

The Advancement of Land Law in Indonesia

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Abstract

The advancement of land law in Indonesia has a difference characteristic than other country. There are three parts in their history. The first, starting from the time of Dutch rule, complexions of Dutch rule, adat law and positive law in Indonesia. Indonesia starting and gained independence back from colonial possessions, they began doing construction of Indonesia land law based on Pancasila as Indonesia ideology of the state and the Constitution of the Republic of Indonesia Year 1945. They established Law No. 5 of 1960 on Agrarian which is born the land rights until now.

Keywords: Advancement, land law

1. Introduction

Any country which its sovereignty is recognized by other countries in the world, shall satisfy 3 (three) main conditions, namely having a territory, people and sovereignty government. Indonesia has satisfied those 3 (three) main conditions by fact (*de facto*) and by law (*de jure*). Geographically, the territory of Indonesia has characteristics amongst other archipelago state, maritime and agriculture nation. Besides, from the demographics point of view, the population of Indonesia is multicultural in nature, consisting of people with various tribes and cultures.

Such condition served as Indonesia's attractive point and coupled with potential and high in natural resources, undoubtedly, became the main reasons for the Dutch to occupy the territory of Indonesia for a very long time and then followed by United Kingdom and Japan for relatively short period of time, mainly to take the natural resources of Indonesia. Occupancy of the Dutch in Indonesia influenced the culture and customary law of native Indonesian people. As understood, the first law which was born and prevailed in Indonesia is customary laws, way before positive law prevailed.

Prior to the arrival of VOC for trade expansion, there was no research on customary law, and during occupancy period of VOC, due to vested interest of its colony (by opportunity politics), then Heren 17 (officials in Nederland who managed the Dutch colonial countries) issued an order to the General who led its own colonial territory to apply the Dutch law to its colonial territory (Indonesia), namely by the application of Concordance Principle (the Dutch law was applied in its colonial territory) precisely on 1 March 1621, but it was actually implemented in 1625, during De Carverter regime, which conducted pre-research and finally came into conclusion that there were customary laws existing in Indonesia. This explanation has already proven that Indonesia was rich in culture and its territory which was divided into islands.

Part of the territory of Indonesia, in this case land, has played an important role in human life because human is inseparable from land; human lives on the land and earns a living from the land. Any land issue may cause dispute, because everyone desires to take possession of the land. The perimeter for definition of land is divided into a number of opinions as follows; The definition of land in land law in juridical meaning, in accordance to article 4 of the *Undang-Undang Pokok Agraria* states that "On basis of the right of the Nation to have power as mentioned in article 2, it is determined the existence of various rights over the earth's surface, which is called land, which can be granted to and be owned by any individual, either individually or collectively with other individual as well as legal entities". Therefore the definition of land in accordance to the law shall be the earth's surface (paragraph 1), however the right to the land shall be the right to a certain part of limited earth's surface.

Land in legal meaning has an important role in human living because it may determine the existence and continuity of the legal relation and actions, whether in terms of individual or the impact to other person. To prevent land issue so that it shall not arise any conflict of interest in community; arrangement, possession and utilization of land is needed, such is called land law. The advancement of land law has passed through several periods which was recorded in history of Indonesia and based on the abovementioned backgrounds, there are several problems identified regarding to the advancement of land law on the government of Dutch East Indies and independent period.

2. Research Methods

Research is the major principle in the development of science. This research has a goal to reveal the truth systematically, methodological and consistently, including legal research. As science of *sui generis*, it shall mean that legal studies is a particular studies; legal studies shall have a distinctive character, that is normative in nature. Therefore the research methodology of legal studies shall be done using its own distinctive methods. Methods and procedures of research in natural and social studies cannot be applied in legal studies.

The research type of this studies is using normative juridical type with normative legal research method, including reviews and analyzes of legal materials and legal issues related to the problems which are being analyzed. This research is conducted to solve the incurred problem, and the result which will be achieved shall be prescription regarding to the action shall be taken to solve such problems.

