

# Land Bank's Regulation in Accordance with Principle of State's Right to Control

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## ABSTRACT

The purpose of this paper is to identify and analyze the position of the land bank based on the principles of the state's right to control and to find out the harmonization of land bank arrangements in accordance with the Indonesian Agrarian Law. This research method uses normative legal research methods related to using a statutory approach and comparative approach. The results of this paper indicate that the state's right to control principle of the regulation related to land banks does not give rights to land ownership in the form of property rights, however only has the right to control the state which is implemented into management rights therefore that even state-formed legal entities cannot have property rights, as well as land banks. The harmonization based on the principle of the state's right to control can be analyze by using the principle of legislation or principle of preference in the form of the principle of *lex superiori derogat legi Inferiori*, in this case the land bank regulation in the Job Creation Law must be set aside.

**Keywords:** *Land Bank's Regulation, States Right, Indonesian Agrarian Law*

## INTRODUCTION

Land has an important meaning in human life, it is not only needed as a place to live which is a strategic resource that covers it fundamentally. Apart from being a place to live, land is also needed as a place for jobs to support life.(1) Soil in the agronomic geological sense is defined as the uppermost

layer of the earth's surface that is used to grow vegetation called arable land, yard soil, agricultural land, plantation land, and building soil used to erect buildings. Land as a basic human need is one of the scopes of agrarian law.(2) In the juridical sense, land is the surface of the earth, land rights are rights to a certain part of the earth's surface, which are finite, two-dimensional with a measure of length and width (3).

The State of the Republic of Indonesia aims to protect the entire nation and all Indonesian bloodshed, promote the general welfare, educate the nation's life and contribute to maintaining world order as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia. Based on this all countries basically have an obligation or responsibility to fulfill the rights of every citizen such as, the right to life, the right to have a place to live, the right to study, the right to get a decent job, the right to get sufficient basic needs and an environment that provides welfare so that the state is expected to benefit from each hectare of land to the maximum with the intention of managing the land that must be appropriate with the needs or interests of society (4).

Regarding the article 33 paragraph (3) in the Constitution of 1945 contains an explanation that "The earth, water and natural resources contained in the earth are the main points of people's prosperity, therefore these must be controlled by the

State and used for the greatest prosperity of the people". Etymological mastery is a process, method, act of mastering or commercializing, somastery is an action that covers in terms of the process to how to master it. In other words, control by the State is a process carried out by the State to control or try something that is in accordance with interests. Whereas the right to control the State over mineral or mining materials means that the State holds the power to control and exploit all mineral resources contained in the Indonesian mining jurisdiction.

Another meaning of control by the State is the rights that are only owned by the State, so that agrarian affairs are understood as the affairs of the Central Government, even though their implementation can be delegated to the Regional Government or the customary lawcommunity is simply needed and not necessary and does not conflict with national interests or constitute rights which are at the highest level controlled by the State as an organization of power for all people.(5)

Indonesian National Land law began after Indonesian independence. The state pays special attention to land located in the territory of the Indonesian state contained in Article 33 paragraph (3) of the Constitution 1945 that "The earth, water, and natural wealth contained in it are controlled by the state and used for the greatest prosperity of the people". Article 33 paragraph (3) of the 1945 Constitution outlines the basic policy regarding the control and use of existing natural resources. The realization of the mandate of Article 33 paragraph (3) of the Constitution 1945 and to ensure justice, legal certainty and the expediency of land law.

If we take a look at it in more depth the agrarian law of Indonesia actually consists of colonial agrarian law that was in force before Indonesia became independent and the national agrarian law that prevailed after Indonesia became independent. The period before Indonesia became independent, namely during colonial agrarian law, the

enforcement of Dutch land law in Indonesia was in effect. Dutch land law came into force legally since the enactment of the new Dutch Civil Law (*Nederlands Burgerlijk Wetboek / BW*) in 1848 and in Indonesia it is called the Indonesian Civil Code. The state passed regulations specifically regulating Agrarian affairs, including regarding land with Law Act No. 5 of 1960 re the Basic Provisions concerning the Fundamentals of Agrarian Affairs (hereinafter referred to as Basic Agrarian Law or BAL) as the beginning of the regulation of national agrarian law.

