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The Contradiction of Dualism in The Position of Land Banks in Creating a Just Economy

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Abstract

This study aims to examine the contradiction of the dualism of the position of land banks in creating a just economy based on a comprehensive analysis of the provisions of the Job Creation Law and its derivative rules. This paper uses normative research methods with a literature, conceptual and comparative approach. The results of the study show that Land Banks has two positions, namely as a representative of the state and an implementer of business activities. The dualism of this position is contradictory because on the one hand it must carry out the function of public service and on the other hand consider the orientation of profit. Based on a study of the substance of the regulation of the formation of land banks, its position as the executor of business activities that are full of economic interests has a tendency to dominate more. The tendency that can be seen from the arrangement of land banks is in the form of siding with the capitalists who own capital without any effort to guarantee the rights of indigenous peoples as marginalized parties. This results in the existence of land banks ignoring efforts to create the greatest possible prosperity for the people as mandated by the constitution which should be a limit on the meaning of the right to control the state. In the end, the equitable economy that was proclaimed as the initial goal of establishing a land bank could not be achieved.

1. Introduction

As we all know, soil is essential to all human life and needs to be well managed. In the implementation of land management, especially related to the management of tenure and land rights, a land registration institution is needed to provide legal certainty between rights holders and land, transfer of land rights, dependent rights on land, transfer of dependent rights and others.[1] Therefore, it needs to be regulated by law in it. According to Surojo Wignyodipuro, there are 2 things that cause soil to have a very important position in life, namely because of its nature and because of the facts. First, because of its nature, that is, land is the only object of wealth that, even though it experiences a fixed state in its condition, can even become more profitable. An example can be illustrated when a fire event occurs on a piece of land, the land will not disappear because after the fire is extinguished, the soil will reappear in the form of the original

[1] Abdul Jabar. (2020). *Pengantar Hukum Agraria Di Indonesia*. Surabaya: Penerbit Buku Pena Salsabila, p. 37

soil. In addition, it can be exemplified if it is hit by a flood, after the water recedes, it begins to reappear as a piece of land that can be even more fertile. Second, because of the fact or fact that the land is the place where the fellowship lives, gives livelihood to the fellowship, and the place where the members of the fellowship who die are buried. According to Ter Haar, the close relationship between human beings and their land is said to be a relationship that is felt and rooted in his mind, "Participeren denken" can be considered as the legal relationship (rechts betrekking) of mankind towards his land.[2] The main joint that can be the constitutional basis for the country's economy and the state's control over natural resources, namely the earth and water and the natural resources contained therein, are used as much as possible for the prosperity of the people, namely Article 33 of the 1945 Constitution of the Republic of Indonesia. In Article 33 of the 1945 Constitution, there are several elements that need to be explained, namely "state control" has the meaning that the branches of production are important and control the lives of many people. The element of "for the greatest prosperity of the people" is the goal of natural resource management, and the element of "the right to control the state", According to Bagir Manan, the right to control the state cannot be released with the greatest possible goal of the people's prosperity.[3] According to the Constitutional Court, all provisions, namely five paragraphs in Article 33 of the 1945 Constitution, must be understood as a unanimous unity and with the spirit to always make the 1945 Constitution a living constitution.[4] In addition, in Indonesia there are regulations that regulate land acquisition, namely Law Number 2 of 2012 concerning Land Acquisition for Development for the Public Interest which is hereinafter referred to as the Land Acquisition Law, Law Number 11 of 2020 concerning Job Creation, and Law Number 41 of 2009 concerning the Protection of Sustainable Food Agricultural Land.

The Indonesian state has a body formed by the government to carry out agrarian reform and land redistribution to the community, namely the "land bank". The government plays a role in collecting land and giving it back or rewarding the community with strict regulation. According to Article 125 paragraphs (1), (2), and (3) of the Job Creation Law, the Central Government established a Land Bank which is a special body that manages land. The organ structure of the Land Bank consists of a Committee, a Supervisory Board, and an Implementing Body. Based on this, the Land Bank Agency is a special body (sui generis) which is an Indonesian legal entity formed by the Central Government which is given special authority to manage land. The Land Bank has the function of carrying out planning, acquisition, procurement, management, and distribution of land in the context of a just economy, including for the public interest, national development, and agrarian reform. According to Article 126 paragraph (2) of the Job Creation Law, a minimum of 30% of state land is allocated to the Land Bank for agrarian reform. Land Banks has two main objectives in managing its land, namely to realize a fair economy and support investment. In carrying out the first objective, the

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[2] Ter Haar. (2008). *Asas-asas dan susunan hukum adat*. Jakarta: Pradnya Paramitha, p.71.

