

Juridical Problematics Of Business Use Rights Over Management Rights

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Abstract

*Cultivation rights according to the UUPA are granted on state land, but in its current development cultivation rights can be granted on state land and land with management rights. Management rights as control rights from the state, the authority to implement which is partly delegated to the holder of management rights, in the development of regulations can be granted on state land and customary land. The purpose of this writing is to describe the juridical problems of cultivation rights over management rights. The method used is normative legal research with priority on secondary data which is analyzed qualitatively. Inconsistencies occur between PP No. 18 of 2021 and UUPA, indicating a violation of the principle of *lex superior derogate legi inferiori*. This creates juridical problems with cultivation rights over management rights, and can result in legal uncertainty for holders of cultivation rights over management rights.*

Ignatius Pradipa Probondaru : Juridical Problematics Of Business Use Rights Over Management Rights

I. Introduction

Humans need land for various purposes, therefore the presence of the State in regulating the allocation of land for various purposes is very important. Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "earth, water and natural resources are controlled by the state for the greatest prosperity of the people". The position of the Republic of Indonesia in this case is as a Ruling Body, not a land owner. The legal relationship between the Republic of Indonesia and the earth, water and natural resources is called the state's right to control. This right is the right to control over land which was born due to the delegation of authority given by the Indonesian people as the holder of the rights of the Indonesian people, to the Republic of Indonesia, merely a delegation of authority of a public nature.

In order to achieve the greatest prosperity of the Indonesian people, Law Number 5 of 1960 concerning Basic Agrarian Principles, popularly known as UUPA, has been implemented. This law succeeded in eliminating the legal pluralism and land rights that existed during the Dutch colonial period in Indonesia by unifying land law and land rights. During the Dutch colonial period in Indonesia, Western Land Law, Inter-Group Land Law, Customary Land Law, Swapraja Land Law, and Administrative Land Law applied. At that time, it was also known that land rights according to customary law and land rights according to western law existed. In the atmosphere of independence of the Republic of Indonesia, the existence of legal pluralism and pluralism of land rights is no longer relevant and can hinder the prosperity of the people.

The UUPA regulates control rights over land, namely the rights of the Indonesian people, control rights from the state, customary law community customary rights, and individual rights over land. Individual rights to land are a legal relationship between a person or legal entity and a plot of land. There are three types of individual rights to land, namely land rights, waqf land rights, and mortgage rights. Land rights are a legal relationship between a person or legal entity and a plot of land which gives them the authority to use the land. The UUPA regulates land rights which originate directly from the rights of the Indonesian people granted by the state, namely property rights, business use rights, building use rights and use rights. These rights are primary land rights. Apart from that, it also regulates the existence of land rights which originate indirectly from the rights of the Indonesian people, granted by the land owner based on an agreement. The secondary land rights arising from an agreement with the land owner are pawn rights, profit sharing business rights, rental rights, boarding rights, secondary building use rights, and secondary use rights.

One of the rights to land specifically intended for agriculture in a broad sense, namely Cultivation Rights. This right can be used for agriculture, fisheries and

livestock. In the UUPA there are provisions that regulate business use rights regarding the definition, subject of rights, time period, the occurrence of business use rights, and the elimination of business use rights. Then the provisions in the UUPA are further regulated in PP No. 40 of 1996 which regulates Business Use Rights, Building Use Rights and Use Rights. However, PP No. 40 of 1996 has been revoked and replaced by PP No. 18 of 2021 which regulates Management Rights, Land Rights, Flats and Land Registration. This PP is an implementing regulation of Law No. 11 of 2020 concerning Job Creation. Then Law No. 11 of 2020, based on Constitutional Court Decision Number 91/PUU-XVIII/2020, needs to be revised by replacing Law No. 11 of 2020 concerning Job Creation. In this regard, a Government Regulation in Lieu of Law of the Republic of Indonesia Number 2 of 2022 concerning Job Creation has been stipulated. On December 30 2022, the President in accordance with his authority based on Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia has enacted Law No. 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law.

In research conducted by A. Silviana, it was stated that the use of land above management rights in its implementation creates legal problems related to the extension of land rights above management rights when the land rights expire. (A. Silviana, 2017: 38). Then, in Devita Monda Seventina's research, it was stated that the enactment of PP No. 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration shows that there has been a development of regulatory provisions that were originally regulated in the UUPA to become more detailed. (Seventina Monda Devita, 2021: 887). Especially in terms of regulating management rights because the articles of the UUPA are not regulated but are only mentioned in the General Explanation of the UUPA. In research conducted by Nisrina Milla Sharfinda, Antikowati, and Bhim Prakoso, it was stated that Law No. 6 of 2023 creates new norms regarding the granting of business use rights (Sharfinda, Nisrina Milla, et.al, 2023: 144).