BAL as the basis for the drafting of laws and regulations in the agrarian field did not succeed in achieving its first goal. The new order regime until the post-new order period as well as the laws and regulations that this caused a plurality of laws in the agrarian field. Therefore, that the government made new laws and regulations governing defense in Indonesia through Law Act Number 11 of 2020 concerning Job Creation (hereinafter referred as the Job Creation Law) as an omnibuslaw to synchronize the overlapping of various laws and regulations and stop land politics that has been in effect since the new order period. The government is the party that has the authority to regulate the distribution of land use in Indonesia based on the Rights of the State as regulated in Article 2 paragraph (2) of the BAL. However, until now the ownership and control of land by the private sector as well as land for non-agricultural purposes has not been realized.(6)

The existence of a Land Bank in Indonesia currently regulated in Articles 125 to 135 of Job Creation Law. The implementing regulation of Articles 125-135 of the Job Creation Law related to Land Banks is Government Regulation Number 64 of 2021 concerning Land Bank Agencies (hereinafter referred as PP No.64/2021). Article 1 paragraph (1) of PP No.64/2021 stipulates that

"The Land Bank Agency hereinafter referred to as the Land Bank is a special entity (*sui generis*) which is an Indonesian

legal entity formed by the central government which is given special authority to manage land. The Land Bank is a special body that manages land, and functions to carry out the planning, acquisition, procurement, management, utilization, and distribution of land. The Land Bank is present as a *land manager*. Land managers will function to form land management strategies to be able to develop optimal land use”.

Furthermore, in the provisions of Article 129 of the Job Creation Law, it basically stipulates that rights to manage of the land are part of the right to the state control where the authority to implement them is partly devolved to the rights holder. The BAL basically does not implicitly regulate management rights. However, in uupa and according to the National Land Law, there are known land tenure rights that have levels, consisting of the rights of the Indonesian nation which are civil and public, the right to control the state which is public, customary rights that are civil and public, and rights to land that are civil.

The rights to manage of the land are part of the right to the state control that is in a public manner, in the sense that the authority it has is only public, namely that the state as the highest power organization has the authority to regulate the allocation, control, ownership, and use of lands in Indonesia so that it can provide legal certainty and justice for all Indonesian people. Like the *principle of domein verklaring* during the colonial period of the Dutch East Indies, where the government as the landowner and the people were not given proper rights if they could not prove that the land belonged to him. Based on this, the land bank in the Job Creation Law has contravened the mandate of Article 33 paragraph (3) of the 1945 Constitution. State control that should be used for the greatest prosperity of the people but with the regulation of land bank bodies in the Job Creation Law will only provide prosperity for a certain group.

Although Article 33 of the 1945 Constitution and TAP MPR No. IX/2001 are used as a basis for weighing in the consideration of the Job Creation Law, the content is not in accordance with the principles of TAP MPR No. IX/2001 therefore that in this case the land bank gives rise to many interpretations as if the land bank reactivated the *domeinverklaring* principle that was in force during the Dutch colonial period. Based on this description, it is important to further study about the regulation of land banks troght with papper entitled “Land Bank's Regulation in Accordance with Principle of State's Right to Control”.

This writing focuses on two problems, among others, first how to regulate the position of the Land Bank based on the principle of the state's right to control and second, how to harmonize the Land Bank Regulation in accordance with the Indonesian Agrarian Law. The purpose of this paper is to identify and analyze the position of the land bank based on the principles of the state's right to control and to find out the harmonization of land bank arrangements in accordance with the Indonesian Agrarian Law.

From the results of the search that the author has done, the writing of the article entitled Land Bank's Regulation in Accordance with State's Right to Control Principle can be said to be new and no one has reviewed it before. Therefore, this article has an element of renewal as a contribution in regulation of Land Bank in Indonesia. Although this paper has had an update and does not contain elements of plagiarism in it.