[3] Bagir Manan. (2004). *Menyongsong Fajar Otonomi Daerah. Cetakan III*. Yogyakarta: PSH FH UII Press, p. 233

[4] Wibowo, S. (2015) "Memahami Makna Pasal 33 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Perihal Penguasaan Oleh Negara Terhadap Sumber Daya Alam." *Fungsional Perancang Peraturan Perundang-Undangan*. Mataram: Kantor Wilayah Kementerian Hukum dan HAM, p. 4-6

Land Bank ensures that at least 30% of its land is used for agrarian reform. However, this is contrary to the second goal which supports investment that can come from within or outside the country. The existence of these two conflicting objectives shows that policymakers ignore Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia concerning the use of natural resources for the prosperity of the people. Supposedly, lawmakers must focus on only one goal so that land can be used as much as possible for the prosperity of the Indonesian people. However, the presence of the Land Bank should be able to provide land for the public interest, not only for foreign investment or elite interests. On October 5, 2020, Law No. 11 of 2020 concerning Job Creation was approved, which reaped positive and negative reactions from various parties. Therefore, it is very important for us to study together the purpose behind the drafting of this law from the perspective of agrarian law, especially in relation to the Land Bank which is also a matter of debate. The development of the Land Bank will be a challenge for the government that established the land management institution. Some of the challenges faced by the Land Bank include the following: First, between investment interests or fair economic interests in the aspect of land provision and distribution, it must be prioritized appropriately. Second, there will be an overlap of authority between the Land Bank and the Minister responsible for land or the Head of the Land Office / Head of the Land Regional Office. Third, the hope to reduce the swelling of cases in the Court due to objections to compensation that occurs from the process of providing land for the public interest must be achieved optimally. The embryo of the formation of this land bank should have started since the development of industrial estates in Indonesia in 1973, namely from the Jakarta area where the Jakarta Industrial Estate Pulo Gadung (JIEP) was established, then followed in 1974 with the construction of the Surabaya Industrial Estate Rungkut (SIER). When viewed from the perspective of the goal of increasing economic growth in a region, the government's way of developing an industrial estate is the right way to increase the economy and investment in the region. The concept of land banks began to be initiated in western countries since the 1700s and then began to be adopted to be applied in other countries in Indonesia, including Indonesia.[5]

In the explanation of the land bank above, it can be seen that land issues related to land banks are very complex. Therefore, it can be concluded that the establishment of a land bank in Indonesia is very important. In addition to being based on the constitution, the establishment of the land bank aims to secure the implementation of the great state mission, namely utilizing the earth and water as well as natural resources for the welfare of the people, as mandated by Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Although the discussion of Land Acquisition in the Land Bank only discusses the need for land for development in the public interest, it is important to expand the discussion so that the process of forming a land bank increasingly upholds its importance. Therefore, the findings recommend a more detailed and comprehensive study related to the position of land banks in creating a just economy for the maximum prosperity of the people as mandated by the constitution. Based on a search of literature sources, the author found one previous research material that will be used as a reference

[5] Kementerian Keuangan Republik Indonesia. Model Bisnis Bank Tanah di Indonesia Guna Percepatan Pembangunan. From *https://www.djkn.kemenkeu.go.id/artikel/baca/10609/Model-Bisnis-Bank-Tanah-Di-Indonesia-Guna-Percepatan-Pembangunan.html* . (Diakses 7 September 2024)

and comparison in writing this research, namely in the 2021 Journal by Nila Erdiana, Budi Santoso and Muji Hafidh Prasetyo with the title "The Existence of Land Banks Related to Land Acquisition Based on the Job Creation Law" which raises the discussion related to Land Acquisition reviewed based on the Job Creation Law and Regulations Other. In the discussion of this journal, it discusses more about the legitimacy of the establishment of the Land Bank, how the structure of the Land Bank organ, the nature of the duties and authorities of the Land Bank, and the explanation of the source of wealth of the Land Bank. This study offers a more critical and in-depth analysis of potential conflicts and broader implications of the existence of Land Banks, especially in relation to the constitutional mandate of people's prosperity, the concept of state control over land, and the rights of indigenous peoples.

2. Research Methods

This article applies a type of normative legal research with the existence of conflict norms and ambiguity of norms. The research approach is literature research (Statue Approach) with a conceptual approach, namely the concept of state control over land and the concept of a just economy and the Comparative Approach approach by comparing the provisions of the land bank with Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles was formed, better known as the Basic Agrarian Law, commonly referred to as UUPA related to the revival of the verclaring domein. The source of legal materials used is related to primary legal materials through laws and regulations by reviewing laws related to issues such as the Job Creation Law and UUPA and secondary legal materials in the form of expert views. The research in this article uses the technique of collecting legal materials through literature study with the study and processing of various literature, starting with conducting an inventory by citing and reviewing laws. Then the legal materials obtained were collected for legal materials. After that, process and analyze by providing legal arguments in accordance with the logic of legal thinking. Furthermore, legal facts are outlined in a qualitative descriptive form so as to produce a logical conclusion related to the problem carried out by the research. The direction of this research is aimed at an in-depth and critical analysis of the existence and operation of Land Banks in Indonesia from the perspective of agrarian law, with a main focus on the potential conflicts between the constitutional mandate for the prosperity of the people and their operational functions that can be influenced by economic interests.

