



Law and policy of regulating the duration of building rights over management rights based on principles of justice

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Abstract

The duration of the Right to Build has been regulated in Article 35, paragraphs (1) and (2) of the Basic Agrarian Law Number 5 of 1960, which is 30 years and can be renewed for an additional 20 years. This also applies to the Right to Build on Management Rights. However, with the provisions of Article 19 of Government Regulation Number 12 of 2023 concerning the Granting of Business Licenses, Ease of Doing Business, and Investment Facilities for Business Actors in the Nusantara Capital, the duration of the Right to Build on Management Rights granted can reach 160 years with 2 cycles. This, of course, causes disharmony between the Basic Agrarian Law Number 5 of 1960 and Government Regulation Number 12 of 2023.

This research aims to analyze how the legal politics of regulating time periods on management rights based on the value of justice are conducted. The method used is a normative juridical approach, a legal research method conducted by examining library materials or secondary legal materials regarding legal politics and land law. This serves as the basic material for research by exploring regulations and literature related to the legal politics of building use rights on management rights.

Keywords: Legal politics, building use rights on management rights, duration, justice

Introduction

Ideologically, land not only serves as a place of residence for the community but also as a vital area for the life of the Indonesian nation and state. This is reflected in the principle of nationality accommodated in the Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960). (Nurhasan, 2012) ^[10] The Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960) is a legal product with the spirit of agrarian reform that emphasizes cultural, ideological, and social aspects in its implementation. Therefore, the main objectives of the Basic Agrarian Law are: (Isnaini & Lubis, 2022) ^[5]

- a. To lay the foundations for the establishment of national agrarian law, which will serve as a tool to bring prosperity, happiness, and justice to the state and the people, especially the farming community, within the framework of a just and prosperous society.
- b. To lay the foundations for achieving unity and simplicity in land law.
- c. To lay the foundations for providing legal certainty regarding land rights for all the people.

Based on the main objectives of the Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960), this law serves as a means to realize the ideals of the nation and state as mandated by the Preamble of the 1945 Constitution, namely to promote the general welfare and to enlighten the life of the Indonesian people. (Supriadi, 2007) ^[14]

Building use rights (Hak Guna Bangunan) are land rights regulated in Articles 35 to 40 of the Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960). The initial period for building use rights is a maximum of 30 years, which can be extended upon request by the right holder, considering the needs and condition of the building, for a maximum period of 20 years as stipulated in Article 35 paragraphs (1) and (2) of UUPA No. 5 Tahun 1960. This is also regulated in Article 37 paragraph (1) of Government Regulation No. 18 of 2021 (PP 18/2021), where the period for building use

rights is given for a maximum of 30 years, extended for 20 years, and renewed for a maximum period of 30 years. If the granted period expires, an extension request can be submitted as stipulated in Article 37 paragraph (1) of PP 18/2021, which must be filed by the right holder no later than two years after the expiration of the building use rights. The application for an extension of the building use rights period must be submitted and registered at the National Land Agency office.

To provide certainty, opportunity, and greater participation for business actors in accelerating development in the Nusantara Capital City, the government has established Government Regulation No. 12 of 2023 on the Provision of Business Licensing, Ease of Doing Business, and Investment Facilities for Business Actors in the Nusantara Capital City (hereinafter referred to as PP No. 12 of 2023). It is hoped that business actors or companies can participate and contribute to equitable development and to stimulate the economy in Indonesia in the future. Article 19 paragraphs (1) and (4) of PP No. 12 of 2023 also regulate the duration of Building Use Rights, which can be granted for a maximum of 80 years through the first cycle with three stages: initial grant for up to 30 years, extension for up to 20 years, and renewal for up to 30 years. This can be further extended for a second cycle if agreed upon. Compared to the duration regulated in UUPA No. 5 of 1960, this represents a significantly longer period.

Politics and law stem from the assumption that law is a product of politics, thus law is viewed as the juridical formality of political wills that interact and compete with each other. (MD, 2017) Based on the emphasis on economic approaches, there tends to be a tendency to overlook or sideline the needs and aspirations of other social groups, even though the state must meet economic growth targets based on principles of justice, utility, and certainty. According to Mahfud MD, legal politics has three reflections: first, the aspirations behind policies and

regulations; second, political interactions during the legislative process; third, the necessary application and interpretation depending on the policies enacted. (Riyanto & Maria S.W Suwardjono, 2020) ^[11]

Government Regulation No. 12 of 2023 provides greater flexibility to investors or stakeholders in terms of land tenure compared to the Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960). This can potentially lead to normative conflicts that exceed the specified time limits under UUPA No. 5 of 1960.

