

Legal Aspects of Land in the Regional Autonomy in Relation To Land Services in Indonesia

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Abstract

Act Number 5 of 1960 on Basic Agrarian Law states that earth, water and airspace including the natural resources contained in it are in the highest instance controlled by the State being and Authoritative Organization of the whole People in Indonesia. Since the issuance of Law No. 5 of 1960, the agrarian authority has been held by the central government. When Law No. 22 of 1999 on Regional Government was first put into force, especially in Article 11, the land management was carried out by Regency / City Governments.

As a result, a number of Regency / City Governments had to form a land agency, creating a dualism in handling land matters because at that time Regency/City Land Offices acted as vertical agencies of the National Land Agency which also carried out the government duties in the land sector. To cope with the dualism in handling land matters, in 2003 the government issued Presidential Decree of the Republic of Indonesia No. 34 of 2003 to limit the authority of Regency/City Governments to 9 (nine) types of land services. The centralistic principle is based on article 2, paragraph (1) of Law No. 5 of 1960, which states that earth, water and airspace including the natural resources contained in it are in the highest instance controlled by the State being and Authoritative Organization of the whole People. While regional autonomy principle is based on Article 2 paragraph (4) of Law No. 5 of 1960 states that the implementation of the right to control by the state may be delegated to autonomous regions and communities of customary law.

This research method using normative law by examining secondary data taken from the literature, legal materials or written data in the form of book of regulations, library materials such as books, magazines, and journals coupled with the primary data from interviews with some City Mayors in Indonesia on the implementation of regional autonomy in land sector. Data were analyzed using the political law approach, started from the implementation of the land law by the central government and by the autonomous regions, described, and vertically systematized using the law reasoning in derogation from the basic principle of the law science is rejecting a rule, because of conflict with higher rules.

The results showed that the authority of the land services currently divided into two parts, namely land services that are carried out by the central government through the vertical agencies in this case the Ministry of Agrarian and Spatial Affairs / National Land Agency, on the basis that in the Law stated that the land matters is the authority of the central government. On the other hand, Regency / City Government implement land service affairs authority according to the Law of Autonomy on the basis that in the Act Number 5 of 1960 also declared land matters can be delegated to local authorities.

Keywords: land service dualism, regional autonomy, current issues

1. Background

Land is a basic need of man created by God Almighty as a place to live in; in fact, every human activity on earth cannot be separated from the need for land. So great is human dependence on land for countless needs and activities that land has placed a strategic position in all walks of their lives. Needless to say, land issues are no longer seen solely as agrarian matters, but they have evolved into economic, social, cultural and environmental issues, including defense and security-related issues. In this context, land issues absolutely require a special attention from the government as a legitimate authority to establish the rule of law related to arrangement, usage, utilization, control and ownership of land in order to protect the public interests.

Since the issuance of Law No. 5 of 1960, marking the end of Dutch colonial law in regulating land-related issues in Indonesia, the land authority has been held by the central government through vertical agencies starting from the Department of Agrarian Affairs, whose name has undergone several changes, and now it has become the Ministry of Agrarian and Spatial Affairs/ National Land Agency. In 2001, when Law No. 22 of 1999 on Regional Government was first put into force, major changes occurred in the management of land in Indonesia. According

to the law, the land management was carried out by Regency / City Governments. As a result, a number of Regency / City Governments had to form a land agency, creating a dualism in handling land matters because at that time Regency/City Land Offices acted as vertical agencies of the National Land Agency which also carried out the government duties in the land sector.

To cope with the dualism in handling land matters, in 2003 the government issued Presidential Decree of the Republic of Indonesia No. 34 of 2003 to limit the authority of Regency/City Governments to 9 (nine) types of land services:

1. Issuing location permits;
2. Carrying out land acquisition for development purposes;
3. Settling arable land disputes;
4. Settling the problems of indemnity and compensation of land for development;
5. Determining the subject and object of land redistribution and conducting restitution of maximum land excess and absentee land;
6. Determining and settling the problems of communal land;
7. Utilizing and Settling the problems of empty land;
8. Issuing land clearing permits;
9. Conducting land use planning of the areas of Regency / City.