3. Results and Discussion

3.1 Position of Land Banks Based on the Job Creation Law and Other Derivative Rules

Soil as a physical object/component found on the earth's surface that includes all natural substances that are above, in, or underneath, including rocks, water, plants, animals, and the air that surrounds it. This soil has an important role in the ecosystem because it is a place for the growth and development of various types of vegetation, a habitat for various types of living things, and also plays a role in the water and nutrient cycle. Land can be said to be an important capital for a country. Because of the importance of this land, the state participates in the regulation of the land that regulates and exists in it. This is based on Article 33 paragraph (3) of the 1945 Constitution which states that the earth, water, and natural resources contained in it are controlled by the state and used

for the greatest possible prosperity of the people. In implying the realization of Article 33 paragraph (3) of the 1945 Constitution, Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles was formed, better known as the Basic Agrarian Law, commonly referred to as UUPA. If reviewed based on Law Number 5 of 1960 concerning UUPA, Article 1 defines Land as the surface of the earth with all objects on or in it, or below it and air that is of interest to human life and other living things. Various mechanisms and regulations issued by the government to regulate land acquisition.[6]

The first regulation regarding land acquisition in Indonesia is Law Number 2 of 2012 concerning Land Acquisition for Development for the Public Interest, hereinafter referred to as the Land Acquisition Law. Based on Article 1 number 2 of the Land Acquisition Law, it is explained that Land Acquisition is a land acquisition activity with a method of providing decent and fair compensation to the right party. Along with the development of the times and clarifying land arrangements, on October 5, 2020, the House of Representatives has passed the Job Creation Bill proposed by the Government to become Law Number 11 of 2020 concerning Job Creation. If reviewed based on Article 122 of the Job Creation Law, it has undergone changes, deletions, and stipulations of several rules that had previously been regulated in the Land Acquisition Law and Law Number 41 of 2009 concerning the Protection of Sustainable Food Agricultural Land. Regarding the land sector, the Job Creation Law also includes provisions related to the existence of Land Banks in Indonesia. The previous government had set a target that the Land Bank would be formed in 2021. However, preparations still face uncertainty because the Draft Government Regulation on Land Banks has not yet been approved as a Government Regulation.[7] The formation of the Land Bank is a form of implementation of land acquisition in an analytical manner which is like abandoned land that is considered to have potential for future development. With this land bank, the central or regional government can be able to acquire and collect land for short-term and long-term strategic purposes. Broadly speaking, the Land Bank can be considered as a representation of the government in providing land that will be used for future purposes. Thus, conceptually, the Land Bank has several functions, namely as an institution that collects land (land keeper), as a guarantee of land for future development purposes (land guarantee), as a party that manages land (land purchaser), and as an institution that distributes land for development purposes (land distributor). The Land Bank can function as an efficient and effective tool to implement various land policies, as well as support area development and supervise land procurement fairly in the development process. If analyzed based on the fact that the existence of the Land Bank can overcome a number of complex problems related to land availability, such as providing government land reserves for various future development purposes, saving funds from the State Budget/APBD, reducing controversy in the land acquisition process, and reducing the negative impact of land liberalization, including limiting illegal speculative activities related to land.[8]

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[6] Ganindha, R. (2016). Urgensi pembentukan kelembagaan bank tanah sebagai alternatif penyediaan tanah bagi masyarakat untuk kepentingan umum. *Arena Hukum*, *9*(3), 442-462.

[7] Roestamy, M. (2017). Procurement of Land in Legal Sociological Perspective. *JURNAL ILMIAH LIVING LAW*, *9*(1)..

