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Gresik, 14 Januari 2023
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Rizki Kurniawan, SH.,M.Kn
NIDN. 0705057502

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HASIL PENILAIAN SEJAWAT SEBIDANG ATAU PEER REVIEW
KARYA ILMIAH : JURNAL ILMIAH

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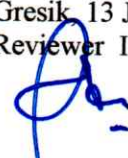
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No	Item	Tanggal
1	Submission article and acknowledgement of submission Pengajuan artikel dan pengakuan penyerahan	22 November 2022
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ACADEMIC PAPER ACCEPTANCE LETTER

Paper Id: 6088

Title: The Concept of Domein Verklaring and Nature of State Control over Land in the Land Bank Concept.

Suyanto, Dwi Wahidiyahningsih, Rizki Kurniawan, Moh Nasichin

Dear Author(s),

After the peer review process, your article has been accepted for publication in the **Baltic Journal of Law and Politics**, in the coming issue, 2022.

All papers are published in English. All submitted manuscripts are subject to peer-review by the leading specialists for the respective topic.

Regards

A handwritten signature in black ink, appearing to read 'Suyanto', is written below the text 'Regards'.

Editorial Manager

Baltic Journal of Law and Politics



The Concept Of *Domein Verklaring* And Nature Of State Control Over Land In The Land Bank Concept.

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Abstract

The concept of controlling land by the state in the Dutch era in the Verklaring domain was to give western rights and make it easier for the Dutch colonial government to take people's land. The amount of fixed land and the need for physical development are increasing in line with the increase in population, causing social problems that cannot be avoided. Social problems occur because of conflicting needs for the government, which requires land for infrastructure construction, and the people who remain adamant in their authority over the land they own. People usually do not give up the land they own for the development of public purposes because the price set by the government is very minimal. The purpose of this study is to know how the concept of domein verklaring of the Dutch colonial government in Agrarische Wet (AW) 1870 and the nature of the state's right to control the land bank in the Job Creation Act. In this study, the researcher uses the type of doctrinal legal research. They used statutory, conceptual, comparative, and primary legal materials in the form of related laws and regulations. Furthermore, other legal regulations are related to secondary legal materials. The concept of domein verklaring concerning state land tenure differs from state control over land in the Land Bank. The Land Bank, the holder of management rights, is given the authority to prepare master plans, help provide ease of business licensing/approvals, carry out land acquisition, and determine service rates.

Keywords: Domein Verklaring, State Control, Land Bank

INTRODUCTION

At the beginning of the second term President Joko Widodo in front of the People's Consultative Assembly when he was inaugurated as President of the Republic of Indonesia, gave the idea of making laws in the omnibus law model, one of which was about job creation, which was later passed into law in the omnibus law model. Law Number 11 of 2020 concerning Job Creation.

The provisions in the Job Creation Act have caused much controversy in the legal community in Indonesia because they are considered contrary to existing legal concepts, including land clusters, management rights arrangements and land banks. At least ten articles regulate the existence of a land bank in the Job Creation Act, starting from article 125 to article 135.

A land bank is formed with a particular agency mandated by the work creation law to manage land and functions to carry out planning, acquisition, procurement, management, utilization, and distribution of land. The existence of this particular agency takes on the role and function of the Ministry of Agrarian Affairs and Spatial Planning, which has previously been regulated in Presidential Regulation Number 47 of 2020 concerning the Ministry of Agrarian and Spatial Planning, namely the function of land acquisition and land development so that with the

enactment of the Job Creation Act, the functions of the Ministry Agrarian and Spatial Planning on Land acquisition and land development will be erased by itself.

The legal problem regarding the land bank is actually about the concept of state control over land rights which suffered a setback long before the enactment of the Basic Agrarian Law because the concept of controlling land by the state in the Dutch era in the *domein verklaring* was to give western rights and facilitate colonial rule. The Dutch legally took community land by enforcing the *domein verklaring* provisions. Namely, any land whose ownership cannot be proven by another party becomes state-owned domain land.