In 2004, Law No. 32 of 2004 on Regional Government in lieu of Law No. 22 of 1999 on Regional Government was issued. Chapters 13 and 14 of the Act stated that land services are mandatory to implement under the authority of provincial governments as well as Regency / City governments. However, this gave rise to problems regarding land services as stipulated in Presidential Decree No. 34 of 2003. In 2007, the government issued Government Regulation No. 38 of 2007, which confirmed that the implementation of land services still used the Presidential Decree No. 34 of 2003. In 2014, Law No. 23 of 2014 pertaining to Regional Government in lieu of Law No. 32 of 2004 was promulgated. Articles 11 and 12 of the Act state that land are the mandatory affairs of the concurrent government which are not related to basic services. However, problems still persist as to which authority must carry out land services due to the existent overlapping laws and interpretations.

2. Identification of the Problems

Based on the description above, the problems identified are as follows:

1. What is the philosophical foundation of the birth of the agrarian law (*Lex agrarian*) from the Netherlands to Indonesia?
2. How is the implementation of land services by the central government and local governments in the regional autonomy?
3. What are the proper concepts and strategies in land services so that the local governments can carry them out effectively and efficiently?

3. Theoretical Study of the Agrarian Law, Regional Autonomy and Authority Delegation

3.1 Agrarian Law in Indonesia

3.1.1 Philosophy of Land Law and Roman Agrarian Law

Gaius a Roman classical jurist equated natural law (*natuur recht*) to special secondary natural law (*ius gentium*) and put private property (*eigendom privaata*) as natural law (*ius natuu recht*).

Gaius's opinion as quoted by Ronald regarding objects, including land, was divided into two groups based on:

1. *Res divini iuris*: the objects associated with the interests of gods, sacred things, and things that are highly prioritized.
2. *Res humani iuris*: the objects related to human interests, both individuals and communities (Titahelu, 1993).

3.1.2 The Birth of Agrarian Law (*Lex Agraria*)

The issuance of Law No. 5 of 1960 was the starting point of the enactment of the national agrarian law and it was expected to serve as the end point of the colonial agrarian law in Indonesia. According to Noer Fauzi: "The unity of law implies that there is only one national agrarian law that ended the colonial agrarian law which was dualistic and complicated because it gave rise to inter-group issues. It was not simple and hard to understand by the people (Fauzi, 1999).

Definition of Agrarian and Land.

Parlindungan (1991) states that:

Definition of “agrarian” has a scope in the narrow sense that can be in form of the rights over land or agriculture only, while Articles 1 and 2 of Law No. 5 of 1960 had taken a stance in the wide sense, namely the earth, water, airspace and natural resources contained therein.

Another definition of “agrarian” is expressed by Subekti and Tjitrosoedibio (1983):

Agrarian is land matters and all that is in and on the land.

The above-mentioned definitions are actually very broad in scope, but they have things in common with the agrarian scope referring to Article 2 of Law No. 5 of 1960, which includes: the earth, water, airspace and natural resources contained therein.

Nevertheless, in its development, the narrow definition of “agrarian” has been more popular, which covers the land as the earth's surface which means as space, which is different from the land in a physical sense.

Definition of “land” in the explanation of article 1, paragraph (4) of Law No. 5 of 1960 is the earth's surface, meaning that land rights are the rights that can be charged on the surface of the earth. In terms of human or legal entity relations with land, this gives rise to private rights for humans or the legal entities themselves, which are included within the scope of civil law (Ardiwilaga, 2006).

According to Wiranata (2004), “land” is defined as follows:

Land is the object that holds the wealth that brings benefits, functions as a means of dwelling place for legal alliance and all its members, provides livelihood to its owner, serves as a site in which the owner will be buried after his death, and acts as a historical arena for the ancestral alliance over several previous generations.

