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Legal Justice Discourse on Land Rights in the Indonesian Constitution

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Abstract

As the Constitution observes, the purpose of the establishment of the Indonesian state is to achieve dignity and justice. One form of this justice is land rights. Until now, the land law is still a complicated discussion and often raises the pros and cons. This article aims to examine how the concept of land ownership in Indonesia is based on the state constitution. The method used in this research is normative-juridical law research with a descriptive-analytical approach. Under the Constitution, the state is not the owner but the land use and ownership regulator. The state's function is to regulate the allocation and use of land as regulated in the Basic Agrarian Law (BAL). Thus, the law must be able to minimize the negative excesses of the development of land conflicts by creating the legal norms needed to protect people who may be harmed. The law must be able to control business transactions and economic development without having to leave the function of law to provide a sense of security and justice.

Keywords

Land rights, Legal Justice, Land for the people, Indonesian Constitution

1. Introduction

The social contract theory was developed by John Locke, Rousseau, and Kant as an adherent of rational natural law and the founder of the theory of popular sovereignty, abstracting that the establishment of a state is due to an agreement between the people and the state. A state is formed because of the so-called *pactum unionis*, an agreement between the people in the country to establish a state. *Pactum subjectionis* is an individual agreement with the state. Based on this

theory, the state is formed by and for the benefit of the people. Land, water, and natural resources in the country are fully given to the people. The distribution of the use of land, water, and natural resources in it must be based on justice (Baynes, 1989; Hoffman, 1999).

Abstract justice has made justice the object of thought of philosophers from the Greek era until now. Ulpianus (170 – 223 AD) justice is a constant and constant will to give to each part (*iustitia est constants et perpetua voluntas ius suum cuique tribuendi*) (Anshori, 2009). Aristotle, in his Nicomachean Ethics, states that justice is a virtue related to human relations. Aristotle distinguishes justice into two types: corrective justice and distributive justice (Anshori, 2009). Corrective justice, also called corrective justice, has the same meaning as commutative justice proposed by Thomas Aquinas. This justice is based on transactions (*sunallagamata*) that occur in civil law, whether voluntary or not. Thomas Aquinas distinguishes justice, namely general justice (*justitia generalis*), namely justice according to the will of the law, which must be carried out in the public interest, and special justice, namely justice based on equality or proportionality (Theron, 2003; Lisska, 2015; Widiyono & Siregar, 2020). John Rawls developed the idea of Utilitarianism that justice is fairness. John Rawls stated that the theory of justice was developed by elevating social contract theory to a higher level of abstraction (Lessnoff, 1971; Pogge, 2007; John, 2011). Hans Kelsen argues that the pure legal theory in no way rejects the requirements for a just law, but the theory is incompetent to answer statements about the fairness or wrongness of a particular law (Kelsen, 1995). According to Hans Kelsen (1948), justice is what is contained in the law.

Based on the thoughts above, it can be concluded that the land, water, and natural resources are for the people, but the distribution of both management and the results is solely fair to and for the people. One of the foundations for thinking about justice proposed by Hans Kelsen is justice that has emerged and is regulated in the legislation in the country. Therefore, it is relevant to raise a question: How is the concept of land ownership based on the Constitution of the Republic of Indonesia?

2. Methods

This study seeks to uncover and find legal norms regarding procedures for obtaining land rights for the community and for legal entities in Indonesia. For the purposes of this research, the method used is normative juridical. The normative juridical research method is library law research conducted by examining library materials or secondary data. At the same time, the technical analysis technique uses descriptive analysis with a qualitative approach. It is a way to describe or describe the data that has been collected as it is. In addition, this technique also helps show or summarize data points in a constructive way so that each data condition can be patterned accordingly (Soekanto & Mamudji, 1986; Christiani, 2016).

3. Results

As the founder of legal positivism adopted by Indonesia, Hans Kelsen stated in his study theory that legal norms are tiered and layered in a hierarchy, from the lowest to the highest. The highest hierarchy in a legal norm is called the ground norm. The implementation of this theory in Indonesia is regulated in the hierarchy of legal norms in Indonesia, namely Law No. 12 of 2012,

amended by Law No. 15 of 2019 concerning the Order of Legislation. Pancasila as a source of law is also referred to as the ground norm, which is then described in the Constitution of the Republic of Indonesia, and the lower laws under it can also be referred to as a social contract because its formation has been through people's representatives both at the People's Consultative Assembly, the House of Representatives and the House of Representatives. Area.

