



Validity of the time period policy for building use rights in the capital city of Nusantara

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Abstract

The Validity of the Building Use Rights Time Policy in the New Capital City of Nusantara Indonesia has decided to relocate its capital city to the island of Kalimantan, naming the region Ibu Kota Nusantara (IKN). The development of this new capital entails addressing numerous aspects, one of which is the economic dimension. To stimulate economic growth in this context, Government Regulation No. 12 of 2023 was introduced, with one of its articles regulating the duration of Building Use Rights (Hak Guna Bangunan or HGB), allowing these rights to be held for up to 160 years. This provision raises normative conflicts with Law No. 5 of 1960 on Basic Agrarian Principles. This study aims to analyze the legal validity of building use rights in Ibu Kota Nusantara and propose a fair model for regulating the duration of such rights. The research adopts a normative legal methodology, utilizing primary and secondary legal sources. The findings of this study reveal that Government Regulation No. 12 of 2023, when examined under Lon Fuller's legal system theory, lacks validity because it does not satisfy the eight principles of legality. According to these principles, regulations must be clear and comprehensible, must not conflict with other laws, and must not be frequently amended. Furthermore, the ideal regulatory model for the duration of Building Use Rights should align with the values of Pancasila (Indonesia's foundational philosophical framework) and consider the rights of citizens. This alignment is essential to achieving the objectives of agrarian law administration, which emphasizes the optimal utilization of land, water, and natural resources for the benefit of society at large.

Keywords: Building use rights, Nusantara Capital City, normative conflict

Introduction

Indonesia as an Agrarian Country and the Critical Role of Land in National Sovereignty Indonesia, as an agrarian nation, recognizes the pivotal role of land in the governance of a sovereign state. Land, being a fundamental natural resource, is indispensable for human survival and plays a crucial role in human livelihood. It even influences the advancement of a nation's civilization. Moreover, land is vital for all development activities, serving as a space for housing and business ventures. However, the availability of land is diminishing over time. Land and development are inherently interconnected and possess a social function. This means that land owned by an individual serves not only the rights of its owner but also the collective interests of the Indonesian people. Consequently^[1], land use should not solely adhere to the rights holder's preferences but must also consider societal needs. This duality gives land a dual function as both a social asset and a capital asset.

- As a social asset, land binds social unity among Indonesian communities, sustaining life and its continuity.
- As a capital asset, land serves as a crucial economic factor in development, conferring economic value.

Land regulation in Indonesia

Following independence, Indonesia initially retained the Western legal framework, particularly the Civil Code (KUHPerdata), which was characterized by liberal and individualistic principles. However, on September 24, 1960, Indonesia adopted a national land law under Law No. 5 of 1960 on Basic Agrarian Law (UUPA).

Types of land rights

Article 16(1) of the UUPA classifies various land rights, including:

1. Ownership rights (Hak Milik),
2. Cultivation rights (Hak Guna Usaha),
3. Building use rights (Hak Guna Bangunan or HGB),
4. Usage rights (Hak Pakai),
5. Lease rights (Hak Sewa),
6. Rights to open land,
7. Rights to harvest forest products,
8. Other rights as legislated, and
9. Temporary rights as stipulated in Article 53, such as:
 - Mortgage rights (Hak Gadai),
 - Profit-sharing rights (Hak Usaha Bagi Hasil),
 - Lodging rights (Hak Menumpang), and
 - Agricultural lease rights (Hak Sewa atas Tanah Pertanian).

Building Use Rights (HGB)

HGB is a type of right that allows individuals or legal entities to construct and own buildings on land that they do not own. According to Article 35(1) of the UUPA, HGB is granted for a maximum period of 30 years, with possible extensions.

While not as robust as ownership rights (Hak Milik), HGB remains a strong legal right that is not easily annulled and can be defended against third-party claims. It must be registered to secure its legal standing.

HGB holders

Under Article 36(1) of the UUPA, HGB can only be held by:

1. Indonesian citizens, including both indigenous people and foreign descendants, irrespective of age.
2. Legal entities established and domiciled in Indonesia, such as limited liability companies (PT), cooperatives, foundations, state-owned enterprises (BUMN), and regional-owned enterprises (BUMD).

These provisions were originally outlined in Government Regulation (PP) No. 40 of 1996, which was later replaced by PP No. 18 of 2021. The updated regulation addresses land management rights, land rights, condominium units, and land registration.

HGB Regulations in the Nusantara Capital City Recent regulations, such as PP No. 12 of 2023, specifically govern the granting of business permits, ease of business operations, and investment facilities for entrepreneurs in Nusantara, Indonesia's new capital city. This regulation introduces unique provisions, including an extended HGB validity of up to 160 years, applicable exclusively within Nusantara.