Based on this definition, land is not only closely related to the economic factor, such as the place to keep beneficial wealth and carry out activities to meet the needs of life, but also the social factor since it serves as the site where legal alliance leads life to death.

3.1.2.1. Agrarian Law and Land Law

Harsono (2003) quoted E. Utrecht as stating that:

Agrarian law in the narrow sense is identical to Land Law. Agrarian Law and Land Law are part of the State Administrative Law, which tests special legal relations whose existence will allow the officials in charge of issues concerning agrarian affairs to do their tasks.

According to Mertokusumo (1988), Agrarian Law is the overall principles of law, both written and unwritten, which regulate land matters. From the above-mentioned definitions, it can be interpreted that Agrarian Law is the law that regulates the agrarian matters covering the earth, water, airspace and natural riches contained therein.

Law of land affairs was originally known as land law, but in its development it was changed into Law of land affairs considering that land law is the law that governs everything related to land rights. According to Perangin (1989), land law is the overall legal rules, both written and unwritten, which governs the rights of land control which are legal institutions and concrete legal relations.

3.1.2.2. The principle of land controlled by the state

This principle is found in article 2, paragraph (1) of Law No. 5 of 1960, which states that earth, water and airspace including the natural resources contained in it are in the highest instance controlled by the State being and Authoritative Organization of the whole People.

In accordance with the basis of the establishment, the words “controlled” here does not mean “owned”, but the definition gives authority to the state as an organization of all the people’s power to manage land, water, airspace and natural riches contained therein, including granting the rights to land to the public.

This is in line with Koesnoe (1979)’s statement:

The explanation that the state can give land to an entity or person is that once the land is handed over to the entity or person concerned, it is no longer the state power which becomes the basis of the rights granted, but the power of the state will be in line with by the rights derived from it.

Notonagoro (1984) explains the rights to control by the state in article 33 paragraph (3) of the Act of 1945 as follows:

The terms “controlled” and “utilized” are two different things used as the goal of “controlled”, although a connecting word “and” that makes the two things seem irrelevant in a causal relationship. The interpretation of “controlled” is not “possessed” but to the state as the supreme power to which authority is given (article 2, paragraph (2) UUPA).

Next, Yamin Lubis and Lubis (2008) stated:

With these provisions the Government has been given the jurisdictional authority to make rules and regulations (*bestemming*) in the agrarian sector in form of land and to execute them related to the subject, object and the legal relationship between the subject and the object as long as connected with the agrarian resources.

Article 2 paragraph (4) of Law No. 5 of 1960 states that the implementation of the right to control by the state may be delegated to autonomous regions and communities of customary law.

Parlindungan (1998) stated: "From this attitude, it is clear that the agrarian authority in the system of Law No. 5 of 1960 is the central government and regional governments may not carry out any agrarian authoritative measure otherwise designate agrarian authority or delegate authority to the autonomous regions”.

However, Harsono (1997) stated that the authority of the state is based on Article 2 of Law No. 5 of 1960 covering the areas of legislative in terms of regulating, executive in terms of organizing and determining, and judicative in terms of resolving land disputes both among people and between people and the Government.

Based on the above-mentioned explanation, it can be said that the main authority in the land sector is held by the central government although part of the authority has been delegated to the provincial and regency / city governments.

3.1.3. Rights to Land

According to Sumaryono (2002): right is the result that appears in legal enforceability and every kind of law determines the rights contained therein. All laws are expecting the existence of rights and all rights obey the law.

According to Santoso (2012), the right to land is a private right, which gives an authority to the right holder (individual, group of people together, legal entity) to use in the sense to control, use or make use of the land.

3.1.4. Land Registration

Harsono (2005) gave similar explanation regarding the registration of land:

Land registration is a series of activities conducted by the government continuously and regularly involving collecting, processing and bookkeeping as well as presenting and maintaining physical data and juridical data in the form of a map and a list of land plots and apartment units, including the provision of letters of proofs for land plot ownership, apartment unit ownership as well as certain rights which encumber."