The approaches applied in these studies are statute approach, historical approach and conceptual approach. Historical approach allows the researcher to gain a better understanding of the law regarding to the system or agencies or any particular legal arrangement therefore it may reduce errors, whether in understanding or application of particular agencies or provision of law. The prevailing legal system currently contains the past elements of legal system and it shall form the elements of legal system in the future.

The statute approach shall be conducted by analysing all laws and regulations relevant to the legal issues which are being studied. Statute approach will open opportunity to the researcher to study the consistency and compatibility between a statute with other statute or between statute and Constitution of Republic of Indonesia Year 1945 or between regulations and land laws.

The historical approach shall be conducted by analysing the background of which has been studied and the development of legal issues which was being faced. This research is conducted in order to track history of legal agencies from time to time. In other way, researcher must also be able to find the basic philosophy of legal dynamics from time to time. For instance, research to Constitution Law of 1945 prior to and after amendment.

The conceptual approach shall mean an approach which is started with opinions and doctrines in legal studies. This opinion and doctrines will find an idea which procreates law understandings, law concepts and law principles relevant to the legal issue which are encountered in this study.

Source of legal materials used in this study is Primary Law Materials that is legal materials having authority in nature, which means such legal material shall have authority, consisting of laws and regulations, official records and treatise.

In this research, laws and regulations as the primary legal materials shall be Law number 5 year 1960 regarding to Principle of Land Law.

Secondary legal materials shall include all publications regarding to the law which are not official documents. Publications regarding to this law shall consist text books, thesis, legal dissertation, law dictionaries, and commentaries on courts' verdict as well as legal opinion from the expert published in the journals, magazines or internet.

3. Result and Discussion

Enforceability of Land Law in the period of Dutch East Indies Government.

The reign of Governor Herman William Daendles; land politics in this period was conducted by selling lands to the big capital owners which were named *partikelir* lands.

The reign of Thomas Stamford Raffles;

The birth of land tax (*landrent*) was originating from a land sector in the reign of the United Kingdom. All land was deemed belong to the king because former kings in Dutch East Indies colonies has submitted to the United Kingdom, therefore those lands become the property of the United Kingdom government and citizen were the tenants.

The reign of Johanes van den Bosch;

In the year of 1830, during this period forced cultivation system (*culture stelsel*) was enforced. In this system the Dutch government acted as entrepreneur by exploiting natural resources of Indonesia through its citizens who were forced to plant 1 (one) particular crop needed by international market as the income source for the Dutch government, such system tormented the Indonesian people. However in the year of 1848 such system became the debate amongst scholars and community leaders, and this system was finally abolished and substituted to the liberal politics without any government's intervention.

During the VOC (*Vereenigde Oost-Indische Compagnie*) regime, some laws and regulations which were not on the side of the poor were created, amongst other:

Contingenten

In form of tax on the crops which shall be paid to the colonial.

Verplichte leverantien

The King shall deliver all crops with purchase price which has already been determined solely by the colonial. In the year 1870, Dutch government ratified agrarian law "*Agrarische Wet*". This agrarian law was drawn with the basis of western law (colonial) as well as to support the establishment of private entity. The purpose is as follows; To provide protection and rights of people's land from government's action, private entity and foreign investor, to utilize the land for public interest, to grant an opportunity for the people to acquire land with agrarian freehold right (*agrarisich eigendom*), to arrange lease activities between foreign investor and native people. The enforcement of the Agrarian Law brought impacts amongst other the expansion of plantation,

whether in the island of Java or outside Java. The sea transportations were monopolised by the Dutch transportation companies.

Rights of land in accordance to the Indonesian Civil Code or *Burgelijk Wetboek*

The arrangement of land law in Indonesia is private in nature and subject to book II regarding to the Property of Indonesian Civil Code or *Burgelijk Wetboek*. The meaning of private system is any legal subject may not create or produce new property rights other than the existing right and any right which has been determined in the laws. Therefore the property rights which are acknowledged are only the property rights as stipulated by law.