Legal and economic implications

The coexistence of diverse HGB regulations, particularly the prolonged durations in Nusantara, has created legal uncertainty and hindered economic growth. This inconsistency undermines the legal hierarchy and raises concerns about investor confidence and adherence to foundational agrarian principles.

Objective of analysis

This study aims to evaluate the validity of Indonesia's diverse HGB policies, emphasizing the need for harmonized regulations that ensure legal certainty, foster sustainable economic growth, and align with the dual functions of land as a social and capital asset.

Method

This study employs a normative research method, utilizing primary and secondary legal materials with a literature or document study as the data collection technique. The analysis technique applied is deductive syllogism, while the interpretation uses a deductive reasoning pattern. The analysis is conducted based on a major premise, which asserts that the law in a country must have a hierarchy or level that must be adhered to by its citizens, and the government, as the rule-maker, must comply with and follow the rules that have been established. This major premise is general in nature and represents the *das sein* (the reality) of this study.

Subsequently, the major premise will be juxtaposed with the minor premise, which has a casuistic function and represents the *das sollen* (the normative ideal) of the research. This includes the legal consequences of under-the-table land sale agreements and a further review of land registration based on previous eigendom rights. Using a deductive approach, this research attempts to apply existing legal rules to specific cases. This analysis is expected to provide a comprehensive understanding of the validity of Government Regulation Number 12 of 2023.

Result and Discussion

1. The basis of policy validity for the duration of building use rights in the Nusantara Capital City

Validity refers to the legal certainty of the existence of a norm, specifically, a norm is valid when it assumes the existence of such a norm and implies that the norm possesses binding force over individuals whose behavior is governed by it. In administrative law, the term "validity" is derived from the Dutch legal term *rechtmatig*, whereas the term for unlawful actions is translated from *onrechtmatig*, which is commonly used in the field of civil law. In civil

law, the term "unlawful acts" is generally used; however, in governmental law, a distinction should be made. The term *onrechtmatig* in the context of administrative law is better interpreted as "juridical defect." Thus, a state administrative decision that is *onrechtmatig* can be understood as a state administrative decision with a juridical defect. Decisions (*beschikkingen*) can generally be divided into two categories: valid decisions (*rechtsgeldige beschikking*) and invalid decisions (*niet-rechtsgeldige beschikking*). Valid decisions do not carry legal consequences and are not elaborated further in this discussion, while invalid decisions may lead to legal consequences.

The granting of building use rights (*Hak Guna Bangunan* or HGB) to holders requires the government to establish specific criteria that must be met to become a holder of such rights. Furthermore, HGB holders are given the opportunity to extend their tenure if they meet the conditions, including:

- The subject of the right holder remains eligible.
- The land is still being used and managed effectively in accordance with the conditions, nature, and purpose of the granted rights.
- The holder complies with the terms of the rights granted.
- The land remains consistent with spatial planning.
- The land is not used for or planned for public interest, natural resources, environmental purposes, or affected by the conditions of the land and surrounding community^[2].

These criteria for extending the tenure of building use rights are stipulated under Article 37 of Government Regulation Number 18 of 2021 concerning Land Management Rights, Land Rights, Apartment Units, and Land Registration. These provisions aim to protect and respect the rights of the community associated with the building use rights while ensuring legal certainty in extending the tenure of these rights.

Government Regulation (PP) No. 12 of 2023, which addresses the granting of business licenses, ease of doing business, and investment facilities for business actors in the Capital of Nusantara, particularly in regulating the term of building use rights (*Hak Guna Bangunan*, HGB), is contradictory to the Basic Agrarian Law (UUPA) and Government Regulation No. 18 of 2021 on Land Management Rights, Land Rights, Condominium Units, and Land Registration. Additionally, this regulation does not stipulate specific criteria for extending the term of HGB rights. This is inconsistent with the ideals of national agrarian law as enshrined in the UUPA, which aims to create a Republic of Indonesia where the social and economic structure, predominantly agrarian in nature, is built upon the principle that land, water, and space, as gifts from Almighty God, play a crucial role in building a just and prosperous society^[3].

If this regulation is implemented, it may lead to land ownership inequalities in the Capital of Nusantara. Under this regulation, HGB rights on land under Land Management Rights (*Hak Pengelolaan*, HPL) can be held for one cycle of 80 years and can be extended for another 80 years if approved by the Nusantara Capital Authority. This extension process lacks specific criteria that must be met. As a result, the regulation disadvantages Indonesian citizens, as land ownership for such an extended period spanning 2 to 3 generations would be controlled by the same

HGB right holders ^[1]. Furthermore, it fails to consider the rights of Indonesian citizens, as the extension of HGB terms does not include specific requirements that need to be fulfilled for approval.