According to Parlindungan (1999):

The term Land Registration is derived from the word "Cadastré", a technical term for a record or recording which refers to breadth, value and ownership (the right base) of a land plot. "Cadastré" comes from Latin "Capitastrum" which means a register or capita or sequence which is made to Roman land tax *teaputatip terreusi*. The firm meaning of "cadastré" is a record of lands, land values and the holders of rights and for the purpose of taxation. So, "cadastré" is an appropriate means to give description and identification of land as "Continuous Recording" of land rights.

3.2. Regional Autonomy

3.2.1. Definition of Regional Autonomy

The term “autonomy” comes from Greek, namely *autos* means independent and *nomos* means rules. Therefore, literally autonomy means independent rules or law, which then evolved into autonomous government (Salam, 2003).

According to Sunarsa (2005):

The term “autonomy” comes from the word *autos* which means regulation. Thus, autonomy means to make their own law, but in the development of government practice, the concept of local autonomy implies *zelf wetgevingas wella* as self-government. Regional autonomy includes regulatory tasks (*regeling*), and governmental duties (*bestuur*).

In line with this, Bagir Manan states that autonomy means independence as proposed by Manan stating that autonomy means independence to regulate and manage the affairs of its own household.

Meanwhile Abdullah (2000) states that:

Regional autonomy as a principle means respecting regional life according to the history, traditions and character traits within the unitary state. Each region has its own history and character traits. Therefore, the government should avoid using one model of regional autonomy for the whole Indonesian territory.

Regional autonomy as one form of 'decentralization' of government is essentially intended to meet the interests of the nation as a whole through an effort to be closer to the goals of governmental execution to realize the ideals of a better society, a society that is fairer and more prosperous by giving, delegating, and transferring a number of tasks.

According to Friedman (1983):

Decentralization is the principle of running the government contrary to centralization. Decentralization produces local government," , a 'superior' government assigns responsibility, authority, or function to 'lower' government units that is assumed to have some degree of authority.

According to Widjaja (2005), "A sub-national government unit is the result of the formation and development of a government that can even be removed through a legal process. The existence of a sub-national government unit is "dependent" and "under" a sub-ordinate government."

4. Agrarian Law Implemented in Indonesia

4.1. Dutch Colonial Agrarian Law

That the agrarian law of the colonizer compiled based on Dutch colonial interests was detrimental to the people of Indonesia, especially the native people, and with the enactment of *agrarische wet* which applied the principle of *domein verklaring* stating that all land which was not proved by the owner to be *eigendom* would be deemed the *domein* of the state.

According to Soemardjono:

In fact, the application of the principle *Domein Verklaring* brought the colonial government to an understanding that the state acted as the land owner. Therefore, it is not surprising if in the application of the principle had made the people suffer from a loss, because they did not have property rights over the land if they could not prove their ownership.

4.2. National Agrarian Law

After 15 years of independence, namely in 1960, finally Indonesia had a national agrarian law that was issued by Law No. 5 of 1960 regarding the Basic Regulation of Agrarian.

The considerations of the issuance of Law No. 5 of 1960 as mentioned in the dictum were as follows:

- a. That agrarian law which was still valid at that time indicated that some were still arranged based on the interests of colonial government and the law was partly influenced by it, making it often in conflict with the interests of the people and the state in the settlement of the then national revolution and the development all over the country.
- b. That the agrarian law is dualistic in nature, with the validity of customary law in addition to the agrarian law based on western law.
- c. That for the people the genuine agrarian colonial law that did not guarantee legal certainty.

4.3. State Authority in the State Agrarian Sector

Law No. 5 of 1960 was a follow-up to the article 33 paragraphs (3) of the Constitution of the Republic of Indonesia Year 1945, which states that the earth, water and natural resources contained in it are controlled by the state and used for the greatest prosperity of the people.

