and Space Law, in particular the development of more intense international relations, either due to international aviation or global telecommunications. Since the Law of the Sea and the Law of Air and Space contains many elements of the International Codes and the International Civil Code, the concept of the "*ulayat*" rights of the state can be useful and influential in the context of international traffic and transnational relations. Finally, the "*ulayat"* right by the State may be used as the legal basis for the settlement of issues on sovereignty and national resilience (Sudiro, 2018).

Given that in this century land ownership plays a very important role in economic life, in addition to individual needs, small and microeconomic enterprises, solely for the purpose of earning a living, the social function attached to the property rights to the land will significant when linked to livelihood and decent living. Therefore, it is natural that the right of ownership of land on one side is determined only for residential use and agriculture and home industry and other parties is limited to 2 hectares/adults. In such contexts, although a plot of land may be an individual right, however, since property rights are attached to the State's customary rights, it is

within certain limits without the exception of the requirements of justice and legal certainty, for example for the purposes of roads, the State is entitled to determine land use of the property, in accordance with national and regional development patterns and legal provisions on land use. Accordingly, in accordance with the concept of customary law, the right of property may return to the State's customary rights if the right of ownership is abandoned, in this case if the land is not used and not done, either because there is no heir or neglected. This is because the property in question no longer fulfils its social function, and the property is used contrary to its function, especially in contravention of the legal basis (*rechts ground*) of the right of recognition by Indonesian law.

Land Rights and the Social Functions

With the right to mining, the right to exploitation, the right to build, and the right to manage and other rights, the land under such conditions will automatically become free from customary rights by the State, so that allocations can be redefined, in accordance with the phases and needs of the stage of development pattern. In accordance with the principle that property rights are functioning socially, the position of property rights against the background of the customary rights by the State is in line with other legal objects, such as mining rights, use rights, right to build, the right to manage and other rights. It is still in line with the social function of the land, and it is just that the social function is different from land of property whose social function is to provide clothing, food and shelter or prosperous life for every citizen and his family. Meanwhile, the social function of mining rights is to allow excavation mining, and social functions of the right to exploitation, such as for industry, enable large-scale land management and land procurement for the purpose of product fulfilment in domestic and overseas markets. Furthermore, the social function of the right to build is to build industrial plants, warehouses and offices, and so on (Lisdiyono, 2018). Other differences are illustrated among property rights, mining, utilization and others. Land rights are also divided into:

1. Subjects that may have rights.
2. Age of rights.
3. The manner in which rights arise.
4. How to transfer rights.
5. Possible to impose rights with other material rights.
6. How to remove rights.
7. Other conditions and constraints relating to relevant material rights.

If property rights can be inherited, for example, the right of the mining authority cannot be inherited. Thus, property rights other than burdened with a mortgage, should also be burdened with the right of use or right to build, for example by obtaining a lease from the owner of a right of use or a right to build that requires land for business, or by acquiring shares in a company or plantation concerned as much as the market value of such use at the time the property is leased with the right of utilization or the right to build. Thus, landowners remain effective owners, even if they do not land effectively control it for a certain period of time. However, they still have the right to take a lease, or to be a shareholder of a company or plantation that uses their land, so that

their property still fulfils the social function of providing their families. So the practice of exemption, discharge or deprivation of rights is no longer allowed. If the nature of hereditary rights is possible and the rights may be burdened with other material rights except from the mortgage property, then the power of property rights will remain strong. In addition, different from mining rights, the right to use and the right to build can be used for commercial purposes of companies with a 75-year term. In order to continue production, the companies concerned must be familiar with the rights mentioned above for their social functions. The mortgage attached to the material on the ground also needs to be adjusted to the possibilities and methods according to the nature of the material right concerned.

CONCLUSION

The philosophical thought of the Indonesian National Agrarian Law is based on Pancasila entirely, especially the fifth points of Social Justice, and the 1945 Constitution of the Republic of Indonesia as a whole, in particular Article 27 paragraph (2) and Article 33. State-owned land is derived from the conception of Public Code. Therefore state-owned land does not mean land ownership by the state (*domeinleer*), but rather leads to the state's authority to organize and use and manage the land. In this context, land in Indonesian agrarian law philosophically has a social function, which seeks to secure a personal relationship between land and society. Land rights are regulated to ensure that social functions in every land use can work well. The concept of the "*ulayat"* land by the state is an original legal concept to ensure that the state guarantees the community to control or occupy and work on the land under customary law. This reinforces the position of the people to implement customary law, as the law that existed before the birth of the nation state system of Indonesia. The State also ensures that land ownership rights must function socially, and the position of property rights with the concept of customary rights by the State is in line with other legal objects, such as mining rights, use rights, right to build, the right to manage and other rights. Here, philosophically, the BAL strengthens the constitutional basis of social justice by introducing the use of land to maximize social function as well as people's welfare. On the other hand, the conception of customary rights by the State can be useful to be adopted in law with other proprietary systems such as air law, space rights, and marine rights to ensure national sovereignty and resilience.

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