

The Nature of Justice to Implement Nationality Principle in the Agrarian Law

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Abstract

This study aims to (1) know and understand the nature of justice of nationality principle of Basic Agrarian Law (hereinafter referred to BAL) as a philosophical foundation in the agrarian regulation; 2) to know and understand the synchronization of nationality principle to be implemented in the agrarian regulation; and 3) to understand and find out the right strategy to embody the principle of nationality of BAL in agrarian regulation. This study is a normative research using a historical approach, a statute approach, and a conceptual approach. The source of legal materials consisting of primary and secondary legal materials. Those legal material then is analyzed by applying legal reasoning logically and systematically. The results shows that (1) The nature of justice of nationality principle of BAL is to fulfill the people's welfare for the sake of the state as a trustee and representative dimensions of agrarian rights; (2) The principle of nationality in any agrarian regulation shows the lack of synchronization; (3) The realization of the principle of nationality in the agrarian regulation must be followed by a discussion of agrarian regulation in the National Legislation Programme (hereinafter referred to PROLEGNAS). In terms of guiding the principle consistently, it would better to establish an independent Commission on Agrarian and Permanently Spatial.

Keywords: Nature of Justice, Nationality principle, and Agrarian Law.

1. Introduction

Agrarian resources have function and position very important in entirely life. It has economic values highly and uncontrolly. It is a basic need of human beings to implement human activities productively either as a place or as an element of production. Considering its strategic position in terms of management and utilization of agrarian resources, it is not surprising if the resources become a potential conflict. The conflict itself can be taken place either amongst members of the community or among members of the community and the authority powers.

To avoid conflicts of interest in the management and utilization of agrarian resources included in resolving agrarian conflicts, the government as executor of state power has a role in accordance with its power to govern the management and utilization of agrarian resources in order to attain the greatest welfare of the people. Theoretically, the state power over agrarian resources derived from the people known as a right of state. State in this term is seen as having the character as a public institution. Therefore, it is given the authority or power to regulate, administer, and control the utilization of all potential agrarian resources in its areas intensively.

The purpose of Agrarian Law concretely set forth in BAL as an implemented regulation of the article 33 (3) of the Indonesian Constitution 1945 is to lay down the foundations for the preparation of the national agrarian law; to lay down the foundations to hold unity and simplicity in land law; and to lay down the foundation to provide legal certainty regarding the rights to the land for the people.¹

BAL philosophically is actually an answer to injustice on agrarian regulation in colonial times.² Agrarian justice can be defined as a condition in which the holding structure of agrarian resources relatively do not show inequality. The holding structure of it basically provides opportunities for the creation of the deployment and strengthening of people based on economic activities in the village and later becomes the basis for the active participation (and productive) for most of people who rely upon the agrarian sector to get involved in national development both socially, economically and politically.

However, all policies, strategies and interventions made by the New Order regime leads to the exploitation of agrarian resources.³ Entering the Reform Order, the agrarian sector is getting into the current neoliberal economic system. Economic deregulation facilitates more investment and suctioning agrarian wealth. Thus, it creates discrepancies between BAL and some agrarian laws. Many provisions of some agrarian laws are not in accordance with BAL.

Neoliberal economic practices in the agrarian sector is facilitated by the various regulations in the field of the agrarian resources. The Constitutional Court (hereinafter referred to CC) as The Guardian of Constitution

¹ See the explanatory the Law No. 5/1960 Basic Provision Concerning the Fundamentals of Agrarian Affairs.

² As a result of Agrarisch Wet 1870, either individual land, communal land, customary right must be abolished. See also Van Vollenhoven in M. Billah C.S. in Soedjono M.P. Tjonrongo and Ginawan Wiradi, *Two Centuries of Land Tenure*, Gramedia, Jakarta, 1984, pp.254-255.