In regard to the state authority, Lubis and Lubis (2008) stated:

With the provisions the Government had given the jurisdictional authority to make rules and regulations (*bestemming*) in the field of agrarian in form of land, as well as to execute the rules concerning the subject, object and the legal relationship between the subject and the object along the agrarian resources.

Furthermore, article 2 paragraph (4) of Law No. 5 of 1960 states: "The right of control by the State in its implementation can be delegated to the autonomous regions and communities of customary law as necessary and as long as not contrary to the national interests, according to the provisions of the government regulations.

The explanation of Law No. 5 of 1960, particularly article 2, paragraph (4) states that the agrarian issues by their

nature and in principle are the duty of the Central Government.

This is in line with Murhaini (2009)'s statement:

that according to the Basic Agrarian Law, settling affairs in the land sector is the authority of the Central Government. The Central Government looks at the land affairs as matters of national law and therefore cannot be delegated to the local government (provincial and regency / city). Despite having been handed out to the region based on Law No. 22 of 1999, which was later replaced by Law No. 32 of 2004 on Regional Government, but because it involves the field of land law which involves policies in the area of land nationally, it is still taken care of by the central government, not assigned to the Autonomous Regions (Local Government).

5. Implementation of Land Services

5.1. Central Government Land Services

Types of land services that are handled by the central government through the Ministry of Agrarian and Spatial Affairs/ National Land Agency (formerly National Land Agency) under the Regulation of Head of National Land Agency No. 1 of 2010 include 67 (sixty seven) types of services.

With the public services in the land sector, it is expected to lead the public to have confidence in the institution of Ministry of Agrarian and Spatial Affairs/ National Land Agency, so that the expectations of the people towards this agency such as to obtain land services in order to get legal certainty of their land will be fulfilled. After obtaining legal certainty of land, the people are expected to optimally utilize their land for the improvement of their welfare.

However, in reality up to now, public complaints regarding service time are still frequently found, including unclear terms of service and service charges.

5.2. Delegation of the authority to carry out land services

As explained in the above sections that land services are the central government authorities which are assigned to vertical agencies currently implemented by the Ministry of Agrarian and Spatial Affairs/ National Land Agency. However, after the issuance of Act No. 5 of 1960, to speed up land services to the community, it had been enacted the rules of delegating authority on land services since 1972 by the regulation of the Minister of Home Affairs No. 6 of 1972 on the delegation of authority to grant land rights that have been amended several times, and the last one was based on the regulation of Head of National Land Agency No. 2 of 2013 on Delegation of Authority Granting Rights to Land and Registration of Certain Land.

In the regulation, only part of the authority has been delegated to the Head of the Land Office of Regency / City, while other parts still become the authority of the Head of Regional Office of the National Land Agency of the Province, and there is even the authority to grant land rights which is still the authority of the Minister of Agrarian Affairs and Spatial Planning / Head of National Land Agency.

5.3. Land Services in the Regional Development

The issuance of Act No. 22 of 1999 on Regional Government brought new changes in the system of land services in Indonesia. Previously all types of land services were conducted by the central government through the vertical institutions in the region, but now land services have also become the authority of local government as stated in article 11 paragraph 2 of Act Law No. 22 of 1999.

However, the implementation of land affairs based on the legislation is limited by the Decree of the President of the Republic of Indonesia No.34 of 2003.

The issuance of Presidential Decree No. 34 of 2003 triggered prolonged debate where on the one hand some say that constitutional law has set the order for the legislation and the legislation must be higher than the presidential decree; on the other hand, others say that the presidential decree is based on the law in this regard the principal agrarian law.

In 2004, Act No. 32 of 2004 regarding Regional Government was promulgated, replacing Act No. 22 of 1999. According to the law, land services were under the authority of the local government, but in 2007 the government issued Government Regulation No. 38 of 2007, limiting the implementation of the local government authority as stipulated in the Presidential Decree of the Republic of Indonesia No 34 of 2003 to 9 (nine) service types.