The followings are property rights under Indonesian Civil Code or *Burgelijk Wetboek*:

Bezit (position of power)

Right to utilize the State's domain lands and under the laws are named *erfelijk individueel gebruiksrecht* (hereditary individual right to use), then the owner shall be deemed to have controlling position (*bezitter*) of the State's domain lands and under the laws shall be named *Inlands Bezitrecht*.

Eigendom (freehold right)

Article 570 of the Indonesian Civil Code explains that *eigendom* right is the right to fully utilize any property in the broadest sense and to control in the broadest sense provided that there is no conflict with the laws or public regulations which has been set forth by the authorized institution (authority), and it does not disturb other people rights, except for the revocation of *eigendom* right (*onteigening*) for public interest with a proper payment in accordance to public regulations.

Person with *eigendom* right shall have authority to: utilize or enjoy the property with a limit and at the fullest; occupy the property at the fullest in the utilization of *eigendom* right with limitation as follows: shall not be utilized therefore conflicting with public laws and regulations from authorized institution; shall not be utilized therefore interfering other people's right and public order. There is an exception to this stipulation as follows: *onteigening* is for public interest; whoever having *eigendom* shall be granted proper damage and shall be conducted in accordance to prevailing laws and regulations.

The characteristics are the strongest right of land in West Law, with *eigendom* right of land, the related owner (*eigenaar*) of the land having "absolute right" of his/her land. This matter is understandable because the west civil law concept based on spirit and view of life having individual-materialistic in its nature, that is view of life prioritizing individual interest than public interest as well as property than morality.

Recht Van Opstal (Right to Build)

In accordance to article 711 Indonesian Civil Code, *optal* right is property right (*zakelijk recht*) to own houses, buildings and plants above other person's land. *Opstal* right is a right granting authority to the holder to own anything above other person's *eigendom* land provided that the land does not belong to the related *eigenaar*. *Opstal* Right, also is a property right to own buildings and plants over a plot of other person's land (Article 711 Indonesian Civil Code).

Recht Van Erfpacht (Right to Utilize)

In accordance to Article 720 Indonesian Civil Code, *Erfpacht* right is determined as property right to enjoy at the fullest (*vollegenot hebben*) of the utilization of a plot of land owned by other person, with an obligation to pay annually of some amount of money or crop (*jaarlijkse pacht*) to the owner of the land as an acknowledgement of *eigendom* right of the related owner. *Erfpacht* right is right to utilize or cultivate other person's land and gain benefit or profit at the most from such land. Other than utilizing other person's land to gain its benefit, the owner of this *Erfpacht* right is also authorize to transfer his/her right to other person, to give as a security of the loan (with mortgage) and also to transfer to his/her heirs provided that the validity of the *Erfpacht* agreement with his/her *eigenaar* is not expired yet.

Gebruik Right (*recht van gebruik*) is property right of other person's property for particular persons to acquired its own property and utilize if there is a benefit, only for his/her own and family's necessity.

The Validity of land Law in Customary Law.

Customary law in Indonesia is a group of Indonesia nation's culture values (native) which creates a norm as direction and guidance of people's behaviour. Customary law is unwritten law created from the values in culture which are conducted repeatedly and become habit. It is necessary to distinguish the meaning between culture and customary law as unwritten law; accordance to van vollenhoven, culture is unwritten habit of the people without any sanction. However, if there is sanction (legal consequences) then it will be called Customary Law. Even though it is not documented or codified and recorded in the State Gazette as well as it has specific nature of the original of Indonesia.