The Constitution is a basic law, is the entire state administrative system of a country in the form of a collection of regulations that form, regulate, or govern the government of a country. The Constitution is the main source of law in the legal hierarchy in the Republic of Indonesia. The Constitution comes from the English "constitution" or Dutch "constitutie" which means the basic law. The ups and downs and the alternation of Indonesian politics have influenced the period when the Constitution of the Republic of Indonesia came into force, starting from the period when the 1945 Constitution came into force 1945, the second period when the Constitution of the Republic of the United States of Indonesia (RIS) came into effect in 1949, and the third period came into effect. Provisional Constitution of 1950, the four periods of re-enactment of the 1945 Constitution, took effect from July 5, 1959, until experiencing successive changes in 1999, 2000, 2001, and 2002.

The 1945 Constitution is a positive legal norm. As a legal norm, its formation is very closely related to legal politics. Soedjono Dirdjosisworo defines legal politics as including activities to find and choose values and apply them to the law in seeking its goals (Dirdjosisworo, 2001). Hirsch Ballin, cited by Tambunan (2002), defines political law as deceiving or applying the law, in this case, the law that applies in Indonesia. Legal politics will involve the relationship between citizens and the state (Tambunan, 2002). Legal Politics can be considered as state policy that wants to manipulate the law, but some say it is not state policy but public policy; there are also government policies (Tambunan, 2002). Therefore, the 1945 Constitution can be interpreted as a legal policy to "empower the law based on a policy of the state, government, and society." It means that there is a straight line between the interests of the people and the goal of establishing the Republic of Indonesia. Concerning the establishment of the Republic of Indonesia, the people are the subject and object of the objective of the establishment of the Republic of Indonesia, not least in the regulation of land, including land ownership (Bakker & Moniaga, 2010; Syarief, 2021; McCarthy & Robinson, 2016).

The legal politics of the founding of the Republic of Indonesia related explicitly to land is visible in the state foundation of the Republic of Indonesia, namely Pancasila, and in the 1945 Constitution of the Republic of Indonesia. Pancasila provides the basic philosophical foundation of justice in the fifth principle: "Social justice for all Indonesian people". The content of the direction of justice in the formation of the state of the Republic of Indonesia is for all Indonesian people, and the function of the state is to administer justice (Bedner, 2016).

In the fourth paragraph at the opening of the 1945 Constitution, it is clearly stated that the purpose of the establishment of the Government of the State of Indonesia is to protect the entire Indonesian nation and the entire homeland of Indonesia; promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace, and social justice, the Indonesian National Independence shall be formulated in a Constitution of the Indonesian State, which is formed in a composition of the Republic of Indonesia which is sovereign by the people with based on: God Almighty, just and civilized humanity, Indonesian

unity, and democracy led by wisdom in deliberation/representation, and by realizing social justice for all Indonesian people.

Consistently in the body of the Constitution of the Republic of Indonesia at 33 paragraph 3 is one of the implementations of the fifth precept of Pancasila, which explains land, namely “Land and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.” In this case, the state only functions as an organizer of the land, water, and wealth in it, including land ownership throughout Indonesia, given to the Indonesian people to improve general welfare as directed in the fifth precept of the Pancasila mentioned above.

The General Elucidation of the 1945 Constitution in point II.4 confirms that the fourth main idea in the “preamble” is that the state is based on the One Godhead according to just and civilized humanity. Therefore, the Constitution must contain contents that oblige the government and other state administrators to maintain the noble human character and uphold the noble moral ideals of the people. Furthermore, in the elucidation of point IV, it is stated that it is sufficient if the Constitution only contains rules, the principal only contains outlines as instructions to the Central government and other state administrators to organize state life and social welfare. Especially for new and young countries, it is better if the written basic law only contains basic rules, while the rules that administer the basic rules are left to laws that are easier to make, change, and revoke (Wallace, 2008).