As a comparison element the following articles will describe similar issues among others, first journal with the author Dixon Sanjaya and Benny Djaja in 2021, entitled “Pengaturan Bank Tanah Dalam Undang - Undang Cipta Kerja Dan Implikasi Keberadaan Bank Tanah Terhadap Hukum Pertanahan di Indonesia”.(7) Based on the observation this journal focuses to examines more about the existence of Land Banks in Job Creation

Law and its implementation in land law in Indonesia, and also discusses more about the function of land banks as legal entities that carry out land acquisition functions for the public interest.

Second, journal with the author Nila Trisna and Ilka Sandela in 2021 entitled "Eksistensi Bank Tanah Dalam Hukum Agraria di Indonesia".(8) This journal focuses about the philosophical and juridical foundations for the establishment of the Land Bank institution and its arrangements in the Job Creation Law, in the study does not refer to PP 64/2021 concerning Land Banks because it is still a draft and has not been ratified. Therefore, it is ensured that this paper does not have plagiarism elements.

## **MATERIALS & METHODS**

This paper uses normative research methods as an effort to solve problems from legal issues in this paper.(9) This research will examine related to the laws that regulate about land bank's regulation in accordance with state's right to control principle, This paper using a statute approach, which is an approach that is carried out by examining all laws and regulations related to legal issues that are being handled and also using a comparative approach which is a method of investigation based on comparison. The technique of tracing legal materials uses document study techniques, as well as study analysis using qualitative analysis.

## **RESULT AND DISCUSSION**

### **Regulation of the Land Bank's Position based on Principle of State's Right to Control**

The completeness of the land administration system is an absolute requirement in land acquisition. The complexity of the tenure system based on the customs and customs of local communities makes the land registration system in Indonesia not simple. The process of juridical verification of landowners to determine who is entitled to a piece of land often takes a short time and sometimes leads to endless conflicts and

disputes. For this reason, it is necessary to think about the process of simplifying land registration which provides security guarantees for the acting land administration but also protects the civil rights of landowners. The weak and complicated administration of land and tenure also makes it difficult to detect the lands of the general reserves of the state. The presence of the Land Bank can run an equitable economy. An equitable economy can mean that justice must be able to side with the weak. This is in accordance with the state principle of Pancasila, namely social justice. According to its function as a land controller, the Land Bank can also be used as a tool to control the land market. The presence of land bank institutions certainly provides efficiency. The land bank can be its own instrument efficiently and effectively, to implement various land policies and support area development and control land acquisition fairly in carrying out development. The Land Bank answers several complex problems related to the provision of land that occurs a lot, such as providing government land stocks for various development purposes in the future.

In Indonesian the institution of land banks must be relied on article 33 paragraph (3) of the Constitution 1945 and the BAL. BAL is a regulation deliberately held by the state that regulates the principles of land, the right to control, land rights and other basic arrangements related to land. Regarding the implementation of land banks, they must be in the form of public legal entities, both as existing units and departments and state-owned institutions. It is not enough to get there, the land bank has a very large responsibility and role and concerns the interests of many communities, therefore supervision must be carried out in its implementation.

The importance of implementing the Land Bank concept in Indonesia can be seen from several positive implications that will occur after the implementation of the land bank

concept, including the availability of land stocks for the Government. The presence of a land bank is very beneficial for the availability of state land. A land bank can be an institution that stores government land reserves for various purposes, especially for development purposes. This function, of course, guarantees the availability of land for the implementation of development activities. Experience so far that the implementation of development activities, be it infrastructure or other public facilities, is often constrained by land acquisition (10). Land acquisition conflicts often occur because land rights holders generally refuse to give up land for development activities due to the amount of compensation value that is considered unfair. Through the presence of the Land Bank, it can guarantee the availability of land to accommodate development activities, especially for the public interest. The Land Bank acquired land long before there was a need for development. Thus, the land that has been collected by the land bank can be used as a container for development activities.