[8] *Ibid.*

Land Banks, if reviewed based on their types, can be divided into three, namely Public Land Banks, Private Land Banks, and Mixed Land Banks. Public Land Bank is a land bank whose implementation provides public services whose regulations are under the control of the government, as well as involving the public and are independent. These Public Land Banks are classified into two types, namely Commercial Land Banks and Special Land Banks. The Public Land Bank has authority over undeveloped and abandoned land, has the task of controlling land and distributing land for all types of land use without previous use specifications for the region. In carrying out its activities, it is directly controlled by public bodies that aim to control the growth rate of the city, regulations on land prices, and land use mechanisms. The Special Land Bank has a role in special areas, including in urban development, housing for the underprivileged, public facilities, industrial development, and green open space. The second type of bank is the Private Land Bank. This Private Land Bank in its implementation involves the role of the private sector. The main purpose of the existence of this Private Land Bank is to seek profits from the income of a contract or long-term lease and increase the value of land. The implications that have been carried out from this Private Land Bank are those engaged in investment, private contractors, industrial estates and others. The third type of bank is the Mixed Land Bank. Mixed Land Bank was formed to get around capital limitations, but while still maintaining the public interest.

The establishment of Land Banks in Indonesia has both positive and negative impacts. If reviewed based on the urgency of the establishment of this Land Bank, there is a land reserve for government needs. The presence of the Land Bank is very meaningful for the availability of state-owned land. The role of the Land Bank is as an institution that stores government land stocks for various purposes, especially in the context of development. With the transfer of land collection and storage functions, the Land Bank can provide land for the government whenever needed. This is important because the government should have sufficient land supply to facilitate the implementation of development in various sectors in the future, especially for the public interest. In carrying out its duties so far, the government has used the Land Acquisition Law as a legal basis to obtain the land needed in development projects for the public interest. This public interest includes the common interests of the people, in line with the interests of the nation and state, by considering social, political, psychological, and national defense and security aspects based on the principles of National Development, National Resilience, and Archipelago Insight.[9] If reviewed based on the position of the Land Bank based on the law, in principle, land acquisition for the public interest must comply with the provisions of the Land Acquisition Law Jo Job Creation Law and the Land Acquisition Implementation PP. Based on the review of Article 1 number 2 of the Land Acquisition Law along with Article 1 number 2 of the Government Regulation on the Implementation of Land Acquisition, Land Acquisition refers to the act of preparing land, which is carried out by providing reasonable and fair compensation to the party who has the right. As stated in Article 36 of the Land Acquisition Law which has been amended by Article 123 of the Job Creation Law together with Article 76 paragraph (1) of the Government Regulation on the Implementation of Land Acquisition, this compensation can be in the form of: money; soil as a substitute; resettlement; share ownership; or in other forms that have been mutually agreed.

[9] Al-Zahra, F. (2017). Melacak Landasan Hukum Pengelolaan Aset Tanah Negara melalui Konsep Bank Tanah. *AL-IHKAM: Jurnal Hukum & Pranata Sosial*, *12*(2), 405-428.

In Article 1 number 1 of the Land Acquisition Implementation Government, it is stated that one of the agencies that need land is the Land Bank Agency which receives a special assignment from the Central Government in the context of providing infrastructure for the public interest. If reviewed based on the article, in this case, the Land Bank Agency is a special body or commonly called sui generis which is an Indonesian legal entity formed by the Central Government which is given special authority to manage land that has been regulated in accordance with Article 1 number 19 of the Land Acquisition Implementation Government. In the Job Creation Law, 10 articles related to the Land Bank have been inserted, namely from Article 125 to Article 135. The explanation is as follows:

First, the legitimacy of the establishment of the Land Bank has been regulated in Article 125 paragraphs (1), (2), and (3) of the Job Creation Law which states that the Central Government establishes the Land Bank as a special body that manages land, where its wealth is the property of the segregated state. based on this explanation, the Land Bank is independent where its wealth is separated from the State to provide public services that are fully under the control of the Central Government.[10]

The regulation in the structure of the Land Bank organ has been explained in Article 130 of the Job Creation Law which explains the Committee, the Supervisory Board, and the Implementing Body. The Land Bank Board Committee is chaired by the minister in charge of land and consists of relevant members, in accordance with Article 131 paragraph (1) of the Job Creation Law. The appointment of the Chairman and members of the Committee is carried out through a Presidential Decree based on the recommendation of the minister in charge of land, as stipulated in Article 131 paragraph (2) of the Job Creation Law. The Supervisory Board of the Land Bank Agency consists of a maximum of seven members, consisting of four members who have professional backgrounds and three members who are directly elected by the Central Government. Candidates from professional backgrounds must be submitted at least twice the need through a selection process by the Central Government, and then submitted to the House of Representatives for selection and approval. Meanwhile, the Implementing Agency of the Land Bank Agency consists of the Head and Deputy, as explained in Article 133 paragraph (1) Job Creation Law. The number of deputies is determined by the Chairman of the Land Bank Agency Committee, and the Head and Deputy are appointed and dismissed by the Chairman of the Land Bank Agency Committee. The appointment and dismissal of the Head and Deputy can also be submitted by the Supervisory Board of the Land Bank Agency.