This provision clearly shows a lack of synchronization between Basic Agrarian Law No. 5 of 1960 (UUPA No. 5 Tahun 1960) and Government Regulation No. 12 of 2023 (PP No. 12 Tahun 2023). It can be seen that the considerations and legal basis of PP 12/2023 contradict UUPA No. 5 of 1960, resulting in a violation of the mandates of Article 28D paragraph (1), Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as UUD 1945). Therefore, this also violates the First, Second, and Fifth Principles of Pancasila. (Simamora, 2021) ^[12] Essentially, in achieving the ideals of a legal system within society, three things must be fulfilled: justice, decency, and legal certainty.

Methods

The characteristic of the research used in this study is doctrinal legal research. Doctrinal legal research, also known as normative research, is defined as research based on legal materials that focuses on reading and studying primary and secondary legal sources. The main focus of this research is on law accumulated as norms or principles that operate within society. This research centers on inventorying positive law, legal principles, and legal doctrines; discovering law in concrete cases; legal systematics; the level of synchronization; legal comparison; and legal history. (Wardhani, 2020) ^[16]

Results and Discussion

Land law politics in Indonesia aims to harmonize with agrarian laws that adhere to general legal wisdom, specifically tailored to Indonesia's societal conditions and its perceived interests and needs. This serves as a guideline for agrarian development to achieve well-established agrarian fields. (Notonagoro, 1972) ^[9] The values of Pancasila serve as the primary foundation for actions in the field of agrarian (land) affairs. Pancasila is regarded as the highest value in the life of the nation and state in Indonesia. These values form a cohesive and inseparable unity in regulating agrarian issues in Indonesia. (Soetiknjo, 1990) ^[13]

The elaboration of the legal goals and principles of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia has given birth to the Basic Agrarian Law Number 5 of 1960, which also serves as a source for the development of national land policies and regulations. Furthermore, the Basic Agrarian Law Number 5 of 1960, with its inherent principles, is aimed at ensuring the prosperity of all Indonesian people, especially for marginalized groups who were sidelined by land policies in the past. (Limbong, 2012) ^[6]

In the formation of the Basic Agrarian Law (UUPA), the Stufen Theory (ladder theory) explained by Hans Kelsen was used. The theory states that "the legal order or legal system is a system of norms that takes the form of a pyramidal ladder. Each step of the ladder contains norms,

and at the top of the pyramid, there is a norm known as the basic norm (grundnorm). Below the basic norm, there is a norm known as the Constitution; below the Constitution, there are norms known as laws; below these laws, there are norms known as regulations; and below these regulations, there are norms known as decrees. Therefore, the validity and legality of a norm depend on the norm above it. (Mustafa, 1985) ^[8]

Indonesia also recognizes the hierarchical structure of legislation according to Hans Kelsen's Stufenbau theory. This is reflected in MPRS Decree No. XX/MPRS/1966 concerning the DPR-GR Memorandum on the Sources of Legal Order of the Republic of Indonesia and the Hierarchy of Legislation. This decree was later revoked by MPR Decree No. III/MPR/2000 concerning the Sources of Law and the Hierarchy of Legislation. There are differences between MPR Decree No. III/2000 and MPRS Decree No. XX/MPRS/1966 regarding the sources of law and their hierarchy. In MPRS Decree No. XX/1966, the source of legal order was Pancasila, the source of all sources of law, which consisted of the Proclamation of August 17, 1945, the Presidential Decree of July 5, 1959, the 1945 Constitution (Proclamation), and the Supersemar 1966. Meanwhile, in MPR Decree No. III/MPR/2000, the sources of law are Pancasila and the 1945 Constitution. Additionally, there are changes in the hierarchy of legislation. In MPRS Decree No. XX/MPRS/1966, laws were equal in rank to Government Regulations instead of Law (Perpu), while in MPR Decree No. III/MPR/2000, Perpu is ranked below laws. Moreover, regional regulations, which were previously only considered implementing regulations in MPRS Decree No. XX/MPRS/1966, became part of the legislative hierarchy. The hierarchy and formation of legislation were further detailed in Law No. 10 of 2004, which was later replaced by Law No. 12 of 2011. A common principle across these provisions is that all applicable legal regulations must not conflict with higher legal provisions according to the legislative hierarchy.

The Right to Build (Hak Guna Bangunan) is one of the land rights regulated under the Basic Agrarian Law. The definition of the Right to Build is stipulated in Article 35 paragraph (1), which states: "The Right to Build is the right to construct and own buildings on land that is not owned by oneself, for a maximum period of 30 years." This statement in Article 35 paragraph (1) implies that the holder of the Right to Build is not the owner of the land on which the building is constructed.