³ Tri Chandra Aprianto, *Commentary Landreform in Path of Indonesian History: Critical Overview over Existing Commentary*, Karsa, Yogyakarta, 2006, p. 26.

has issued some rulings (decisions) in favor of the weak. Some CC's decisions can be seen firstly in the CC decision No. 3 / PUU-VIII / 2010 regarding the Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands (hereinafter referred to PWP3K). Secondly, The CC decision No. 45 / PUU-IX / 2011 and No. 35 / PUU-X / 2012 regarding the Law No. 41/1999 Concerning Forestry. Thirdly, The CC decision No. 55 / PUU-VIII / 2010 the Law No. 18 of 2004 on Plantation. Finally, the CC decision No. 85 / PUU-XII / 2013. regarding the Law No. 7 of 2004 on Water Resources.

Those laws as mentioned above do not legally binding or overwhelmingly being canceled. It meant that those laws had violated the constitutional rights of citizens. The consequence of the violation of constitutional rights of the citizens in the agrarian regulation resulted in many agrarian conflicts occurred in various regions. The agrarian conflicts continue basically to occur from time to time. This is because of the agrarian problem is a fundamental issue concerning human being life either in terms of aspects of economic, social, cultural, demographic, legal, or political at the same time. Those aspects then become more complex due to technical aspects such as agronomy, ecology, and so on. For that reason as stipulated prior, the agrarian matters are known as complex, complicated, and difficult issues.¹ To deal with those agrarian matters as explained, an absolute policy reform must be implemented to provide a legal basis for the implementation of agrarian reform to the agrarian justice.² To create agrarian justice, the principle of nationality of BAL used in this study is a right of the state, the right to control of the state, and the customary rights.

The paper then will focus on some issues such as the nature of justice of the nationality principle of BAL as a basic philosophy in the agrarian regulation; the synchronization of the principle of nationality being implemented in the agrarian regulation; and 3. The embodiment of the principle of nationality of BAL in agrarian regulation.

2. Research Methods

This study is a normative research using a historical approach, a statute approach, and a conceptual approach. The historical approach means to analyse the process and the amendment of the Constitution 1945 and the draft of BAL in order to understand the philosophical background of the nationality principle of the BAL. The statute approach itself is to analyse the agrarian regulation and to synchronize the principle to the those agrarian laws. The conceptual approach further is applied to discuss the principle in the perspective of the experts.

The source of the research apply legal materials consisting of primary and secondary materials. The primary legal materials consist of the Constitution 1945, the agrarian laws, and the relevant laws that have connected to the agrarian issues. The secondary legal materials then consist of supplementary materials such as books, articles, journal, and some papers. Those legal material then is analyzed by applying legal reasoning logically and systematically.

3. Findings and Discussion

3.1. The Nationality Principle in BAL

Assessment of conflict norm in the agrarian regulation requires to review the values and principles contained in the BAL as principal laws in the agrarian area. The BAL itself basically applies Article 33 (3) the Constitution 1945 as a legal basis. Therefore, the assessment will be made regarding the values and principles of the principle of nationality in the BAL that is also contained in the Constitution 1945. The principle of nationality in this case indeed is the rights of the nation, the right to control of the state, and the customary rights.

The reason why the author exercise those rights as contained in the nationality principle is because they are a unity and cannot be separated in the management and utilization of the agrarian resources. Implementation of the right to control of the state must comply with the rights of the nation and the recognition of the existence of customary rights of indigenous peoples. Similarly, the implementation of community land rights in accordance with the law should still take into account the right of the state and their right to be controlled by the state. Elaboration of those rights can be described as follows:

- (1) All Indonesian people at the time of formation of Indonesia chose welfare state concept as an ideology as clearly stated in Paragraph IV of the Constitution 1945. There are two important things in this choice for Indonesia as a Independent State. *First*, concerning the purpose of the State. It means that the State shall protect its nation and region. It also create welfare, intelligence of the state, and participation in embodying the world order based on freedom, perpetual peace and social justice; and *Second*, concerning the basic fundamental philosophy of Indonesia – Pancasila, which consists of 5 items (Sila).
- (2) In accordance with the purposes and principles of the state, Indonesia must work hard to realize the welfare state. The welfare state means the public welfare (Indonesian people shall be prosperous. Indonesian people

¹ Gunawan Wiradi, *the Methodology of Study of Agraria: Selected Works of Gunawan Wiradi*, Sains Press PT. Sarana Komunikasi Utama, West Java, 2009, p.1.