When linked to Lon Fuller's theory of the legal system, PP No. 12 of 2023 is invalid because:

a. Regulations must be formulated in understandable terms

In the context of Government Regulation (PP) No. 12 of 2023, the formulation of the provisions includes ambiguous or unclear articles. For instance, Article 19 of PP No. 12 of 2023 does not explicitly detail the mechanism for acquiring building use rights (HGB), whether all at once or over two cycles amounting to 160 years. This lack of clarity differs from the provisions in PP No. 18 of 2021, which clearly explain the procedures for extending HGB terms. PP No. 18 of 2021 specifies that an extension must be initiated before the expiration of the HGB term, and a renewal can still be conducted up to two years after the initial HGB term expires. In contrast, Article 19 of PP No. 12 of 2023 fails to provide clear guidelines regarding the procedures for extension, renewal, or acquisition of HGB rights for two cycles. This lack of detail undermines legal certainty and the comprehensibility of the regulation ^[4].

b. There must be no conflicting regulations

This principle emphasizes that the government, in drafting regulations, must carefully consider the content of the provisions to avoid overlaps or contradictions between one regulation and another. In the case of building use rights (HGB), the conflicting provisions highlight this issue. At a higher regulatory level, the Basic Agrarian Law (UUPA) stipulates that HGB can be granted for a maximum of 30 years and extended for an additional 20 years. However, PP No. 12 of 2023 states that HGB can be granted for up to 160 years, divided into two cycles: the first cycle grants HGB for 80 years, and the second cycle, subject to agreement, can extend it for another 80 years ^[5]. This stark discrepancy between the UUPA and PP No. 12 of 2023 creates a fundamental conflict. Such inconsistencies undermine legal certainty and coherence within the legal framework, reflecting a lack of alignment and careful consideration in regulatory drafting.

c. Regulations should not be frequently changed

This means that a regulation must be forward-looking and not merely temporary, addressing only specific social phenomena. This is essential to ensure legal certainty. Frequent changes to regulations lead to a lack of consistency and reliability, ultimately eroding legal certainty.

The lack of stability in regulations hampers the creation of a just regulatory framework, particularly in the context of governing the duration of building use rights (HGB). A model that upholds fairness in regulating such rights should aim for consistency and predictability to safeguard legal certainty and public trust in the legal system ^[6].

A fair model for the duration of building use rights (HGB) in the Nusantara Capital City

Justice in the context of land ownership and use implies prioritizing public interests and ensuring that land is controlled and utilized for the prosperity of the people. Setting the maximum duration of building use rights (HGB)

at 160 years creates an imbalance in land ownership and utilization. Such prolonged control of land is likely to benefit only those with higher economic status, particularly as HGB land ownership can be granted to private entities. This raises concerns about potential commercialization by private entities through long-term leases of up to 160 years ^[7]. Moreover, the regulation of building use rights under Government Regulation No. 12 of 2023 conflicts with Law No. 5 of 1960. This inconsistency leads to legal uncertainty in the country's regulatory framework. In contrast, countries like Malaysia, the Netherlands, and Singapore have established uniform regulations regarding agrarian law. To address these issues, efforts must be made to harmonize land policies based on Pancasila, which represents Indonesia's foundational values and serves as a guiding framework for national legal development. As often emphasized by Prof. Mahfud, these fundamental values give rise to four guiding legal principles that must be adhered to in the development of laws in Indonesia.

1. Hukum National law must safeguard integration (unity and wholeness), both ideologically and territorially, in line with the goal of "protecting the entire nation and all the land of Indonesia."
2. National law must be established democratically and nomocratically, meaning it should invite participation and absorb the aspirations of the broader society through mechanisms that are fair, transparent, and accountable.
3. National law must be able to create social justice, meaning it should bridge the gap between the strong and the weak and provide special protection for the weaker groups when dealing with stronger groups, whether from within or outside the country. Without special legal protection, the weaker groups will inevitably lose when left to compete or struggle freely against the stronger groups. Moreover, the law must ensure civilized religious tolerance among adherents. As a domain that concerns the essential needs of the public, there must be a direction for reform and harmonization of agrarian laws in Indonesia, including actions such as:
 - a. Conducting a review of various laws and regulations related to agrarian matters to synchronize policies across sectors.
 - b. Implementing the restructuring of land control, ownership, use, and utilization in an equitable manner, with particular attention to land ownership for the people.
 - c. Conducting land data collection through comprehensive and systematic inventory and registration of land control, ownership, use, and utilization as part of implementing land reform.
 - d. Resolving conflicts related to agrarian resources that arise while simultaneously anticipating the emergence of new conflicts.
 - e. Strengthening institutions and their authority to carry out agrarian reform implementation and resolve conflicts related to agrarian resources.
 - f. Strengthening institutions and their authority to support the implementation of agrarian reform and resolve conflicts related to agrarian resources.
 - g. Striving earnestly to secure funding for the implementation of agrarian reform programs ^[8].