According to G. Kartasapoetra, the Right to Build is the right to construct and own buildings on land that is not owned by oneself, for a maximum period of 30 years. In addition to land controlled by the state, the Right to Build can also be granted on privately owned land. (G.Kartasapoetra, 1992) ^[3]

In Articles 35 to 40 of the Basic Agrarian Law (UUPA) Number 5 of 1960, the initial period for the Right to Build is up to 30 years and can be extended upon request by the rights holder, based on the needs and conditions of the buildings, for a period of up to 20 years as regulated in Article 35 paragraphs (1) and (2) of UUPA Number 5 of 1960. This is also stipulated in Article 37 paragraph (1) of Government Regulation Number 18 of 2021, which states that the Right to Build is granted for a maximum of 30 years, extended for 20 years, and renewed for a maximum of 30 years. If the granted period has expired, an application

for an extension of rights can be submitted as stated in Article 37 paragraph (1) of Government Regulation Number 18 of 2021, which must be filed by the rights holder no later than two years after the Right to Build period ends. Applications for extensions of the Right to Build period must be submitted and registered with the National Land Agency office.

The period for the Right to Build (Hak Guna Bangunan) has been extended, where previously under the Basic Agrarian Law (UUPA) Number 5 of 1960, the total period for the Right to Build was 50 years. In contrast, the Right to Build in the Capital City of Nusantara, based on Article 19 of Government Regulation Number 12 of 2023, has a total period of 160 years. Article 2 paragraph (3) of UUPA Number 5 of 1960 also emphasizes that the authority derived from the state's control rights is used to achieve the greatest possible prosperity of the people in terms of nationality, welfare, and freedom within an independent, sovereign, just, and prosperous Indonesian legal society and state. (Harsono, 1995) ^[4]

In the explanation above, there is a difference between the regulation of Land Rights in the Basic Agrarian Law (UUPA) Number 5 of 1960 and Government Regulation Number 12 of 2023 concerning the Granting of Business Licenses, Business Facilitation, and Investment Facilities for Business Actors in the Capital City of Nusantara. This difference is due to the background of each regulation. UUPA Number 5 of 1960 is a general and comprehensive regulation that governs land issues throughout Indonesia. Meanwhile, Government Regulation Number 12 of 2023 is a specific regulation that specifically regulates the granting of licenses, business facilitation, and investment facilities for business actors in the Capital City of Nusantara, which is the new capital of Indonesia.

Both of the above regulations accommodate the substance of the duration of Land Rights; however, there are differences in the application of these durations. The following outlines the differences in the duration of Land Rights based on the Basic Agrarian Law (UUPA) Number 5 of 1960 and Government Regulation Number 12 of 2023 concerning the Granting of Business Licenses, Business Facilitation, and Investment Facilities for Business Actors in the Capital City of Nusantara. The following outlines the differences in the duration of Land Rights based on the Basic Agrarian Law (UUPA) Number 5 of 1960 on Agrarian Principles and Government Regulation Number 12 of 2023 on the Granting of Business Licenses, Business Facilitation, and Investment Facilities for Business Actors in the Capital City of Nusantara

UUPA Number 5 of 1960:

- The Right to Build (Hak Guna Bangunan) is granted for an initial period of up to 30 years and can be extended for a period of up to 20 years, making a total duration of 50 years.

Government Regulation Number 12 of 2023

- The Right to Build in the Capital City of Nusantara is granted for a total duration of up to 160 years, significantly longer than the duration stipulated in the UUPA.

These differences are due to the distinct backgrounds and purposes of each regulation. The UUPA Number 5 of 1960 serves as a general and comprehensive law governing land

matters across Indonesia. In contrast, Government Regulation Number 12 of 2023 specifically targets the granting of business licenses, business facilitation, and investment facilities for business actors in the Capital City of Nusantara, which is the new capital of Indonesia.

Therefore, based on the analysis conducted on the regulation of the duration of the Right to Build over management rights in the Capital City of Nusantara, it is not yet based on justice. The existence of Article 33 paragraph (3) of the 1945 Constitution is a manifestation of the constitutional nature that always regulates the guarantee of human rights and the relationship between humans and land. Thus, the acquisition of land rights by the state is solely for the realization of environmental protection, including the ecosystems within it, and the acquisition for public interest in development must be in accordance with the laws and regulations and be just. Essentially, UUPA Number 5 of 1960 requires the utilization of land in a just manner so that welfare can be comprehensively obtained by all elements of society. The existence of the Right to Build in UUPA Number 5 of 1960 is an embodiment of Article 33 of the 1945 Constitution, which mandates the utilization of natural resources, including land, for the welfare of the community, thus prohibiting the monopolization of land use by a select few groups.