²² Anonym, *Two Centuries of Land Tenure: the Pattern of Agricultural Land Tenure in Java from Time to Time*, Yayasan Obor Indonesia, Jakarta, 2008, p.418.

has binding themselves in the concept “Bhinneka Tunggal Ika”. It means that the people that are consisting of various groups, diverse group, and ethnicity with various religions, customs and habits, but they are unity.

(3) People who composed of various groups, diverse group, and ethnicity with various religions, customs and habits, that have existed since before the establishment of the Republic of Indonesia and especially for them who has been formed as a unitary legal community, are still recognized dan respected to their existence and traditional rights as their constitutional rights particular after amandement of the Constitution 1945. It is enshrined in Article 18B (2) of the 1945 Constitution.

Therefore, the control of the state is accompanied by the phrase "*utilized for the benefit of the people*". The greatest prosperity of the people become the main measure for the state in determining to maintain, govern, or manage the land (soil), water, and natural resources contained therein. In addition, the control of the state over the land (soil), water, and natural resources contained therein should also pay attention to the rights that already exist, either right personally or collectively rights. Those rights basically are guaranted by the Constitution.

3.2 Synchronization of the Nationality Principle in the Agrarian Regulation

3.2.1 The Rights of the Nation in the Agrarian Regulation

Table 1 Construction of the Right Nation Arrangement in the Agrarian Regulation

Peraturan	Hak Bangsa
The Law on Irrigation	The Gift from the almighty God to State of Indonesia
The Law on Forestry	The Gift from the almighty God to State of Indonesia
The Law on Oil and Gas	A national wealth
The Law on Geothermal	A national wealth
The Law on Plantation	The Gift from the almighty God to State of Indonesia
The Law on Spatial Planning	The Gift from the almighty God to State of Indonesia
The Law on Mining	A national wealth
The Law on Fishery	The Gift from the almighty God and mandated to State of Indonesia

3.2.2 The Rights to Control of the State

Tabel 2
 Construction of the Governing of the Rights to Control of the State

The Constitution 1945	BAL	CC
Land (soil), water, and natural resources contained in it are controlled by the state and used for the people's welfare	a. Regulating and conducting allocation, use, supply and maintain land (soil), water, and air space. b. Determining and regulating legal relations between people with the land (soil), water, and air space. c. Determining and regulating legal relations between the people and the legal acts on the land (soil), water, and air space.	a. Maintainance acts (<i>bestuursdaad</i>). b. Regulation (<i>regelendaad</i>). c. Management (<i>beheersdaad</i>). d. Control (<i>toezichthoudensdaad</i>).

3.2.3 Regulation

Table 3
 Construction of Regulation of the Right to Control of the State in the Agrarian Regulation

TTLaws	The Regulation of the Right to Control of the State
The Law on Irrigation	Controlled by the State
The Law on Forestry	Controlled by the State
The Law on Oil and Gas	Controlled by the State
The Law on Geothermal	Controlled by the State
The Law on Mining	Controlled by the State
The Law on PWP3K	Controlled by the State

3.2.4 Maintainance

Table 4
 Construction of Maintainance of the Right to Control of the State in the Agrarian Regulation

Laws	Maintainance of the Right to Control of the State
The Law on Irrigation	Utilization of water and water resources must obtain permission from the Government.
The Law on Forestry	Utilization of protected and production forests is carried out through lisencing.
The Law on Oil and Gas	Downstream business activities can be done by business entities after obtaining a business license from the government.
The Law on Geothermal	Mining business license issued by the Minister, the Governor and Regent / Mayor in accordance with their authority respectively.
The Law on Plantation	Every businessman on cultivation of plantation with a certain area of land and / or industrial business management of plantation with capacity of specified factory shall have a license of business plantation.
The Law on Investment	Investment companies conducted business operations must obtain a permit in accordance with the provisions from authority institution.
The Law on Spatial Planning	Determination of the draft of the regional regulation on Spatial Planning in provincial level and detailed of spatial planning prior must be approved by the Minister.
The Law on Mining	Mining license granted by the government and / or local government.
The Law on Management and Protection of the Environment	Every business and / or activities that are required to have EIA or UKL-UPL to have an environmental lisencing.
The Law on UU Sustainability Agricultural Land Protection	Lisencing conducted by the government and / or local government.
The Law on Fishery	Fisheries business must have SIUP, SIPI, and SIKPI.
The Law on PWP3K	Utilization of coastal areas and small islands should have location and management permit.
The Law on Local Government	Mining lisence granted by the government and / or local government.