It was specifically related to land, Law no. 5 of 1960 concerning the Basic Agrarian Law. Article 1 paragraph (1) states that “The entire territory of Indonesia is the unity of the homeland of all the Indonesian people, who are united as the Indonesian nation.” Paragraph (2) states “All land, water, and space, including the natural resources contained therein within the territory of the Republic of Indonesia as a gift from God Almighty, are the land, water, and space of the Indonesian nation and constitute national wealth.” Furthermore, paragraph (3) states that “the relationship between the Indonesian people and the land, water, and space as referred to in paragraph (2) of this article is an eternal relationship. And verse (4) states, “In the sense of the land, in addition to the surface of the land, including the body of the land beneath it and those underwater.”

Based on the provisions in Article 33 paragraph 3 of the Constitution and the matters referred to in the provisions of the land, water, and space, including the natural resources contained therein, are at the highest level controlled by the state, as an organization of power for the entire people. The main philosophy and legal basis in the politics of national land law are “the state is not the owner of the land,” but the state is the party that “controls the land.” This is based on Article 33, paragraph 3 of the 1945 Constitution, which states, “Land, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.” This article provides an explanation that “land” throughout the territory of Indonesia is generally controlled by the state. It means that the state only controls and does not own. The definition of “control” is translated in Law no. 5 of 1960 concerning Basic Agrarian Law, Article 2.

Article 2 paragraph 1 explains, “On the basis of the provisions in Article 33 paragraph 3 of the Constitution and the matters referred to in Article 1, the land, water and space, including the natural resources contained therein, are at the highest level controlled by the state as an organization of power for the whole people.”

Article 2 paragraph of the LoGA further states, “The state’s right to control as referred to in paragraph 1 of this article gives the authority to:

- a. Regulate and administer the designation, use, supply, and maintenance of the land, water, and space.
- b. Define and regulate the legal relationships between people and the land, water, and space.
- c. Determine and regulate legal relations between people and legal actions concerning land, water, and space.”

Article 2 paragraph 3 states, “The authority that comes from the state’s right to control in paragraph 2 of this article is used to achieve the greatest prosperity of the people in the sense of nationality, welfare and independence in society and an independent, sovereign, just and prosperous Indonesian legal state.” Article 2, paragraph 4 states, “The above exercise of the State’s right to control can be delegated to the Autonomous Regions and customary law communities, as long as it is necessary and does not conflict with the national interest, according to the provisions of government regulations.”

It is clear that in the conception of Indonesian land law, the state does not have ownership rights over a plot of land, but the state has the “right to regulate” land parcels throughout the territory of the Indonesian state. Further implementation in the conception of Indonesian land law can be seen in various laws and regulations relating to land, including but not limited to the types and rights to land, transfer, guarantee, granting of permits, liberation, revocation, management, spatial planning (RUTR/General Spatial Plan) and legal subjects that can be granted certain rights over certain land parcels (Yubaidi, 2020).

This is in stark contrast to the basic concept of land politics in the Dutch era, known as the Domain Verklering staatsblad 1870-118. What was issued by the Dutch East Indies government was that all other people’s land could not prove that the land belonged to them, then the land belonged to the state. The land policy of the Dutch East Indies, which provided the basis for state ownership of land in the Dutch East Indies, ended. The Republic of Indonesia became formally independent since the enactment of Law no. 5 of 1960 concerning the Basic Regulations on Agrarian Principles dated September 24, 1960.

It should be stated that ownership of a right to a certain plot of land granted by the state to certain legal subjects is only limited to the surface of the land or a few meters from the surface of the land and a few meters from the surface of the air. It means that water sources below the land’s surface and air in the atmosphere of a plot of land owned by legal subjects for certain types of rights are still controlled by the state. In other words, a person who has been given a title to a certain plot of land does not necessarily mean that they have been given the right to own the entire land beneath it and all the air above it. The granting of rights to the plot of land is only given by the state to use the surface of the land (a few meters from the ground) (McCarthy & Robinson, 2016). The deeper and larger water sources that are below the land’s surface cannot be taken immediately without prior permission from the Regional Government, which is regulated in more detail regarding this matter which stands alone outside of the granting of rights attached to such ownership rights (Wallace, 2008).