Exposure regarding to the Nature of Customary Law is summarized from any reference, as follows:

Koentjaraningrat in his thesis writes : Religiomanis of Natural Mind shall have elements as follows; Belief that creature, spirits and ghosts who occupy the whole universe and especially for natural phenomena,

plants, animal, human body and properties, Belief that sacred power which consists of the whole universe and especially there are extraordinary events, extraordinary plants, extraordinary animals, extraordinary properties and extraordinary sounds, Assumption that the passive sacred power will be utilized as “*magische kracht*” in various magic activities to achieve human’s wish or to reject supernatural danger, Assumption that the excess of passive sacred power in universe may cause critical condition, cause the occurrence of various supernatural dangers which may only be avoided or prevented with various restrictions.

The second matter of the basic nature of mind in Customary Law is: an aspect or distinctive types of isolated living society or in their daily life are still very dependent on the land or nature in general. In this society, there is a nature to prioritize the interest of the society: public interest will be prioritized than individual interest. In this society, the individuality of each person will be pushed backward. Society, village, rural district which always hold a decisive role, its judgment and decision may not be ignored. The village’s decision is substantial, continuously and shall be complied with respect under any circumstances.

The nature of cash in the third nature of mind is contained in Customary Law generally. The nature of cash consist of the meaning that there is a real action, a symbolic action or any statement, such legal action has finally completed at once, and conducted or stated simultaneously as required by the culture. Therefore in customary law, anything happened before and after “*timbang-terima*” in cash will exclude the legal consequences and will not be relevant or having causality in accordance to the law. The legal action which has been completed at once is a legal action in juridical meaning will stand alone. With a meaning, facts, actions before and after the performance with nature of cash shall have logical meaning to each other. The perfect example in customary law regarding to the performance having nature in cash shall be: independent sell-purchase, honest marriage, releasing right of land, adoption and et cetera.

The fourth basis nature of mind which generally contained in customary law shall be a nature of concrete. In particular nature of thinking, it is always be tried or attempted therefore any matters which are wished, preferred, desired, or done, transformed or granted any form of object, granted any visible sign, either directly or only similar with the intended object (symbols, magical objects). For example : Down payment (*Panjer*) in case sale and purchase agreement will be executed or transfer right of land; *peningset (penyangcang)* in engagement or marriage will be carried out; take revenge against someone by making sculpture, dolls or other things, then such thing will be destroyed, burnt, beheaded. Therefore the content will be something visual, visible, event it is only similar to the intended object.

The customary law system in Indonesia shall consist of 3 (three) categories, that are; Customary law regarding to Constitutional, that is system which is arranging the formation and order in legal partnership, as well as formation and office environment, equipment goods, titles and the officer; Customary law regarding to the people (people’s law) consist of Family law, Land law and Credit law.

Customary law regarding to delict (criminal law)

Whoever will participate in performing customary law system will be the chief of the tribe (tribe leaders), because he/she is the leader who is respected by the community, based on three categories of the intended customary law system in this discussion will be customary law relating to the private relation in this case shall be Land Law. However, the various rights of land in accordance to Customary Law shall be:

Partnership right of land.

Right of *Ulayat*

Mr. C.C.J. Maassen and A.P.G Hens in book of *Agrarische regelingen voor het Gouvernements Gebied van Java en Madura* explain that *ulayat* right (*beschikkingsrecht*) is a village right in accordance to culture and their intention to control the land in their region for the interest of its members or for the interest of other person (foreigner) by paying compensation to the Village, in case the said village interferes with the inaugural of the land and also responsible for cases happened in there which cannot be resolved yet.

Right of the group of family or extended family; Individual right of land, Property right, *yasan* right Property right may be regarded as property right of land, right of which may grant a power to someone who hold such power to obtain (feel) the benefit in full from the land and to utilize the land as *eigenaar* with due observance to the local customary laws and regulation and regulations and Government; The authority to select right, *kima-cek* right, right to precede, Right to enjoy the benefit, Right to Use, Right of *Imbalan Jabatan*, Right of *Wenang Beli*.