3.2.5. Management

Table 5
 Construction of Management of the Right to Control of the State in the Agrarian Regulation

Peraturan	Pengelolaan Hak Menguasai Negara
The Law on Irrigation	Water utilization is conducted for greatest prosperity of the people.
The Law on Forestry	Forestry establishment is aimed for greatest prosperity of the people that is justice and sustainability.
The Law on Oil and Gas	Management of oil and gas is done optimally in order to be used for the greatest prosperity of the people.
The Law on Geothermal	Geothermal can contribute to national development to realize a prosperous society.
The Law on Plantation	Plantation development is done in order to realize the prosperity and welfare.
The Law on Investment	The purpose of investment establishment to increase the people welfare.
The Law on Spatial Planning	The State held a spatial planning for the greatest of the people welfare.
The Law on Mining	Mining business must give economicand social benefits for the greatest of the people welfare.
The Law on Management and Protection of the Environment	Implemented Development is accordance with the potential of natural resources and the environment for the improvement of social welfare.
The Law on UU Sustainability Agricultural Land Protection	Food Agricultural Land Protection is organized with the aim of increasing the prosperity and welfare of the people and community.
The Law on Fishery	Fishery utilization is conducted for greatest prosperity of the people.
The Law on Land Use	Implemented Development is conducted to increase the welfare of the nation and the community.
The Law on PWP3K	To increase the people welfare who live in coastal areas and small islands.
The Law on Village	The village development for greatest prosperity of the people.
The Law on Local Government	Granting broad autonomy to the regions directed to obtain the people welfare.

3.2.6 Supervision

Table 6
 Construction of Supervision of the Right to Control of the State in the Agrarian Regulation

Peraturan	Pengawasan Hak Menguasai Negara
The Law on Irrigation	Supervised by the Minister
The Law on Forestry	Supervised by the Government, local government, community or private
The Law on Oil and Gas	Oversight of Oil and Gas business activities is carried out by the department that has duties and authorities including oil and gas activities.
The Law on Geothermal	Responsibility to guide and supervise conducted by the Minister, the Governor, Mayor/Regent based on their authority.
The Law on Plantation	Guidance and supervision conducted by the Minister, the Governor, Mayor/Regent based on the laws.
The Law on Investment	Fishery supervision conducted by fishery supervisor.
The Law on Spatial Planning	Supervision on governing, coaching, and implementing of spatial planning conducted by the government and the local government.
The Law on Mining	The Minister supervises the establishment of management mining business conducted by the provincial government and the city/regency government based on the authority.
The Law on Management and Protection of the Environment	The Minister, the Governor, Mayor/Regent in accordance with its authority shall conduct supervision.
The Law on UU Sustainability Agricultural Land Protection	The Minister, the Governor, Mayor/Regent in accordance with its authority shall conduct supervision.
The Law on Land Use	Supervision and evaluation of Land use for the sake of public interest conducted by the government.
The Law on PWP3K	Supervision conducted by the government.
The Law on Local Government	Guidance on establishment of local governance conducted by the government.

2.3. The Customary Rights in the Agrarian Regulation

Tabel 7
 Requirements of Recognition of Rights of Customary Law Community in the Agrarian Regulation