It has been known as the State Land, but by *de-facto* the government cannot control the land. Of course, the government only plays the role of land administrator while the role of executor still does not exist. Therefore, a solution is needed so that the government has this function to become an executor by forming a Land Bank Agency. The Land Bank is present in order to carry out the authority of the state, a form of the implementation of the state right to control. On the other hand, there is an interest in optimizing the use of land use throughout Indonesia, which in turn is to improve community welfare.

The highest right of control of the right to control land in the BAL is the right of the Indonesian nation. The ownership relationship between the Indonesian nation and land throughout the territory of Indonesia shows a private relationship, while the right of control as a form of

delegation of authority to the state to manage, regulate and manage for the greatest prosperity of the people is a public relationship. Based on the right of control over the land, the form of carrying out the duties of the nation's authority which is public in nature is derived in the form of the right to control the state.

The right to control the state is the highest right given by the Indonesian nation to the state as an organization of power of all people based on article 2 paragraph (1) BAL. The meaning of the right to control the state is to regulate the use and allocation of land with the aim of the greatest prosperity of the Indonesian people covering the entire territory of the Republic of Indonesia.

The function of land banking is different from the State Asset Management Institute as a land asset management agency because land banking has the task of providing land which then channeled for various development needs. State Asset Management Institute only manage state assets that have been registered as State Property therefore they will be profitable income for the state. The scope of land banking object is wider because it includes the criteria for land objects that can be controlled based on the provisions of legislation. Another difference is that State Asset Management Institute obtains land assets as a result of the land acquisition process. Meanwhile, land banking acquires for the development of public interest (11).

### **Harmonization of Land Bank Regulations according to the National Agrarian Law**

The land bank is a government policy, presented as a special body in the form of a legal entity held to ensure the availability of land in order to achieve a just economy. Although the regulation of land banks in the Job Creation Law is seen as a new norm, the regulation must be guided by the principles in the BAL and not conflict with the BAL.

The operation of the land bank must be subject to Article 33 paragraph (3) of the Constitution 1945 and the BAL because the regulation of fundamental and special land issues has been regulated therein (12).

In harmonizing the regulation of land banks in the Job Creation Law with the BAL, the position of the BAL will first be outlined towards the Job Creation Law. The establishment of national agrarian law, namely realizing the mandate of Article 33 paragraph (3) of the 1945 Constitution, took almost 15 years until finally the BAL was born. It is presented as the basis or basis for the formation of national agrarian law and the legal law of all agricultural affairs. Agrarian regulations must be in accordance with that and not contrary to the BAL as the executor of the constitutional mandate (13).

The regulation of land banks in the Job Creation Law indicates that the state no longer only acts with the right to control the state which is public but acts in the same position as the people, namely as landowners. The practice of stateization leads to the degradation of justice. This is because lands that have not been certified, land abandoned by former land rights and so on will be determined based on the government's determination as state land based on article 2 paragraphs (1) and (3) PP 18 of 2021 jo Article 6 and Article 7 PP Land Bank. Then the state land is given to a land bank with right to manage status on which the right of exploitation, the right of building and the right of use can be issued with a period of renewal and renewal automatically/at once. Such arrangements can lead to increasing inequality of tenure, and land ownership and agrarian conflicts are increasingly difficult to overcome.

The state's right to control is carried out because of its position as an organization of people's power as regulated in article 33 paragraph (3) of the Constitution 1945 and article 2 of the BAL, the meaning of state control here also includes state authority in terms of management (*bestuurdaad*), regulation (*regelendaad*) and supervision (*toezichthoudensdaad*). This oversight

relates to abandoned lands and former rights lands. This is because basically there are still thousands of hectares of land controlled by entrepreneurs but abandoned / there is no business activity on it. This government oversight function is also related to limiting the interests of investors and the interests of the public.