The implementation of provisions of *Agrarische Wet* is stipulated in various regulations and decree. One of which that is important is regulated in *Koninklijk Besluit*, which further to be known as *Agrarische Besluit*. Article 1 *Agrarische Besluit* shall include a statement known as “*Domein-Verklaring*”: then firmly held the basic law stating that the lease of land with no evidence of eigendom right shall belong to the state.”“ All unoccupied land (vacant) including state land, except lands which its right hold by the people in accordance to their right to develop the land.

In practice, *domein verklaring* has several functions, which are: utilized as a legal foundation for the colonial government to provide land with western rights and to verification purpose. With the enactment of Law number 5 Year 1960, then provisions which are stipulated in *agrarische eigendom* shall become invalid.

3. Land Law after the Validity of Basic of Agrarian Law.

Dualism and pluralism of agrarian law are still continuing even though Republic of Indonesia has been independent. To avoid vacancy of law, then it is stipulated Article II Transition Regulation Constitutional Law 1945 (Amendment of Constitutional Law Transition Regulation Article III), that is: "All state agencies and the valid regulation shall remain prevail, provided that new regulation is not stipulated yet in accordance to Constitutional Law 1945."

In practice, not entire issues relating to the management of natural resources shall be settled with new interpretations which are based on provision of Article II Transition Regulation Constitutional Law 1945. Therefore while waiting for the new Agrarian Law is enacted, any various regulations shall nullify colonial feudal institution as well as to perfect the old regulation. The foundation of philosophy of agrarian law after the independent shall be customary law based on the fulfilment of community's interest (communalistic) always which result the equilibrium between the public interest and individual interest.

The politic of agrarian firmly stated in the Article 33 paragraph (3) Constitutional Law 1945 (Amendment), that is: "Earth, water, outer space and natural resources contained in it are controlled by the sated and shall be utilized for the welfare of the people." As the basis of starting point from politic of agrarian law in Indonesia shall be started when Law number 5 Year 1960 regarding to the Basic Regulation of Agrarian (UUPA) was enacted on the 24th day of September 1960.

UUPA firmly explains the legal relation between the nation of Indonesia, the state of Indonesia and the people of Indonesia with natural resources (in case of narrow meaning shall be "land"). In memory explanation in point II/2 confirms that the world of "controlled" in this article shall not mean "owned", but the meaning shall be the grant of authority to the State as the power organization of the nation of Indonesia, previously referred to as the highest level of Authority institution to arrange and establish its designation, usage, supply and maintenance, determine and regulate any rights which can be owned of (part of) such earth, water and outer space, determine and regulate the legal relation between the people and legal action regarding to the earth, water and outer space.

The intended power of the State shall be all earth, water and outer space, either it has been owned by anyone or not. The power of the state regarding to the land which has already be owned by somebody with any right limited with the content of such right that is to what extent the State shall give the power to somebody who owned it to exercise his/her right, then to such extent the limit of such power of the State.

Various rights of land in national land law shall be contained in the formulation of Article 16 and Article 53 UUPA shall be right of land with permanent nature. This right of land shall remain valid provided that UUPA remains valid or has not been revoked yet with the new law. This type of right of law, amongst other: Freehold Right, Right to Cultivate, Right to Build, Right to Use, Right to Develop Land, Lease Right for Building and Right to Collect the Product of Forest, right of land which shall be determined by law, that is right of lad which will be further enacted with the law.

The explanation of the Right of Land in UUPS shall further be explained, as follows Freehold Right (*Hak Milik*), in accordance to Article 20 UUPA, what will be defined as Freehold Right is "Inter generation Right, strongest and fullest that can be owned of land with due observance of social function, which can transfer and be transferred to other party". Therefore the nature of freehold right of land for the legal subject is absolute and strongest as well as unlimited and shall not be contested as *Eigendom* Right. Freehold Right shall have characteristics as follows; Inter generation, Shall mean Freehold Right of the intended land will transfer by law from the owner of the land who passes away to his/her heir(s), Strongest, Shall mean the Freehold Right of such land is the strongest amongst other rights of land, Fullest. Shall mean the Freehold Right of such land may be utilized for agricultural and also for the construction of the building.