Laws	The Requirements
The Law on Irrigation	Indigenous peoples are recognized as long as they are not against to the national interest and legislation. Not establishing the rights of the indigenous peoples.
The Law on Forestry	Recognition of the customary law community is done as long as in fact it exists and acknowledged they exist.
The Law on Oil and Gas	Recognition of the customary law community without some requirements of the recognition and guarantee the rights of the community without detailed the rights of customary community.
The Law on Geothermal	Recognition of the customary law community without some requirements of the recognition and guarantee the rights of the community without detailed the rights of customary community.
The Law on Plantation	Recognition of the customary law community is done as long as in fact they existed and fulfill some requirements: a. It is existed society in form of "paguyuban" (<i>rechtsgemeinschaft</i>); b. It is customary institution in form of customary officers; c. It is a customary territory; d. It is a legal norm, especially customary judicature that must be obeyed. e. There is confirmation with local regulations f. Rights of indigenous people are obtaining compensation if its territory is used for plantation concessions.
The Law on Fishery	Recognition of the indigenous people and the condition does not conflict with national laws. No details regarding the rights of the indigenous people.
The Law on Spatial Planning	Recognition of the customary law community without some requirements of the recognition.
The Law on Land Use	Recognition of the customary law community without some requirements of the recognition. The rights of the customary law community must be compensated if their land are an object of public interests.
The Law on PWP3K	Recognition of the customary law community without some requirements of the recognition. The customary law community has a right to register its territory in RZWP-3-K and to utilize its space and coastal resources.
The Law on Management and Protection of the Environment	Recognition of the customary law community without some requirements of the recognition. The rights of the customary law community must have Management and Protection of the Environment.
The Law on UU Sustainability Agricultural Land Protection	Recognition of the customary law community is done indirectly. It means that it can be seen in the communal rights without detailed expalantation about the rights.
The Law on Village	Recognition of the customary law community is done with giving definition that a village is "a village and customary village".
The Law on Local Government	Recognition of the customary law community without some requirements of the recognition. An enactment of separated governance authority in environment, community empowerment, and villages. Did not specify the rights of the customary law community.

Law as a system of norms requires that any laws ranging from the highest to the lowest should be in line with one to another. They should not be in conflict with each other. The process of formation of norms started from the highest to the lowest. This process then is called as a concretization process. In the agrarian regulation, BAL is governing the main principles in the agrarian matters. Therefore, the agrarian regulation and

laws related to the agrarian sector should be further elaborated the principles of BAL. To realize the synchronization amongst the laws and to avoid conflicts of norms, the provisions in the regulation may not contradict to the principles of the BAL. In this research, specializing in the principle of right of the nation, the right to control of the state, and the customary rights.

From the explanation as stipulated above, the implementation of the principle of nationality in the agrarian regulation shows that all the regulation govern the rights of control of the state to the agrarian resources, but the right of the nation is not regulated in the entire agrarian regulation. The customary rights of the indigenous people itself regulated in some agrarian regulation to establish different requirements on the recognition of the indigenous peoples. It can said then that the fact as discussed above does not promote justice in the management and utilization of the agrarian resources. It means that the purpose of the state cannot be reached.

3. To Embody the Nationality Principle in the Agrarian Regulation

3.1 Discussion of the Agrarian Regulation in PROLEGNAS

Synchronization of some regulation is a consequence of the legal hierarchy of law as stipulated in the Law No. 12/2011 concerning the Legislation Form. The synchronization will show the picture of those regulation itself as part of the whole regulation. It is necessary because the law as one of the laws basically is sub-system of national legal system. As part of it, amongst those regulation have connection one to another. Therefore, synchronization of them is holistic and comprehensive. Those regulation also can be judicial review both materially and formally.

The synchronization and harmonisation mechanism of those regulation in the context of drafting PROLEGNAS pursuant to article 14 to article 18 of the Presidential Decree No. 61/2005 concerning Procedures for Preparation and Management of PROLEGNAS, as follows:

- 1) The Minister of Justice and Human Rights conducts harmonization of the laws draft received from another Minister or Leader of LPND or other related government agencies.
- 2) The harmonization is directed to the realization of the conception of the philosophy of the nation and the purpose of the nation.
- 3) The harmonization is implemented through consultation forum that coordinated by the Minister. In terms of the draft of the laws is accompanied by academic paper (NA), the NA used as a discussion in the consultation forum. In consultation forum may also be invited some expertises from universities and organizations in the areas of social, political, and appropriate issues.
- 4) The concept of the draft of the laws that has gained harmony, roundness, and the steadiness of conception, by the Minister shall request prior approval to the President as PROLEGNAS drafted by the Government before it is coordinated with the House of Representatives.