Furthermore, in the Regulation on the function of the Land Bank which is regulated in Article 125 paragraph (4) of the Job Creation Law Jo Article 3 paragraph (1) in the Land Bank RPP which explains the implementation of planning, acquisition, procurement, management, utilization, and distribution of land. The Land Bank ensures the availability of land to achieve economic justice in the context of public interest, social interest, national development interest, economic equity, land consolidation, and agrarian reform, as stipulated in Article 126 paragraph (1) of the Job Creation Law. The

[10] Erdiana, N., Santoso, B., & Prasetyo, M. H. (2021). Eksistensi Bank Tanah Terkait Pengadaan Tanah Berdasarkan Undang-Undang Cipta Kerja. *Notarius*, *14*(2), 930-942.

available agrarian reform land covers at least 30 percent of the total state land allocated to the Land Bank, in accordance with Article 126 paragraph (2) of the Job Creation Law. Based on Article 127 of the Job Creation Law which states that the Land Bank Agency in carrying out its duties and authorities is transparent, accountable, and non-profit. Furthermore, in Article 128 of the Job Creation Law which concerns the source of income of the Land Bank, that the source of income of the Land Bank can be sourced from the State Revenue and Expenditure Budget (APBN) and the participation of capital from the state and other sources that have legality in accordance with the provisions of laws and regulations. Furthermore, based on Article 129 paragraphs (1) and (2) of the Job Creation Law regarding the right to manage land. In the article, it is explained that land managed by the Land Bank is given management rights in the form of Building Rights (HGB), Business Use Rights (HGU), and Use Rights. Regarding the position of the Land Bank in the Job Creation Law, it is already contained in Articles 125 to 135 which regulates the Land Bank itself.

3.2 Contradiction of the Dualism of the Position of Land Banks

3.2.1 Land Banks Hurt the Concept of the Right to Control the State

In carrying out its existential function, there is a dualism of position owned by the Land Bank. First, the Land Bank has a position as a representative of the state in exercising the Right to Control the State over land for the greatest possible prosperity of the people as mandated by the constitution through the substance of Article 33 paragraph (3). Second, when viewed from the functions and authority of the Land Bank as a whole in the Job Creation Law, this body also has a position as the executor of business activities. The contradiction between the two positions is obvious when on the one hand, Land Bank must strive to create prosperity for the people. Meanwhile, on the other hand, it must also consider economic aspects that are closely related to the profit-seeking orientation in its position as an implementer of business activities. In the end, this dualism of position leaves room for concern that on a practical level there will be one of the more dominant positions. This domination will not be a problem if it is carried out to achieve the prosperity of the people. However, if we look further at the entire construction of the article on the establishment of the Land Bank in the a quo law, the tendency that seems to occur is precisely the dominance of the position of the Land Bank as the executor of business activities. Juridically, the establishment of the Land Bank cannot be separated from the meaning of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as the main basis for its existence. Article a quo mandates that:

"The earth and water and the natural resources contained in it are controlled by the state and used for the greatest possible prosperity of the people" On the basis of the phrase "controlled by the state", the establishment of the Land Bank was carried out with the authority to manage the land so that it was considered able to represent the presence of the state as well as implement the rights of control it had. However, the reading of the constitutional mandate cannot be carried out separately. The Right to Control the State (HMN) implied in the a quo article actually comes from the right of the Indonesian nation to land. However, the implementation of the management of all common land is not possible to be carried out independently by the entire Indonesian nation. Therefore, the Indonesian nation as the holder of the right and bearer of the mandate then handed over power at the highest level to the Indonesian state which became the organization

of power of all the people. This means, HMN is essentially a form of assignment and exercise of the nation's authority which implies elements of public law.[11] In other words, HMN is a form of delegation of public authority from the nation's rights so that the limit of the meaning of these rights is also in the form of "used for the greatest possible prosperity of the people".[12]

Judging from the provisions of Article 129 paragraph (1) of the Job Creation Law, for land managed by the Land Bank attached to the Management Rights (HPL). The manifestation of HMN through HPL is full of concerns in the context of the reality of its use which has the potential to be used to exploit lands for the benefit of certain groups. When studied based on UUPA as a lex generalist in land regulations, the concept of HMN has been clearly described through Article 2 paragraph (2). The provision states that HMN includes the authority for the state to:

a. "Regulate and administer the allocation, use, supply and maintenance of the earth, water and space;
b. Determining and regulating the legal relationships between people and the earth, water and space,
c. Determine and regulate legal relationships between people and legal acts related to the earth, water and space."