This research focuses on Cultivation Rights granted on Management Rights land. It is interesting to examine the substance of the cultivation rights in the UUPA and the substance of the cultivation rights in PP No. 18 of 2021. Then in relation to management rights, are the cultivation rights granted on land with management rights consistent with the UUPA? Based on this background, the aim of this writing is to describe the juridical problems of cultivation rights over management rights.

2. Research Method

This research uses a normative legal research type using literature study as a method of collecting data. The nature of the research carried out is analytical descriptive research, so that the research results are able to describe the juridical

problems of cultivation rights over management rights. Secondary data is the main data used for analysis, therefore the primary legal materials and secondary legal materials collected are then analyzed qualitatively. The approach used is a statutory approach.

3. Results and Discussion

Substance Of Business Use Rights And Substance Of Management Rights According To UUPA

a. Substance of Business Use Rights According to UUPA

Cultivation Rights appeared for the first time in the UUPA in article 28. If there are Indonesian citizens and Indonesian legal entities who need land to cultivate in the fields of agriculture, fisheries or animal husbandry then based on a government determination they can be granted cultivation rights. Cultivation rights subjects have the right to control and use their land to carry out business in the fields of agriculture, fisheries and animal husbandry. (I Ketut Oka Setiawan, 2020:102). The granting of cultivation rights is carried out on state land whose area is at least 5 hectares. The maximum period given to holders of business use rights is 25 years, but for companies that operate long-lived plants such as oil palm plants, a period of up to 35 years can be given. If the term expires, the holder of the business use right can request an extension for a maximum of 25 years and if the extension expires, it can be renewed for a maximum of 35 years. Referring to the national principle, business use rights may not be granted to foreigners and foreign legal entities. An Indonesian person or legal entity is obliged to release or transfer the right to cultivate to another party if the holder of the right to cultivate no longer meets the requirements as a subject of the right to cultivate. The transfer of cultivation rights to a party who meets the requirements as the subject of cultivation rights is carried out within a period of 1 year. If this obligation is not carried out, the legal consequences will be that the right to cultivate is terminated by law, so that the land becomes state land.

b. Substance of Management Rights According to UUPA

Management rights are not regulated in the articles of the UUPA, but the General Explanation of the UUPA states that the state can provide land in the form of management to a ruling body such as a government agency, department or autonomous region for use in carrying out their respective duties. Boedi Harsono is of the opinion that management rights are not essentially land rights but are an extension of the state's right to control. (Boedi Harsono, 2013: 277). Consideration of management rights is not included in land rights because the holder of management rights, although he has the authority to use the land he holds for his business purposes,

this is not the purpose of granting such rights, because the main purpose is that the land in question is made available for use by parties. others who need it. In providing and granting the land, the right holder is given the authority to carry out activities which are part of the state's authority, as regulated in Article 2 of the UUPA. In this regard, management rights are not essentially rights to land, but rather constitute control rights from the state. This means that management rights cannot be transferred and cannot be used as collateral for debt.

Initially, the legal subjects of management rights were departments, departments and Swatantra regions. Later in development, the subjects of management rights were: 1) Ruling Body; 2) Government-owned legal entities whose entire capital is owned by the government/regional government; 3) Perum or Persero; 4) Authority Body. (Arie Sukanti Hutagalung and Oloan Sitorus, 2011: 40). According to the Regulation of the Minister of State for Agrarian Affairs/Head of BPN No. 9 of 1999 concerning Procedures for Granting and Cancellation of Rights to State Land and Management Rights, it is emphasized that the subjects of management rights are: 1) Government agencies; 2) State-Owned Enterprises; 3) Regional Owned Enterprises; 4) PT. Persero; 5) Authority Body; 6) Other government legal entities appointed by the government.

According to Article 3 of the Minister of Home Affairs Regulation No. 5 of 1974, the subject of management rights has three powers, namely: 1) planning the designation and use of the land concerned; 2) use the land for the purposes of carrying out its business; 3) hand over parts of the land with management rights to a third party according to the conditions determined by the right holder, which includes aspects of its designation, use, time period and finances, provided that the grant of land rights to the third party is carried out by authorized officials. (Irene Eka Sihombing, 2009: 47). Management rights have a term as long as the land is used according to its intended purpose. These management rights cannot be transferred to other parties, and cannot be used as collateral for debt. In principle, as long as the subject of management rights still exists, the management rights will not be removed. This is because management rights are an extension of the state's right to control where the authority to implement these rights is delegated to certain agencies. So as long as the agency continues to carry out government duties and the task of providing parts of its management rights to third parties, then the management rights remain.

Juridical Problems Of Cultivation Rights Over Management Rights

a. Cultivation rights according to PP No. 18 of 2021

Regulations regarding cultivation rights are contained in articles 19-33 of PP No. 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration.