The authority that comes from the right to control from the state is used to achieve the greatest prosperity for the people in the sense of nationality, welfare, and independence in society and an

independent, sovereign, just, and prosperous Indonesian legal state. (4) The state's control rights mentioned above can be exercised to autonomous regions and customary law communities only as necessary and not in conflict with national interests, according to the provisions of Government Regulations (Bedner & Arizona, 2019).

The 1945 Constitution is described in subsequent regulations in the form of a law, namely Law No. 5 of 1960 concerning Basic Provisions on Agrarian Principles dated September 24, 1960. Law No. 5 of 1960 concerning BAL has regulated the ownership of land rights for the community, namely;

- a. Right of ownership.
- b. Cultivation Rights;
- c. Building rights,
- d. Right of Use,
- e. Lease Rights,
- f. Land Clearing Rights,
- g. Right to Collect Forest Products,
- h. Other rights not included in the rights mentioned above will be stipulated by law, as well as temporary rights (lie rights, business rights for profit sharing, boarding rights, and agricultural land rental rights as mentioned in article 53) .

The rights to water and space as referred to in Article 4, paragraph 3 of the BAL are:

- a. Water use rights,
- b. Right to keep and catch fish,
- c. Space-use rights.

In addition, there are land rights that are regulated in other provisions, namely: 1) In PMA No. 9 of 1965 concerning "Implementation of Conversion Rights of Control over State Land," introduced the "Right of Management," which is essentially part of the "Right to Control the State"; 2) In Law no. 16 of 1985 concerning Flats, introduced the Ownership of Flat Units.

The details of land rights in Law No. 5 of 1960 concerning the BAL are as follows:

1. Right of ownership

Property rights are hereditary, the strongest and fullest rights people can have on land, keeping in mind the provisions in Article 6 of the BAL, namely land with social functions. Property rights can be transferred and transferred to other parties. The legal subject who can own land with the status of property rights is a single Indonesian citizen. In particular, in Government Regulation No. 38 of 1963 concerning the Appointment of Legal Entities That Can Have Land Ownership Rights, among others, it is stated that there are legal entities that can have land ownership rights, namely:

1. Banks established by the state;
2. Agricultural Cooperative Associations were established based on Law no. 79 of 1958;
3. Religious bodies, appointed by the Minister of Agriculture/Agrarian after hearing the Minister of Religion;

4. Social agencies are appointed by the Minister of Agriculture/Agrarian after hearing the Minister of Social Welfare.

Property rights are deleted if:

1. The land falls to the State: 1. due to revocation of rights; 2. due to voluntary surrender by the owner; 3. being neglected; 4. because the owner or recipient of land rights does not meet the requirements as a party that may own rights.
2. The land is destroyed.

Meanwhile, Ownership Rights can be obtained from:

1. Conversion confirmation event;
2. Rights Application event;
3. Transfer of rights, namely buying and selling, exchanging, grants and inheritance;
4. Agreement with the Management Right Holder which is then registered at the local land registration office, and a Certificate of Ownership is issued by the National Land Agency,
5. Other legal acquisitions, such as expiration (see the acquisition of rights to objects that have been peeled off in Chapter IV concerning Definition of Objects and Arrangements How to Transfer), but still through the Certification process.

2. Cultivation Rights (HGU)

Cultivation Rights (HGU) is the right to cultivate land which is directly controlled by the state for a certain time (a maximum of 25 years, but for companies that require a longer time, a maximum period of 35 years can be granted. Each can be extended by a maximum period of 25 years) for agricultural, fishery or livestock companies. Land that can be granted with Cultivation Rights is state land. So there is no Cultivation Right that was born from an agreement with the owner of the freehold certificate (*Sertifikat Hak Milik*/SHM). If the granting of Cultivation Rights on land that has been controlled with certain rights, the implementation is after the completion of the relinquishment of those rights. Thus, if the investor intends to apply for land with certain rights status (Right of ownership, Building Use Rights, or Right of Use), the rights to the land must first be relinquished.