May transfer and be transferred, may be used as the collateral with encumbrance right, the unlimited period of time.

Right to Build

Based on Article 35 paragraph (1) UUPA, Right of Build shall mean Right to construct and have buildings above the lands which are not owned by him/her, with the period of time at the latest of 30 years. The statement of Article 35 paragraph (1) implies the meaning that the holder of Right to Build shall not be the owner of freehold right of the land in which the building is constructed. Relating to such matter, Article 37 UUPA states that Right to build may be occurred to the State's land which is determined by the government's determination. Other than that, Right to build may also be originated from the land with Freehold Right, which is changed its status due to the prevailing regulation; Land with Freehold Right shall be transferred to the Legal Entity.

Right to Cultivate

Right to cultivate is right to cultivate the lands which are controlled by the state, within some period of time in accordance to the regulation, which can be used for agricultural, fishery and farm companies. Right to Cultivate may be issued due to the government's determination. Right to Cultivate may be granted to the land

with an area at least 5 hectare. If the area of the land is more than 25 hectare, then the additional regulation will be prevailed. Right to Cultivate may transfer or be transferred to other party. The time period of the grant of Right to Cultivate is at maximum 35 years, unless there is particular license. The subject of Right to Cultivate or who may own Right to Cultivate shall be Indonesian citizen or legal entity established in accordance to the Indonesian law and domiciles in Indonesia. Similar to Freehold Right may also be used as collateral charged with encumbrance right.

Right to Use

Based on Article 41 UUPA, the definition of Right to Use is right to utilize and/or collect the products from the land which is directly controlled by the State or land owned by other person, who grant authority and obligation determined in the decision grant by the competent authority or in the agreement with the owner of the land, which are not a lease agreement or agreement of the utilization of land, everything provided that is not contrary to the provision of this law.

Right to use is originated from the State's land or freehold right. Land which is controlled by the State, then Right to Use may only be transferred to other party with the permission of the decree of minister or authorized officer with the proposal of the holder of right to manage and if the right to use of the land is above the freehold right, then its transfer to the other party may only be possible if firmly determined in the agreement.

The Land law in UUPA is adhered the principle of horizontal separation (*horizontale scheidings beginsel*) shall mean any principle which is separating between the ownership right of land with any property or building which are above the land, in this case the freehold right, right to build, right to cultivate and right to use. In this current advancement of the land law in Indonesia shall not only adheres the principle of horizontal, but the principle of vertical (*verticale scheidings beginsel*) will be the principle of adherence which is stating that anything attached to the property or which constitutes as one part of such property will be deemed as one and integral part of the property, then in this principle there is no separation between the building constructed above such land. For example the construction of apartments, office tower or strata title consisting of rights of strata titles which are originated from the right to build or right to use which is above the right to manage, the state's land and freehold right.

4. Conclusion

The existence and the advancement of land law in Indonesia are having a process as determined from time to time with character or special distinctive which is attached to the arrangement substance. Some periods which become the backgrounds of the advancement of land law, starting from the period of Dutch government, the characteristic of Dutch Government influences the existence of law in Indonesia producing rights, *eigendom* right, *recht van opstal* (Right to Build), *recht van erfpacht* (Right to Cultivate) and *Gebruik* Right (*recht van gebruik*), even the Dutch strengthen the law absolutely in community, but Indonesia still secured the purity of customary law which is believed and prevail in the community, then also produce rights of land such as *ulayat* right, individual right and right of land in agriculture, then the construction of national law with characteristic of Pancasila as the constitutional of the state has started after Indonesia proclaimed its independent from the colonial, and Constitutional Law of Republic of Indonesia Year 1945 shall become the foundation of the construction of Law number 5 Year 196 regarding to the Basis of Agrarian, therefore the rights of land which are still prevailed until now have been arisen and also develops in accordance to its period of time.

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