Act No. 32 of 2004 was later replaced by Act No. 23 of 2014 on Regional Government. The Act states that the

Regional autonomy is the right, authority, and duties of the autonomous regions to regulate and manage their own administrative affairs and public interests in the system of the Unitary Republic of Indonesia.

Until the issuance of Act No. 23 of 2014, the authority of land services by Provincial and Regency / City Governments was confined to 9 (nine) authorities as stipulated in the Government Regulation No. 38 of 2007 Jo. Decree of the President of the Republic of Indonesia No 34 of 2003.

6. Proper Concepts and Strategies Should Be Effectively and Efficiently Employed in Land Services by Local Autonomy

6.1. Amendments to Law No. 5 of 1960

Amendments or revisions to Act No. 5 of 1960, which had been mandated by Decree No. IX of 2001 and the material draft of the land law had long been discussed in the House of Representatives, but until now with several times changes in the House of Representatives, the land law has not been completed.

In the amendment to Act No. 5 of 1960, it is explicitly stated that the respective authorities of the central government and local governments are:

- a. The authorities of the central government are to develop and formulate policies concerning land law, including setting norms, standards and procedures of land services, the supervisory authority and guidance on the implementation of the policy.
- b. The authorities of the local government are to implement land policies, especially land services with a guidance of norms, standards and procedures set by the central government.
- c. Land services are fully delegated to the Regency / City Governments while the Provincial governments carry out the coordination and supervision.

6.2. Changes in the Land Service System

The new land service system should include a system of land tenure, land administration system, and the law certainty in the land sector; both in the process and in a variety of land tenure rights.

To implement the regional autonomy in the area of land services, it is necessary to have organizational changes and the restructuring of institutions and personnel in the area of land services in order to achieve the goal of providing the public with good service standards. Until now land services have not been satisfactory for most people, especially the business community since there is a dualism in providing land services between the central agencies and the regional agency.

The land services undertaken by the Ministry of Agrarian and Spatial Affairs/ National Land Agency are currently as many as 67 kinds of land services that had been determined in Government Regulation No. 1 of 2010 and 9 types of land services are authorized to the regional governments based Presidential Decree No. 34 of 2003, all of which are set to be the government's authority of Regency / City to make it easier for the people to get land services.

7. Conclusion

Based on the discussion above, it can be concluded:

That the agrarian law applied in Indonesia during the colonial era was the Dutch colonial law, which was influenced by French law derived from Roman law.

1. The Dutch colonial agrarian law brought a loss to the Indonesian people, especially the natives during the implementation of the principle of *domein verklaring*, where the state acted as the ruler as well as the land owner. The enactment of Act No. 5 of 1960 actually ended the implementation of the Dutch colonial agrarian law in Indonesia. Act No. 5 of 1960 confirmed that land is controlled--not owned--by the state in this case the central government. Likewise, the right of the State to control land may be delegated to local authorities.
2. That authority of land services is currently divided into two parts, namely land services that are carried out by the central government through the vertical agencies in this case the Ministry of Agrarian and Spatial Affairs/ National Land Agency covering 67 types of services, as set in the Regulation of the National Land Agency No. 1 of 2010. The types of land services have largely been delegated to the Regional Office of the National land Agency of the Provinces and the land Office of Regency / City, except for the issuance of land titles, which are still regulated by the central authority. Land services carried out by regional governments

are limited to 9 types of services based on Presidential Decree No. 34 of 2003 and Government Regulation No. 38 of 2007.

3. The land services carried out by Regency / City Governments are not effective and efficient because the services only include 9 types of land services based on Presidential Decree No. 34 of 2003 and Government Regulation No. 38 of 2007. Of the nine types of authorization services, only location permit which can be carried out due to a technical understanding of human resources in Regency / City Governments is still limited.

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