If studied carefully, the above provisions do not explain the existence of HPL at all as a form of authority on the basis of HMN. The UUPA and the National Land Law basically only recognize several levels of land tenure rights, which include the rights of the Indonesian nation which are civil and public; The Right to Control the State with public elements; Customary rights that are civil and public, and land rights that are civil.[13] This shows that the HPL that is now owned by the Land Bank is a new form of authority for the state which was introduced through the a quo law and implemented through the existence of the Land Bank. However, the existence of HPL actually caused a shift in the meaning of HMN, which should be public, to seem to also enter the civil realm.
The problem of HPL that distorts the original intent of the formulation of HMN can be seen when Article 137 paragraph (1) of the a quo Law stipulates that there are many parties who can be granted management rights, including:

"… Central Government Agencies; Regional Government; Land Bank Agency; State-Owned Enterprises/Regional-Owned Enterprises; State/Regional Legal Entities; or a **Legal Entity appointed by the Central Government".**

The existence of the phrase "Legal Entity appointed by the Central Government" is a form of legal uncertainty that can be used as a gap for political interests to enter it. It is possible that the legal entity in question also includes privately owned legal entities that are full of economic interests as long as they are directly appointed by the Central

[11] Kafrawi, R. M. (2022). Kajian Yuridis Badan Bank Tanah Dalam Hukum Agraria Indonesia. *Perspektif Hukum*, 109-138.

[12] Harsono, Boedi. (2008) *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria Isi dan Pelaksanaannya,* Jakarta: Djambatan, 2008

[13] Wardhani, D. K. (2020). Disharmoni Antara Ruu Cipta Kerja Bab Pertanahan Dengan Prinsip-Prinsip UU Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria (UUPA). *Jurnal Komunikasi Hukum (JKH)*, *6*(2), 440-455.

Government to carry out the authority of HPL. This has a very crucial impact considering that HPL is a form of delegation of part of HMN to the right holder. When HPL is used haphazardly and focuses on obtaining profits, it will ultimately simultaneously harm the essence of HMN which is aimed at creating the greatest possible prosperity of the people.

The issue of HPL which is alleged to harm the essence of HMN seems to be even clearer when Article 129 paragraph (2) of the a quo Law emphasizes that on top of HPL can stand the Right to Use (HGU), the Right to Use (HGB) and the Right to Use (HP). The formulation of the article is contrary to Article 28 paragraph (1) of the UUPA which in essence contains the principle that HGU can only be given directly by the state and not through its representation, in this case in the form of a Land Bank. In addition, Article 40 of the Land Bank Agency also contains provisions that the transfer of land rights is carried out on the basis of an agreement. The implication of this provision is that the determination of the land use period will be freely extended as long as it meets the elements of agreement between the parties as stipulated in the civil law. Furthermore, the HGU on HPL can also be extended and renewed with an uncertain period of time and not directly stipulated in the a quo law. This is very contrary to the UUPA which expressly limits the extension period of HGU to a maximum of 20 years. Not only that, the uncertainty of the HGU term in the a quo law has also deviated from the mandate of the Constitutional Court Decision Number 21-22/PUU-V/2007 in testing Law Number 25 of 2007 concerning Investment which states:

"… for land controlled by the state, the equal distribution of land rights is carried out with a policy of equal opportunity to obtain HGU, HGB and Right to Use within a certain period of time that is not too long"[14] In addition to the existence of HPL, deviations in the meaning of HMN also occur when looking back at the provisions of Article 7 of the Land Bank Agency Government which basically states that the acquisition of land by this agency can come from land that has no control over it. This provision seems as if it wants to revitalize the verklaring domiin which was enacted during the colonial era and had previously been revoked based on the UUPA. This is also contrary to the meaning of HMN that has been given by the Constitutional Court as the sole and the highest interpreter of the constitution in Decision Number 001-021-022/PUU-I/2003 which emphasizes that HMN means a policy to regulate, manage, manage and supervise by referring to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and is not interpreted as the state owns land.[15]

This form of covert revitalization of the domein verklaring will ultimately further distance the state from the mandate of the constitution in creating the greatest possible prosperity for the people. Moreover, based on data from the National Land Agency of Bali Province, there are 58% or around 1.1 million out of 1.9 million land plots on the

[14] Halaman 256 Putusan Mahkamah Konstitusi Nomor 21-22/PUU-V/2007 tentang Pengujian atas Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal

[15] Lahilote, H. S., Irwansyah, I., & Bukido, R. (2021). Pengawasan terhadap Bank Tanah: Urgensi, Kewenangan, dan Mekanisme. *Undang: Jurnal Hukum*, *4*(1), 191-211.