Based on the provisions of the *domein verklaring*, the Dutch colonial government controlled the land intended for various purposes such as the construction of economic centers, government, roads and others. This provision provided a legal basis for the Dutch to control much community-owned land by arbitrarily taking over many customary or *ulayat* lands that had been controlled for generations by the community. Law Number 5 of 1960 concerning Agrarian Principles in the opening section, namely the 'deciding' section point 2, has firmly abolished the concept of land in the Dutch colonial era over land whose rights have not been attached to state land by revoking *domein verklaring*, *algemene domein verklaring*, *verklaring* domain for Sumatra, *verklaring* domain for the residency of Manado, and *verklaring* domain for residential *zuiden on westerafdeeling van Borneo*.

Based on this, the authors focus on researching "How the concept of *domein verklaring* of the Dutch colonial government in Agrarische Wet (AW) 1870 and the nature of the state's right to control the land bank in the Job Creation Act".

METHODS

In this study, the researcher uses the type of doctrinal legal research, namely research that puts law as a system of norms, namely regarding principles, norms, laws, and regulations, court decisions, agreements, and doctrines (teachings) (Fajar & Achmad, 2010) using the statutory approach, conceptual approach, comparative approach, using primary legal materials in the form of related laws and regulations such as Law Number 5 of 1960, Law Number 11 of 2020, and other legal regulations related to secondary legal materials. These legal materials further explain primary legal materials taken from relevant literature, journals, and research results obtained from library research.

RESULTS AND DISCUSSION

During the colonial era, the Dutch made legal regulations governing land in Agrarische Wet (AW) 1870, especially Article 51 IS, by providing guarantees for good land use from a land whose owners cannot prove rights to the land they have traditionally controlled for years. The provisions of Article 51 IS become the legal basis for the government to be able to provide lands such as eigendom rights, *erfacht* rights, and other rights. Furthermore, Article 1 of Agrarische Besluit (STB 1870 Number 118) states that all land whose ownership cannot be proven is owned land (*domein*) or *domein verklaring*. This provision emphasizes the relationship between the state's complete controls over land (*staat ter beschikking van de landsoverheid*).

Domein verklaring is defined as the right to control by the state in its day by ignoring the rights of the people namely, if the people cannot prove their ownership rights to a plot of land formally, then the land or land is considered state property, with the provisions of the people's *domain verklaring* being enforced which do not can prove that it is formally challenging to maintain their property rights that have been passed down from generation to generation as a native.

Domein verklaring implies absolute property rights of the Dutch East Indies colonial state.

Therefore the Dutch East Indies government could sell land in Indonesia to anyone, even foreign nationals, which in the past gave rise to many private lands and landlords with rights that are very broad and can be likened to the existence of a state (private lands) within the state (the Dutch East Indies Colonial Government). (Fauzi, 1919)

In principle and in principle the application of the agrarian legislation in Agrarische Wet 1870 does not reflect the values of justice for the Indonesian people who before the arrival of the Dutch colonialists had indigenous people law by recognizing customary land law for the Indonesian people. . In line with Von Savigny's thought, the nature of every legal system is part of the reflection of the soul of the people who developed the law (Cotterrell, 1984), then Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles was reaffirmed in its Preamble stating that in the Republic of Indonesia whose composition of people's lives, including the economy is still primarily an agrarian pattern, earth, water and space, as a gift from God Almighty has a very important function to build a just and prosperous society, in the consideration of point c, '*opinions*' it is said that agrarian law The national law must embody the incarnation of Godhead, Humanity, Nationality, Democracy and Social Justice, as the spiritual principle of the State and the ideals of the nation, as stated in the Preamble to the 1945 Constitution.

The Basic Agrarian Law (UUPA) follows the concept of rights. Control the country contained in Article 33 paragraph (3) of the 1945 Constitution, which states that the earth, water and natural resources contained therein shall be controlled by the State and used for the most significant benefit of the people. In the Basic Agrarian Law (UUPA), the right to control the State is detailed, and its meaning is broadened, which includes over the earth, water and space, so whether a person's rights already exist or not/not yet exist. The power of the State regarding land that people with certain rights already own is limited by the content of that right, meaning to what extent the State gives power to those who have the right to exercise their rights. That is the limit of the State's power. (Parlindungan, 1990)