In the concept of simplification and structuring for investment, land bank arrangements are created as a new norm without referring to the BAL as the parent regulation. The difference in the conception of simplification with the new norm without reference to the BAL gives the impression that the government is unwise and overly imposing the presence of a land bank. The land bank in the Job Creation Law and its derivative regulations pp Land Bank is not clear whether it is in the form of a commercial land bank or a special land bank.

There are discrepancies or overlapping land bank arrangements in their arrangements as if the Job Creation Law wants to replace the principles of Article 33 paragraph (3) of the 1945 Constitution, BAL. The populist understanding adopted by the BAL will slowly change to a liberal and capitalist understanding as evidenced by the government's agrarian policies that are no longer pro-people. The establishment of a land bank because of the existence of a land bank today is needed by Indonesia considering that the availability of land that is static in nature is not comparable to the increasing population growth, but the land bank arrangement should still be imbued with the value of Pancasila, the principles of Article 33 paragraph (3) of the 1945 Constitution, BAL, and other related regulations that do not intersect with Pancasila as a state ideology and affect the regulation of Article 33 paragraph (3) of the 1945 Constitution, BAL and other relevant regulations.

Referring to the *stufenbau theory* and the provisions of Article 7 of Law 12 of 2011 concerning the Establishment of Laws and Regulations, regarding the hierarchy of the

formation of laws and regulations in Indonesia, the regulation of land banks in the Job Creation Law should be guided by the basic norms, namely Pancasila and higher-level laws and regulations, namely Article 33 paragraph (3) of the 1945 Constitution and its parent regulation, namely the BAL.

The making of laws and regulations must be guided and based on higher-level regulations or in other words must not conflict with the laws and regulations above (14). This is in line with Hans Kelsen's *stufenbau theory* that the law is tiered and multi-layered like a pyramid with its top occupied by a *grundnorm*. The order of laws and regulations consists of those at a higher level to a lower level so as to form a hierarchy of laws and regulations.(15)

Regarding the position and implementation of land bank regulations as a new norm in the Job Creation Law and the government regulations concerning Land Bank with the BAL, it can be viewed from the principle of laws and regulations or the principle of preference. The principle of *lex superiori derogat legi Inferiori* is the enactment of a higher level of legislation so that the lower legislation is set aside. Therefore, the regulation of land banks in the Job Creation Law and land bank regulations must be set aside. This is because, as previously explained, the regulation of land banks as holders of right to manage land whose object is state land has been contrary to Article 33 paragraph (3) of the 1945 Constitution regarding the right to control the state.

The state's right to control regulated by Article 33 paragraph (3) of the Constitution 1945 has been violated and expanded its understanding with the state becoming a landowner so that it has unwittingly re-adhered to the principle of *domeinverklaring*. The principle of *lex superiori derogat legi Inferiori* is a principle of legislation that is the answer to the position and existence of land bank arrangements in the Job Creation Law against the 1945 Constitution and the BAL

for the discrepancy in the substance of its regulations.

## CONCLUSION

In accordance with the state's right to control principle of the regulation related to land banks does not give rights to land ownership in the form of property rights, however only has the right to control the state which is implemented into management rights therefore that even state-formed legal entities cannot have property rights, as well as land banks. Harmonisation of the land bank regulation based on the principle of the state's right to control can be analyzed by using the principle of legislation or principle of preference in the form of the principle of *lex superiori derogat legi Inferiori*. In accordance with the Job Creation Law and the BAL related to the regulation of land banks as the new norm in the Job Creation Law and the Government regulation of land bank with the BAL in this case the land bank regulation in the Job Creation Law must be set aside.

## Declaration by Authors

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#### **Law and Regulations**

Constitution of the Republic of Indonesia of 1945

Law of the Republic of Indonesia Number 5 of 1960 concerning basic regulations on Agrarian Principles

Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation

Government Regulation of the Republic of Indonesia Number 64 of 2021 concerning Land Bank Agencies

Government Regulation of the Republic of Indonesia Number 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Tana h Registration

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