3. Building Use Rights (HGB)

Hak Guna Bangunan is the right to construct and own buildings on land that is not one's own, with a maximum period of 30 years. At the right holder's request and considering the needs and condition of the buildings, this period can be extended for a maximum period of 20 years. Building Use Rights can be transferred and transferred to other parties. In the event that after the extension, the term of the HGB expires (50 years), then based on Government Regulation no. 40 of 1996 concerning Cultivation Rights, Building Use Rights, and Land Use Rights Article 25 paragraph 2, the right holder may be granted a renewal of Cultivation Rights on the same land. Meanwhile, based on Article 27 paragraph 1, the application for the period of Building Use Rights (HGB) or its renewal is submitted no later than 2 (two) years before the expiration of the Building Use Rights (HGB) period or its extension.

4. Right of Use

Right of Use is the right to use and/or collect proceeds from land that is directly controlled by the state or land owned by another person who gives the authority and obligations specified in the decision to grant it by the official authorized to give it or in an agreement with the land owner, which is not a lease agreement. Lease or land management agreement, everything as long as it does not conflict with the spirit and provisions of the Basic Agrarian Law.

Permit/Hak use granted by the government on land directly controlled by the state based on the article above is commonly called an Occupation Permit. As long as the state directly controls the land, the right of use can only be transferred to another party with the permission of the authorized official, for example, the local land office that issued the right of use. Meanwhile, the right to use land not owned by the state can only be transferred to another party if this is possible in the agreement concerned.

Right of Use can be granted for a certain time or as long as the land is used for certain purposes. The granting of the Right of Use can be free of charge, with payment or providing services in any form.

Those who can have use rights are:

1. Indonesian Citizens;
2. Foreigners domiciled in Indonesia;
3. A legal entity established under Indonesian law and domiciled in Indonesia;
4. Foreign legal entities that have representatives in Indonesia.

Whereas for Bank security, specifically for this Right of Use, when used as credit collateral, the following matters must be considered:

1. The Right of Use is on land directly controlled by the state.
2. The land, due to statutory provisions, must be registered.
3. The land, because of its nature, must be transferable.
4. The binding is done with Mortgage Rights.

Right of Use on behalf of religious and social bodies, and Right of Use on behalf of Representatives of Foreign Countries, whose validity period is not determined and granted as long as the land is used for certain purposes, are not objects of Mortgage Rights.

Therefore, a land right can be obtained from:

1. Conversion confirmation event;
2. Rights Application event.
3. Agreement between the land owner and the right holder.
4. Transfer of rights, namely buying and selling, exchanging, grants and inheritance;
5. Due to *inbreng* or entry into the company.

5. Rental Rights for Buildings

A person or a legal entity has the right to lease land if he has the right to use land belonging to another person for building purposes by paying the owner a sum of money as rent. This means that in formal juridical terms the “rental rights” in the land law (UU No. 5/1960) are only used for “building” purposes. In other words, “lease rights” outside of building designations are not

recognized in Indonesian land law. Another thing that needs to be observed is that the Right to Rent for Buildings (HSUB) has similarities and differences with the Building Use Rights described previously. Even though both have similarities in their birth, which are both based on an “agreement” between the owner of the right and the owner of the building, the “essence of the agreement” has a fundamental difference, namely in the Rental Rights for Buildings (HSUB) the agreement is of the type of “lease agreement”, but in SHGB, the agreement includes a land “use agreement”. The agreement is regulated in different terms if it is related to Civil Law. Leasing is regulated in the third book of the seventh chapter of Articles 1548 to 1600. Land leases are specifically regulated in articles 1588 to 1600 of the Civil Code.

Those who can become holders of Building Lease Rights are:

- a. Indonesian citizens;
- b. Foreigners domiciled in Indonesia;
- c. Legal entities established under Indonesian law and domiciled in Indonesia;
- d. Foreign legal entities that have representatives in Indonesia.

6. The Right to Clear Land and Collect Forest Products

The right to clear land and collect forest products can only be owned by Indonesian citizens and is regulated by Government regulations. Of course, concerns the law in the forestry sector (Law No. 41 of 1999 concerning Forestry). Using the right to collect forest products legally does not automatically obtain ownership rights to the land.