Article 33, paragraph (3) of the 1945 Constitution acts as a source for the development of national land policies and legislation to ensure the realization of prosperity for all Indonesian people. In industry and other fields whose implementation depends on the availability of land, thus the Basic Agrarian Law (UUPA) is placed as a progressive or prismatic law. As a progressive law, the Basic Agrarian Law (UUPA) is intended as an instrument to create a change in society that is advanced in the economic field through structuring the land ownership structure, which on the one hand, encourages changes in agriculture and industry that are increasingly advanced, but without neglecting justice in the sense of creating an equal distribution of land ownership. As a prismatic law, the principles of the Basic Agrarian Law (UUPA) are described in two groups of social values, namely modern and traditional, according to the plurality of Indonesian society (Ismail, 2018). This elaboration is reflected in the principles of individualizing land rights ownership, land use and land ownership for large-scale business development in the agricultural or industrial sector with certain limitations (Suyanto et al., 2019).

The right to control from the State is the delegation of tasks of authority to the Indonesian nation, which in its legal construction can be analogous to an agreement to grant power to the State by the people, as the party giving power to the Indonesian people as the holder of the highest rights over the earth, water, space and natural resources contained therein. Within the territory of the Republic of Indonesia, as stated in Article 1 paragraph (1) of the BAL is referred to as the Right of the Ruler, while the recipient of a power of attorney is the State of Indonesia as an organization of power for the entire Indonesian people.

The right of control over land contains a series of authorities, obligations, and prohibitions for the holder of the right to do something that is allowed, obliged or prohibited to be done regarding the land that is his right that is the benchmark for distinguishing between land tenure rights regulated in law Soil. Land tenure rights consist of the rights of the Indonesian people to the land, state control rights to land, customary rights of customary law communities, and individual rights to land, including land rights, mortgage rights, and waqf land.

The state's right to control land is regulated in Article 2 of the Basic Agrarian Law (UUPA), which contains the authority of the state's right to control, namely: a. regulate and administer the allocation, use, supply, and maintenance of earth, water, and space; b. determine and regulate legal relations between people and the earth, water, and space; c. determine and regulate legal relations between people and legal actions regarding the earth, water, and space. In principle,

the state's authority stems from the right to control land by the state in the hands of the central government. The local government only has the authority if it receives a delegation of authority from the central government.

In the principle that the state controls the relationship between the state and the community, the position of the community cannot be subordinated to the state because the state receives power from the community to regulate the allocation, supply and use of land, as well as legal relations and legal actions related to land. (Sumardjono, 2006)

The decision of the Constitutional Court of the Republic of Indonesia No. 35/PUU-X/2012 in conjunction with the Constitutional Court's Decision No. 50/PUU-X/2012 in conjunction with the Constitutional Court's Decision No.3/PUU-VIII/2010 interpreting the right to control the state as a public right, which is different from the character of private rights in the civil realm, the state is not in a position to own natural resources. However, it is present to formulate policy (*belied*), make arrangements (*regelandaad*), manage (*bestuurdaad*), manage (*beheersbaar*), and supervise (*toezichthoudend aad*) so that in its implementation, the state's right to control over land should maintain existing rights, both individual rights and collective rights owned by customary law communities (*hak ulayat*), indigenous peoples' rights and other constitutional rights owned by the community.

In the general explanation number II number 2, the Basic Agrarian Law (UUPA) states that the state can give land to a person or legal entity with a right according to its designation and needs, for example, Ownership Rights, Building Use Rights, Use Rights, or give it in management to an agency, the mention of such management rights does not mention explicitly, both in the dictum, body and explanation. Management rights first existed with the issuance of Minister of Agrarian Regulation No. 9 of 1965, which stipulates the conversion of control rights over state lands. Furthermore, it is regulated in the Minister of Agrarian Regulation No. 1 of 1966 concerning Registration of Use Rights and Management Rights, in its development based on Article 9 of Government Regulation No. 24 of 1997 concerning Land Registration stipulates that Management Rights are one of the objects of land registration.

Initially, management rights came from the conversion of state land tenure rights. In its development, management rights are born, and the granting of rights to state lands is requested by the holders of management rights. The party who can own land with management rights is a government legal entity engaged in public and business services, whose main tasks and functions are related to land. In contrast, individuals nor private business entities can have land with management rights even though their primary duties and functions are related to land.