In fact that the President deems to get more clarity on and / or provide guidance to the conception of the draft, the President commissioned the Ministry of Justice and Human Right to coordinate the re-conception of the draft with other ministers or Leader of LPND or other related government agencies. The coordination referred by the Minister reported to the President. Therefore, to create synchronization between those agrarian regulation, it should be discussed in one PROLEGNAS. Those agrarian regulation are:

Table 8
 Discussion of the Agrarian Regulation in One Prolegnas

No	The Title of the Draft of the Laws	Notes
1	The Law on Irrigation	The Sectoral Agrarian Law
2	The Law on Forestry	The Sectoral Agrarian Law
3	The Law on Oil and Gas	The Sectoral Agrarian Law
4	The Law on Geothermal	The Sectoral Agrarian Law
5	The Law on Mining	The Sectoral Agrarian Law
6	The Law on Fishery	The Sectoral Agrarian Law
7	The Law on land Use	The Sectoral Agrarian Law
8	The Law on Village	The Sectoral Agrarian Law
9	The Law on Plantation	The Sectoral Law Related Agraria
10	The Law on Investment	The Sectoral Law Related Agraria
11	The Law on Spatial Planning	The Sectoral Law Related Agraria
12	The Law on Management and Protection of the Environment	The Sectoral Law Related Agraria
13	The Law on UU Sustainability Agricultural Land Protection	The Sectoral Law Related Agraria
14	The Law on PWP3K	The Sectoral Law Related Agraria
15	The Law on Local Government	The Sectoral Law Related Agraria
16	The Draft Law on Land's Ownership	Prolegnas 2005-2009
17	The Draft Law on the Rights of Indigenous Peoples	Prolegnas 2005-2009
18	The Draft Law on Management of the Natiral Resources	Prolegnas 2005-2009
19	The Draft Law on Recognition and Honorable of the Indigenous people and its Customs	Prolegnas 2005-2009
20	The Draft Law on Land (Agraria)	Prolegnas 2010-2014
21	The Draft Law on Agrarian Court	Prolegnas 2010-2014
22	The Draft Law on Agrarian Resolution Conflict Settlement	Prolegnas 2015-2019

3.2 Establishment the Commission of Agraria and Spatial Planning

In the current governance, it has established the Ministry of Agraria and Spatial Planning. The change in terms of nomenclature of the Ministry of National Land Agency into the Ministry of Agraria and Spatial Planning mean a new paradigm in viewing the land and natural resources. In this context, agraria and spatial planning are seen as comprehensive matters regarding land and natural resources. It means that the agraria and the spatial planning should be put in the same line when they are discussed.

Synchronization of the agrarian regulation adjusted to the Constitution 1945 and BAL. It is done in order to create social justice in accordance with Pancasila as a whole “sila”. the step of synchronization of nationality principle in the agrarian regulation must be followed by action to establish the Independent Commission on Agraria and Spatial Planning to create a unity perception of the rights of the nation, the right to control of the state and the customary rights that applied in each of the agrarian law. This is to avoid conflicts of interest in the filing of the draft of law and unskill human resources.

The tasks of the Commission of Agraria and Spatial Planning are:

1. To examine the conflict regulation relating to the agrarian matters.
2. To oversee the drafting process of the draft and NA to create harmony between the agrarian law.
3. To register (record) the land rights of society actively either individual land, collective land, and communal of indigenous territories, in the area of forest and non-forest.
4. To perform spatial planning processes, space utilization, and control the use of space as well as transitional use.
5. To do reserach and provide supported data, as the researcher and data providers, to the Directorate General of Agriria and Spatial Planning.

4. Conclusion

It can be concluded from those discussion as stipulated above are:

1. The nature of justice in nationality principle in BAL can be found in the right of the nation, the right to control the state, and the customary rights. It means that the principle should be applied by the as a board member (trustee) and representative of the agrarian rights dimension to for the prosperity of the people.
2. The principle of nationality in any agrarian regulation indicates the absence of synchronization. There are some laws do not apply the right of the nation, the right to control the state, and the customary rights.
3. The realization of the principle of nationality in the agrarian regulation in the future should be followed by a discussion of the agrarian regulation in one PROLEGNAS. In addition to guard the principle, the establishment of the Commission on Agraria and Spatial Planning is needed in which it is permanent and independent.

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