Forest concession rights give the holder authority to do something and process wood in a certain forest area. The area and others are determined in the HPH (*Hak Pengusahaan Hutan*/forest concession rights) letter. Usually, it is the Directorate General of Forestry that issues HPHs.

7. Right to use water, maintenance, and fishing

Right to Use Water (GHA) is the right to obtain water for certain purposes and/or to drain the water over other people’s land. Water Use Rights (GHA), as well as fish maintenance and fishing, are regulated by Government Regulations. The Right to Use Water is based on the principle that the ownership of land rights granted by the state to legal subjects is only limited to a few meters below the ground. This means that the land under which there is a deep spring is still controlled by the state based on article 33 of the 1945 Constitution. Therefore, the state still controls the deep part of the land and the vast sea. Furthermore, the state has the right to regulate the allocation and use of land rights. The arrangement is, in its implementation, left to the local government based on autonomy.

8. Space Use Rights

The Right to Use Space (HGRA) authorizes the use of energy and elements in space for efforts to maintain and develop the fertility of the land, water and natural resources contained therein and other matters related to it. A Government Regulation regulates the right to use space. The Space Use Rights (HGRA) are similar to the Water Use Rights mentioned above, namely that the space above the land owned by legal subjects is not part of their rights. The space is still the state’s right to control, whose authority to regulate it is owned by the state.

9. Land Rights For Sacred And Social Purposes

Land ownership rights of religious and social bodies as long as they are used for business in the religious and social fields are recognized and protected. These agencies are also guaranteed to obtain sufficient land for buildings and businesses in the religious and social fields. For worship and other sacred purposes, as referred to in the availability, the designation and use of the land (Article 14 of the BAL) may be granted land directly controlled by the state with a usufructuary right. The endowment of the owned land is protected and regulated by Government Regulation. This waqf is regulated in PMDN No. 6 of 1977 concerning Procedures for Land Registration Regarding Ownership of Land Perwakafan. The application for registration of the waqf of unregistered (uncertified) lands is carried out together with the application for rights. In other words, first, there is a certificate of land rights in the management of the waqf certificate. If the land to be waqf is not certified, the management of the waqf certificate is concurrent with the management of land rights.

10. Ownership of the Flat Unit

In the Basic Agrarian Law (UU No. 5/1960), there is no known Ownership of Flat Units. Because the Right of Ownership to the Flats was born in 1985. Thus, the Right of Ownership to the Flats is a relatively new land/building rights status, which was introduced based on Law no. 16 of 1986 concerning Flats. To provide an overview of the limitations/simple definitions of flats, here are some important definitions: Article 1 paragraph 1, “Flats are multi-story buildings built in an environment, which are divided into functionally structured parts. In the horizontal and vertical directions and are units, each of which can have its own and be used separately, especially for residential areas equipped with shared parts, objects and shared land.”

Flats can only be built on land with ownership rights, building use rights, use rights on state land, or management rights in accordance with applicable laws and regulations. Suppose the apartment building is built on a management right. In that case, the developer cannot sell the flat before being granted the status of the right by the holder of the management right (based on an agreement), so that it is issued as a right of ownership, right of the building, right of use on state land. In other words, SHMSRS may only be established on land with property rights, building use rights, and use rights on state land. Thus, to better understand the SHMSRS, an understanding of the land rights (Ownership Rights, Building Use Rights, Use Rights on state land) described previously must be understood. Likewise, it must be understood the description of Management Rights, because Ownership Rights, Building Use Rights, and Use Rights on state land which are used as the legal basis for the existence of the flats are standing, where Ownership Rights, Building Use Rights, and Use Rights on state land were born because of the “agreement” between the holder of the management right and the owner of the Right to Build and Use the Right to State land.

11. Customary Rights

Temporary customary rights, as referred to in Article 16 paragraph 1.b, are liens; Profit sharing business rights; The right to ride, and the right to lease agricultural land are regulated to

limit their characteristics that are contrary to the Agrarian Law, and these rights are sought to be abolished in a short time.