Indonesian land regulations remain unstable and are often subject to changes driven by the desires and interests of those in power. Land regulations should ideally be more responsive in addressing issues related to land regulation. A responsive legal framework also means that the fundamental values of the Indonesian nation, as embodied in Pancasila and the 1945 Constitution of the Republic of Indonesia (UUDNRI), must be the core of land policy. The foundation for the formulation of a legal system and its enforcement depends on a stable, consistent, and sustainable legal policy, as outlined by Bagir Manan, including:

- a. A Unified National Legal System
- b. The National Legal System Must Be Built on Pancasila and the 1945 Constitution of the Republic of Indonesia
- c. No Legal Discrimination Granting Privileges to Individuals, Groups, Ethnicities, Races, or Religions
- d. Lawmaking Must Consider the Diversity of the Indonesian Nation
- e. Customary Law and Traditional Practices Are Recognized as Part of the National Legal System as Long as They Continue to Exist and Are Preserved in Society
- f. The Formation of Laws Must Be Based on Public Participation
- g. Laws Created and Enforced Must Promote Public Welfare and Social Justice for All Indonesian Citizens, Enabling a Democratic and Self-Reliant Society.

The spirit of agrarian reform lies in the unification of laws capable of accommodating the diverse interests of communities across various regions into a new regulation aligned with the nation's aspirations. A recurring challenge that arises is the issue of injustice. Therefore, the state must be able to provide a sense of security and fairness for all parties. Achieving a just decision is undoubtedly challenging. However, Indonesia has defined justice by adhering to Pancasila and the Constitution of the Republic of Indonesia of 1945, which encompass the values of the nation's struggle. Specifically, the fifth principle of Pancasila, "Social Justice for All the People of Indonesia," serves as a foundation implemented in the 1945 Constitution regarding state governance in the economic field. This governance reflects economic democracy aimed at achieving the greatest prosperity for the people. This is the core meaning of social justice, interpreted as the realization of a just and prosperous society.

Conclusion

1. Validity of Building Use Rights Duration in Nusantara Capital City

The regulation on the duration of building use rights (HGB) in Nusantara Capital City allows ownership for up to 160 years through a two-cycle mechanism, as stipulated in Government Regulation No. 12 of 2023. When assessed under Lon Fuller's legal system theory, this regulation is deemed invalid for violating the principles of:

- **Drafting rules that can be understood:** The provisions lack clarity and are difficult to interpret.
- **No conflicting rules:** The regulation conflicts with higher laws such as Law No. 5 of 1960, which limits HGB ownership to 30 years, extendable for an additional 20 years.

- **Stability of regulations:** Frequent changes in regulations disrupt legal certainty, and overly flexible rules may lead to instability.

2. Fair regulation of building use rights duration in Nusantara Capital City

A fair regulation of the duration of HGB in Nusantara Capital City must be grounded in Pancasila values and aimed at the prosperity of society. However, the provision for 160 years of HGB ownership poses risks of monopolization by private entities and limits land ownership distribution to only a select few.

According to Hans Kelsen's theory of justice, such regulation may fail to reflect justice because true justice, as per Kelsen, requires that regulations apply universally and not just to specific locations or contexts. The current framework risks creating inequities by disproportionately benefiting certain economic classes or regions rather than ensuring a fair distribution of land rights for all.

Recommended

1. The need for revising the duration of building use rights in Nusantara Capital City

The government should promptly revise the duration of building use rights (HGB) in Nusantara Capital City to address conflicts of norms and eliminate overlapping regulations. Aligning this regulation with higher laws will create legal certainty for all segments of society. Legal certainty not only fosters public trust but also bolsters national economic growth by providing a stable legal framework for investment and development.

2. Ensuring public welfare in regulation making

As the regulator, the government must prioritize the rights of the broader society and work toward fulfilling the mandate of the 1945 Constitution to promote national prosperity. Economic interests should not come at the expense of public rights. Striking a balance between economic development and societal welfare is essential to ensure that the benefits of policies are equitably distributed and contribute to the common good.

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