According to Van Dijk, a land bank is a mechanism for systematic land expropriation activities of an overall size, which will be utilized in the future to implement land policies (Candra & Khaidir, 2020). Meanwhile, the omnibus law on job creation, which regulates the establishment of a land bank or in total is called a land bank agency, only mentions that it is a unique agency that manages the land, whose function is to carry out planning, acquisition, procurement, management, utilization, and distribution of land. Furthermore, Government Regulation Number 64 of 2021 concerning the Land Bank Agency does not stipulate the definition of a land bank, except to only add that this land bank is an Indonesian legal entity. In its function, the land bank ensures the availability of land for various future development needs, efficiency in the APBD/APBN, reducing conflicts in the land acquisition process and reducing the adverse effects of land liberation.

The land bank agency is a state organ that manages the procurement and distribution of land in the context of future consolidation in order to provide land allocation in the context of development, and this concept seems to adopt the concept that exists in European countries, one of which is in the Netherlands which has implemented. This concept has been in place since 1841 by establishing an institution under the Ministry of Finance which manages land services which manage the development of government policies in the field of land, management of state-owned land, facilitation of the use of state land, and the sale of state land. (Damen, 2004)

The concept of a land bank in the omnibus law of job creation is a step backwards when it comes to the spirit of agrarian reform because this concept seems to be stepping back toward the spirit of respect, protection and fulfilment of land rights as guaranteed in the Law of the Republic of Indonesia. Number 2 of 2012 concerning Land Procurement for the Public Interest (Suyanto, 2021). Implementing a land bank is more likely to side with the interests of private entrepreneurs to obtain land cheaply through implementing regulations made in the omnibus law on copyright and investment in Indonesia. Following Article 127 of Law no. 11 of 2020, which confirms that land banks in carrying out their duties and authorities are transparent, accountable and non-profit, this non-profit phrase can be assumed to provide an opportunity to get land for free.

The land bank strengthens the system of land management rights by providing more open opportunities for foreign nationals to have management rights to apartment units in Indonesia located on shared land with building rights. Applying this system philosophically and in principle contradicts the principles and spirit of nationalism in the Basic Agrarian Law.

The new authority in the form of management rights by the state is given by the laws and regulations based on Article 129 paragraph (1) of the Job Creation Law. Previously in the land system in Indonesia, it was not known and previously not regulated in the Basic Agrarian Law (UUPA), because the Basic Agrarian Law (UUPA) only regulates rights. Control the state based on the provisions of article 2 so that the existence of two legal instruments (the Job Creation Law and the Basic Agrarian Law (UUPA)) creates overlapping land policies in Indonesia.

The existence of management rights so far has been confusing. On the one hand, management rights are rights to control the state over land and other parties. On the other hand, it can also be mentioned that management rights are land rights. The confusion is due to management rights previously not explicitly regulated in the law. Basic Agrarian Law (UUPA), but only regulated in the Minister of Agrarian Regulation No. 9 of 1965 concerning the Implementation of Conversion of Right of Tenure to State Land and continued with the provisions of Article 2 paragraph (3) letter f of Law no. 21 of 1997 concerning Customs for the Acquisition of Land Rights. Other arrangements regarding land management rights by the state are also regulated in Article 1 point 3 of the Regulation of the State Minister of Agrarian Affairs/Head of BPN No. 9 of 1999 concerning Procedures for Granting and Cancellation of Land Rights and Management, where it is explained that management rights are the control rights of the state whose implementation authority is delegated to the holder so that the presence of the Land Bank Institution is a new legal norm regarding land management rights by the state which reaffirms the existence of the state is not only in terms of the state's right to control land but also regarding the management of land in the country in the future for the benefit of development for the public interest.

The birth of the Land Bank Institution is a manifestation of the implementation of state control rights to provide land that will be allocated for land use in the land acquisition oriented towards public interest and investment. The government's authority in the land bank appears in the concept of state control rights, which are limited by the social function of the land (Damen, 2004).

CONCLUSION

The concept of *domein verklaring* concerning state land tenure is different from the concept of state control over land in the Land Bank, the concept of Land Bank in the Job Creation Act in that the granting of rights is granted for public and social interests, national development interests, economic equity, land consolidation and reform Agrarian. The Land Bank, the holder of management rights, is given the authority to prepare master plans, help provide ease of business licensing/approvals, carry out land acquisition, and determine service rates.

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