In addition to the abovementioned rights, other land rights have not been converted, namely Customary Ownership Rights. For customary land rights that have not been converted into one of the rights regulated in the Basic Agrarian Law (UUPA), where the land rights will be used as credit guarantees with Mortgage Rights, then the land must come first or together between the registration of the confirmation of the conversion of land rights with the registration of Mortgage Rights.

Several instructions can be used as evidence of ownership of customary land rights, including, 1. Girik; 2. Letter C; 3. Kohir; 4. Tax Petuk; 5. Ketitir; 6. Ipeda; 7. Buying and selling based on customary concessions, such as buying and selling that occurred before September 24, 1960 (before the enactment of the BAL); 8. And so on according to local customs.

12. Western Rights

Eigendom rights to land that existed at the entry into force of the Basic Agrarian Law (UUPA) were converted into property rights if they met the requirements stipulated in Article 21 of the BAL. Meanwhile, the *eigendom* rights belonging to foreign governments, which are used for the residence of the Head of Representative and the embassy building, are converted into Use Rights as referred to in Article 41 paragraph 1 of the BAL as long as they are used.

Eigendom rights owned by foreigners or their owners are not single Indonesian citizens or their owners are legal entities that are not appointed by the government as referred to in Article 21 paragraph 2 of the BAL are converted into Building Use Rights with a period of 20 years.

Land rights that provide authority as or similar to the rights referred to in Article 20 paragraph 1 (property rights), such as *agraricht eigendom* rights, property, yasan, andarbeni, rights to druwe, rights to village druwe, pesini, grant sultan, lenderijenbezirecht, *Altijddurende* erfacht, business rights on former private lands and other rights under any name which is further confirmed by the Minister of Agrarian Affairs are changed to Property Rights in Article 20 paragraph 1 of the BAL unless the owner does not meet the requirements stipulated in Article 21 of the BAL. If a foreigner or the owner owns the rights is not a single Indonesian citizen, or the owner is a legal entity that is not appointed by the government as referred to in Article 21, paragraph 2 of the BAL. Converted into *Hak Guna Usaha* or *Hak Guna Bangunan* in accordance with its designation.

13. Management Rights

In the Agrarian Law, no known land right is called "Management Right". Management Rights as a spin-off of the State's Right to Control as regulated in Article 33 paragraph 3 of the 1945 Constitution states that, "Land and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people."

The holder of the Management Right can give part or all of the Management Right he has to a person or legal entity that meets the requirements in the form of a Certificate of Ownership or Certificate of Building Use Rights, or a Certificate of Use of Land Rights on state land. Thus there is a Certificate of Ownership Rights or Certificate of Building Use Rights, Certificates of Use of Land Rights on state land that are born from Management Rights. The birth of these rights was born because of an agreement between the holders of Management Rights.

4. Discussion

In relation to land law, Indonesia is very concerned and regulates it in the basic law of the 1945 Constitution in Article 33 and is described in Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles. It is in line with Hans Kelsen's will in *stufentheorie*; legal norms are tiered and layered from the highest to the lowest level (Paramudhita et al., 2021).

Judging from the social contract theory expressed by John Locke, Rousseau, and Kant, the establishment of a state is due to an agreement between the people and the state. A state is formed because of the so-called *pactum unionis*, namely an agreement between the people in the country to establish a state, and *pactum subjectionis* is an individual agreement with the state. Based on this theory, the state is formed by and for the benefit of the people (Hamid et al., 2021; Hamdani & Fauzia, 2021). Land, water, and natural resources that exist in the country are fully given to the people. Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles because the 1945 Constitution and the hierarchy of laws under it are all formed through a process of people's involvement represented by members of the People's Consultative Assembly for the Constitution and the involvement of the People's Representative Council and Regional Representative Council for the formation of laws.

The land distribution in Indonesia also needs to be seen based on the Theory of Justice. The urgency of this understanding is necessary because the law and justice cannot be separated, and the ultimate goal of the law is justice. Abdul Ghofur Anshori stated that the ultimate goal of the law is justice. Therefore, all efforts related to the law absolutely must be directed to finding a legal system that is most suitable and follows the principles of justice (Anshori, 2009).