Island of the Gods that have not been equipped with a certificate.[16] These land plots are actually land belonging to customary villages whose existence has not been recognized by legal institutions. The disparity between the reality of the still high obstacles to community land certification and the birth of the authority of the Land Bank in acquiring land through land that does not have control over it causes on a practical level that it is possible that land that should belong to indigenous peoples will be taken over by the agency. Although this narrative is built by the author only relying on data on indigenous peoples in Bali, the same problem certainly still occurs outside the island of the gods considering the large number of indigenous peoples in the country. This condition further shows that HMN has been read separately from its essence in order to create the greatest prosperity of the people.

3.2.2 Marginalization of Indigenous Peoples' Interests under the Pretext of Public Interest

The authority possessed by the Land Bank is specifically aimed at ensuring the implementation of a just economy for the sake of the public, social, national development, economic equity, land consolidation and agrarian reform. Theoretically, according to Aristotle, the concept of justice should be seen as distributive justice based on the distribution of goods and services according to the position owned by each party.[17] The theory of justice adheres to the principle of equality on the basis of consideration to give the same portion to the same party, and vice versa to give different portions to different parties.[18] When associated with the existence of the Land Bank, the equitable economic situation that is to be aimed at has not been clearly regulated. As a form of effort to create proportional conditions, Land Bank provisions should reflect the partiality of vulnerable groups that are weak in terms of economy and society, one of which is indigenous peoples. However, there is not a single article formulation in the establishment of the land bank body that explicitly regulates the recognition and protection of the rights of indigenous peoples. With its vulnerable position and not followed by the strengthening of protection in terms of regulations, it is not impossible that in the end indigenous peoples increasingly become marginalized parties in the context of land management under the pretext of public interests which are actually more loaded with economic and political interests.

The contextualization of the normative establishment of land bank bodies included in the Job Creation Law causes its presence to be inseparable from the reality of the main agenda of the formation of the law, namely increasing investment and ease of doing business. The recognition of customary land rights belonging to indigenous peoples is often defeated by the interests of certain groups and parties which in the context of land banks enter as the political and economic agenda behind its formation. The tendency of

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[16] Kompas. Com (2011) "Sertifikasi Tanah di Bali Temui Kendala" from,https://regional.kompas.com/read/2011/03/30/19344724/~Regional~Indonesia%20Timur (diakses 23 November 2024)

[17] Dwisvimiar, I. (2011). Keadilan dalam perspektif filsafat ilmu hukum. *Jurnal dinamika hukum*, *11*(3), 522-531.

[18] Suliantoro, B. W., & Murdiati, C. W. (2018). Konsep keadilan sosial dalam kebhinekaan menurut pemikiran Karen J. Warren. *Respons: Jurnal Etika Sosial*, *23*(01), 39-58.

land banks to take sides with people with strong economies can be seen in the contradictions of several formulations of articles on the formation of the body in the a quo law and re-clarified in the substance of the PP of the Land Bank Agency. Article 127 of the a quo law has clearly stated that the presence of land banks is non-profit or not oriented to seek profits. Through a quick reading, these provisions show that Land Bank has a clear position as a representative of the state with the main agenda, namely services to the public. However, an anomaly seems to occur when observing the formulation of the next articles which actually illustrates the orientation of seeking profits for the Land Bank Agency.

Article 128 of the a quo Law contains a provision that one of the sources of wealth from the Land Bank Agency is capital participation, which is further described in Article 26 paragraph (5) of the Land Bank Agency Government that this body can receive payments in the form of capital participation in land use cooperation with other parties. In addition, Article 14 of the Land Bank Agency stipulates that the use of land as one of the functions of the Land Bank can be carried out with a cooperation scheme with other parties through buying and selling, leasing and business cooperation. Each of the schemes mentioned can in essence provide profits and is not in line with the non-profit nature of the schemes it proclaims. Not only that, the provisions that also emphasize the position of the land bank as the organizer of business activities can be seen in Article 128 letter d which shows that there is legal uncertainty regarding "other legitimate sources" as one of the sources of wealth of this entity. This provision can be a "new entrance" for investors and capital owners of land liberalization actors by "donating" the funds they have for the operational interests of the Land Bank so that it can influence the policy-making process and decisions by the implementing body in land management.

On a practical level, the implementation of the provisions of the Land Bank with construction that prioritizes economic and investment aspects can be projected to erode customary rights, especially related to land rights. This projection is not a utopian narrative if it reflects on the policies that have previously been taken by the government in the fields of mining, forestry, and the use of small islands that show favor with the capitalist bourgeoisie that owns capital. Although Article 126 paragraph (1) claims that the presence of land banks is intended for the public interest and the interests of national development, these two designations are actually the main excuse that the government often uses as a space to ignore the rights of indigenous peoples. A case of neglect of the rights of indigenous peoples under the pretext of public interest occurred in 2020 against the Besipae Indigenous People in East Nusa Tenggara who were forcibly evicted by the Regional Government from the Pubabu Customary Forest.[19] The eviction from the 3,700 hectares of land is claimed to be intended for the public interest, namely in the form of livestock, plantations and tourism. According to Jan Gijssel, the determination of corridors or boundaries of the meaning of "public interest" is not easy to formulate clearly because the meaning of "interest" itself is vague (vage begrif).[20] Therefore, if the

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[19] Amindoni, Ayomi. "Masyarakat Adat Besipae di NTT yang 'digusur' dari Hutan Adat Pubabu: Anak-anak dan Perempuan 'trauma' dan 'hidup di bawah pohon'", Agustus, 20, 2020, https://www.bbc.com/indonesia/indonesia-53839101 (diakses 25 November 2024).