The provisions for the cycle and length of the land rights period over Management Rights in the Capital City of Nusantara indirectly steer the Indonesian nation towards the practice of capitalism. UUPA Number 5 of 1960 essentially aims to ensure fair and equitable land use so that welfare can be enjoyed by all elements of society. However, the provisions for the cycle and duration of land rights in the Capital City of Nusantara, which allow land ownership for up to 160 years, are feared to potentially exacerbate inequality and limit people's access to land.

Humberto Avila's definition of legal certainty emphasizes the principle that norms require the legislative, executive, and judicial branches to adopt behaviors contributing more to existence, for the benefit of citizens and from the citizens' perspective. It involves a condition where the law can be predicted and relied upon based on knowledge, through the juridical-rational control of argumentative structures that reconstruct general and individual norms. This serves as an instrument ensuring respect for citizens in shaping present law in a dignified and responsible manner and planning future law without deception, frustration, surprises, or arbitrariness. Knowledge refers to the state where citizens possess high material and intellectual abilities to understand argumentative structures reconstructing substantive and procedural norms, both general and individual. (Avila, 2016) ^[2]

From the perspective of legal certainty theory, granting the Right to Build (Hak Guna Bangunan) for an excessively long period can create uncertainty for society. The lack of knowledge about when the Right to Build will expire can disrupt community planning and land utilization. Moreover, granting a long duration provides disproportionate advantages to the holders of the Right to Build, leading to inequality and injustice for other members of society. This not only disadvantages the current population but also impacts future generations, making it difficult for them to access land for various needs such as housing, businesses, or agriculture, as the land is controlled by holders of the Right to Build for an extended period.

This allows someone to control the building rights above management rights for up to 160 years. Unlike the provisions of Basic Agrarian Law Number 5 of 1960 which grants maximum land ownership rights for up to 50 years for building rights. This is considered to have serious implications for the provisions of the land ownership cycle and tenure granted in the Capital City of Nusantara, namely

1. The occurrence of Land Monopoly
2. The reduction of the Principle of Land Ownership by the State
3. The occurrence of Land Overlaps

According to the Agrarian Reform Consortium (KPA), there are many cases of land ownership overlap occurring in the East Kalimantan region, which is set to become the Capital City of Nusantara (IKN). In the Kutai Kartanegara Regency, approximately 46% of cases involve overlapping, while in the Penajam Paser Utara Regency, about 67% of cases are affected by similar issues. (Ahdiat, 2022)^[1]

The regulation granting excessively long durations for the Right to Build (Hak Guna Bangunan) is also seen to exacerbate agrarian conflicts and land ownership disparities in the Capital City of Nusantara. The Secretary General of the Agrarian Reform Consortium (KPA) stated that the rule granting the Right to Build for up to 160 years with 2 cycles contradicts the Constitutional Court's Decision Number 21-22/PUU-V/2007 concerning the Material Testing of Law Number 25 of 2007 on Investment. (Theodora, 2023)^[15]

The long duration of land rights will result in communities being increasingly distanced from opportunities to access state land for agricultural purposes, while population growth and the rate of population continue to increase. On the other hand, the government should be able to learn from the history of the proliferation of conflicts, both latent and open, as a result of agrarian disputes. Quantitatively, the majority of Indonesia's population are farmers. However, most of them do not own land, so many farmers rely on working as farm laborers and in plantations.

Based on the above, there is a significant difference between Basic Agrarian Law Number 5 of 1960 and Government Regulation Number 12 of 2023. The significant difference lies in the duration of the Right to Build (Hak Guna Bangunan). Certainly, if the duration given is too long, it can create conflicts of norms and potentially lead to land monopolies, reduce the principle of land ownership by the state, and result in overlapping land claims.

Conclusion

The normative conflict between Basic Agrarian Law Number 5 of 1960 and Government Regulation Number 12 of 2023 is a vertical normative conflict where there is inconsistency between lower norms and higher norms according to the hierarchy of legislative regulations under Law Number 12 of 2011 concerning the Formation of Legislation. Based on this, along with the implications outlined by the author in the previous problem statement, there is a need for harmonization of legislative regulations between Government Regulation Number 12 of 2023 and Basic Agrarian Law Number 5 of 1960. Harmonization should be achieved through a material review conducted by the Supreme Court to repeal or amend specific articles that experience inconsistency, or the entirety of the relevant legislative regulations.

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