Therefore, the distribution of land contained in No. 5 of 1960 concerning the Basic Regulations on Agrarian Principles must also be viewed from the perspective of justice. Ulpianus (170 – 223 AD) argued that justice is a constant and constant will to give to each part (*iustitia est constants et perpetua voluntas ius suum cuique tribuendi*) (Anshori, 2009.). Aristotle, in his *Nicomachean Ethics*, states that justice is a virtue related to human relations. Thomas Aquinas distinguishes justice, namely general justice (*iustitia generalis*), namely justice according to the will of the law, which must be carried out in the public interest, and special justice, namely justice based on equality or proportionality (Lutz-Bachmann, 2000). The distribution of land is follows the public interest, although it still needs to be improved, especially the distribution of land to conglomerates through group companies.

The distribution of land based on Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles can also be considered fairness, as is justice based on John Rawls's opinion that the theory is not competent to answer statements about whether or not certain laws are fair or not (Kelsen, 1995). John Rawls, who is seen as an adherent of the Utilitarian school of thought as stated by Priyono, cited by Darji Darmodiharjo, Rawls's theory itself can be said to depart from the thought of Utilitarianism, developing the idea that justice is fairness (Darmodiharjo, 1995). status quo where all agreements reached are fair (Darmodiharjo, 1995). Utilitarianism is a school that puts benefit as the main goal of law (Posner, 1979; Weinrib, 1980; Frankel, 1974).

Because John Rawls argues that freedom and equality are the core part of the theory of justice (Anshori, 2009), Rawls also argues that there needs to be a balance between personal and common interests. Achmad Ali (2010) concludes Rawls's opinion that "the only way we can

decide about justice is to imagine a situation where we do not or do not have interests. In this case, there is no other interest except to decide honestly.”

It is important to emphasize that the theory of justice, according to Hans Kelsen, the most famous and adopted in Indonesia, is justice based on pure law. Based on this theory, pure legal theory aims to clean the law from foreign elements. Thus justice is what is implied in the law. Based on this theory, the judge is a subsumption of the law. Therefore, the distribution of land based on Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles is a form of justice.

Legal theory has provided a theoretical basis for the various forms of business entities. In this case, Mochtar Kusumaatmadja (2002) stated that “the role of law in development is to ensure that changes occur in an orderly manner.”. Therefore, in the development of land law related to economic development, the changes in the law must occur orderly. Kusumaatmadja (2002) further stated, “because both change and order (or order) are twin goals of a society that is building law into a tool that cannot be ignored in the development process.”

The law must be able to minimize the negative excesses of the development of land law by creating the legal norms needed to protect people who may be harmed. Law is one of the instruments for changing people’s lives; besides, the law is a means that can impose its decisions with external power (Latif & Ali, 2010). Law is a tool for economic management and a lever for social change (Trubek, 1972; Hartono, 2011) (Trubek, 1972; Hartono, 2011). That is, the desire to participate in the government’s role in the function of regulating the economy through legal instruments. Law must be able to control business transactions and economic development without having to leave the legal function to provide a sense of security and justice.

5. Conclusion

The Indonesian Constitution, which is also a ground norm that Pancasila, theoretically and philosophically, has fulfilled the requirements as a subjectionist fact in social contract theory. The hierarchical arrangement of laws and regulations in the Republic of Indonesia, as regulated in Law No. 12 of 2012, is in line with Hans Kelsen’s theory in *Stufentheorie*. The distribution and distribution of land in Indonesia are based on Law no. 5 of 1960 concerning Basic Agrarian Regulations. Their implementation regulations have also followed justice based on the pure legal theory of Hans Kelsen and the Fairness theory developed by John Rawl. The state, based on the Constitution of the Republic of Indonesia, is not the owner of the land but the land owner. It is in stark contrast to the basic concept of land politics in the Dutch era, known as *Domain Verklaring*, namely, all land that other people cannot prove that the land belongs to them, then the land belongs to the state.

The granting of land rights as regulated in Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles was born from the right to control the state. The state’s function is to regulate the allocation and use of land. The law must be able to minimize the negative excesses of the development of land conflicts by creating the legal norms needed to protect people who may be harmed. The law must be able to control business transactions and economic development without having to leave the legal function to provide a sense of security and justice, especially related to the control of the conglomerates who ruled the land indefinitely.

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