[20] Gijssel, J. Hoecke, M.V. *Apakah Teori Hukum Itu* (Terjemahan B. Arief Sidharta). (Bandung: Fakultas Hukum Universitas Parahyangan., 2000

phrase is formulated into a legal norm, it will cause the norm to become vague (vage normen). If it is associated with the reality of its implementation, the public interest pretext that is often used by the government in the context of land acquisition is contrary to the situation of the community who directly experienced and was in the process. As in the case of the Besipae indigenous people who in the end had to live under trees and only used mats as a base and the sky as a roof as a result of the demolition of their refugee houses when they wanted to defend the customary forest that should be their right without any preparation for land relocation. Intimidation in the form of physical and verbal threats from the authorities is also often obtained by the community. Not only that, a sense of trauma was also formed as a result of three warning shots given by the authorities against him. This situation also raises questions again regarding which "public interest" is actually aimed at by the government and whether it is comparable to the marginalization of indigenous peoples who seem to be "colonized" in their own homeland. The dark portrait experienced by the Besipae indigenous people clearly reflects that even without the existence of land bank institutions, cases of neglect of indigenous peoples' rights still often occur. Especially if the Land Bank is present with all the broad authority it has and without being accompanied by explicit rules in the establishment of the Land Bank to recognize and protect the rights of indigenous peoples.

The conflict between the authority of the land bank and the absence of protection for the rights of indigenous peoples shows that there has been a neglect of the mandate of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which essentially contains provisions for the recognition of the rights of indigenous peoples. Not only that, as a member state that participated in ratifying the United Nations Declaration on the Rights of Indigenous People, Indonesia has also neglected to implement the declaration progressively which contains the right to self-determination, rights to land, territory and natural resources and participates in development for indigenous peoples.[21] In addition, Article 6 of the UUPA emphasizes that "all land rights have a social function". In relation to the social function of land, the public interest does not mean that it can urge and distort the interests of individuals and indigenous peoples.[22]

Given that the dualism of the position of the Land Bank is contradictory, it is important to consider and reaffirm the limitations in terms of conception and implementation of the right to control the state, especially in this case in contextualization as a management right that can be partially handed over to other parties. Partiality towards vulnerable groups (including indigenous peoples) should also be re-normed as a form of recognition and guarantee of the rights inherent in them. Thus, the concern of land control by financiers under the pretext of investment will be overcome and ultimately run in harmony with efforts to create a just economy for the maximum prosperity of the people desired by the constitution.

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[21] Syofyan, A. (2012). Perlindungan Hak-Hak Masyarakat Adat Menurut Hukum Internasional. *Fiat Justitia Jurnal Ilmu Hukum*, *6*(2), 1-19.

[22] Rejekiningsih, T. (2016). Asas fungsi sosial hak atas tanah pada negara hukum (suatu tinjauan dari teori, yuridis dan penerapannya di indonesia). *Yustisia*, *5*(2), 298-325.

4. Conclusion

Land is very important for all human life and is a capital of a country. Because this land has an economic value and a use value for the community and the state, an arrangement regarding land is needed. The state participates in the regulation and control of land which has been clearly regulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Various regulations have been issued by the government, starting from Law Number 5 of 1960 concerning the Basic Law on Agrarian Affairs or commonly known as UUPA, regulations on land acquisition contained in Law Number 2 of 2012, and the existence of a new regulation that is still pros and cons in Law Number 11 of 2020 concerning Job Creation. In this Job Creation Law, there are regulations regarding Land Banks which have been regulated in Articles 125 to 135. The existence of the Land Bank plays two contradictory positions, namely as a representation of the state and the executor of business activities. Based on a comprehensive review of the content of the UUCK, the position that has the potential to be more dominating is as the executor of business activities that reflect the partiality of capital owners. This condition has injured the essence of the meaning of the right to control the state which should not be separated from efforts to create the greatest possible prosperity of the people. The absence of provisions related to the recognition and respect for the rights of indigenous peoples also shows that the land bank has failed to achieve the equitable economy that was actually proclaimed from the beginning.

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