Cultivation rights can be granted to Indonesian legal entities and Indonesian citizens. If in the future the holder changes to be a non-Indonesian citizen or Indonesian

legal entity, then there is an obligation to relinquish these rights. The period given to relinquish rights is 1 year, if this period is exceeded and the rights are not released or transferred then by law the rights are forfeited. The term given to the holder of the right to cultivate is a maximum of 35 (thirty five) years, and can be extended for a period of 25 (twenty five) years. When the extension time expires, the rights holder can request a renewal of the rights for a maximum period of 35 (thirty five) years.

Different from the UUPA regulations in PP no. 18 of 2021 Cultivation rights can not only be granted on state land but can also be granted on land with management rights. Through a decision granting rights by the minister, the requested cultivation rights on state land can be granted to the applicant. For cultivation rights applied for on management rights land, approval from the management rights holder is required, which is the basis for the decision to grant rights by the minister. The granting of rights must be registered at the land office and from the moment it is registered the right to cultivate is established. Then the subject of the right to cultivate is given a certificate of land rights as proof of rights.

b. Management rights according to PP No. 18 of 2021

After the enactment of Law No. 11 of 2020 concerning Job Creation, PP No. 18 of 2021 was issued concerning Management Rights, Land Rights, Flats and Land Registration. Even though Law No. 11 of 2020 concerning Job Creation is no longer in effect, replaced by Perpu No. 2 of 2022, and then replaced by Law No. 6 of 2023, PP No. 18 of 2021 is still in effect as implementing regulation. In the PP, the definition of management rights is the right to control from the state, the authority to implement which is partly delegated to the holder of management rights.

Land that can be granted management rights is state land and customary land. As stated in PP No. 18 of 2021, state land is land that is controlled directly by the state, this land is not attached to any land rights, is not waqf land, is not ulayat land and/or is not an asset belonging to the state/regional property. Meanwhile, ulayat land is land that is in the area of customary law community control which in reality still exists and is not attached to any land rights. The existence of management rights originating from state land or ulayat land is determined by a Ministerial decision.

Management Rights originating from state land are granted to: a) Central Government Agencies; b) Regional Government; c) State-Owned Enterprises/Regional-Owned Enterprises; d) State-Owned Legal Entity/Regional-Owned Legal Entity; e) Land Bank Agency; or f) Legal entity appointed by the Central Government. Meanwhile, management rights originating from customary land are assigned to customary law communities. In Article 7 of PP No. 18 of 2021, it is stated that the holder of management rights has the authority to: a) prepare a plan for the allocation, use and use of land in accordance with the spatial plan; b) use and utilize all or part of the management rights land for their own use or in collaboration with other parties; and

c) determine the rates and/or annual mandatory fees from the other party in accordance with the agreement. In the case of management rights, the use and utilization of all or part of the land is used independently or in collaboration with other parties, then above the management rights, land rights can be given in the form of business use rights, building use rights and/or use rights above the management rights. If above the management rights, business use rights, building use rights and/or use rights are given to other parties, in the sense of collaboration with other parties, then a land use agreement is made.

Since it was registered at the land office, that is when the management right was declared born. Those who hold management rights will be given proof of ownership of management rights in the form of a certificate. Even though you have a certificate, management rights cannot be encumbered with mortgage rights as a means of debt security. Apart from that, rights holders cannot transfer these rights to other parties. However

Based on recommendations from the management right holder and written clearly in the land use agreement, other parties who hold land rights over management rights can transfer their land rights or also use them as collateral for debt repayment. Regarding the abolition of management rights, it is stated that the management rights were abolished because: a) the rights were canceled by the Minister due to an administrative defect; or a court decision that has obtained permanent legal force; b) released voluntarily by the rights holder.

c. Inconsistencies in the substance of Cultivation Rights over Management Rights in PP No. 18 of the Year 2021 with UUPA

The UUPA regulates business use rights including their meaning, subject of rights, time period, occurrence and termination. One thing that is emphasized in Article 28 paragraph (1) of the UUPA is that cultivation rights are granted on state land. Provisions regarding business use rights are further detailed in PP No. 40 of 1996 concerning Cultivation Rights, Building Use Rights and Use Rights. However, PP No. 40 of 1996 has been revoked and replaced with PP No. 18 of 2021 which regulates Management Rights, Land Rights, Flats and Land Registration. This PP is an implementing regulation of Law No. 11 of 2020 concerning Job Creation. In PP No. 18 of 2021, it is stated that on top of Management Rights, Business Use Rights, Building Use Rights and Use Rights can be granted. It was also emphasized that Cultivation Rights can be granted on state land, and Management Rights. Law No. 11 of 2020 concerning Job Creation then no longer applies and was replaced by Perpu No. 2 of 2022 concerning Job Creation, which was subsequently implemented by Law No. 6 of 2023 concerning the Determination of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law.

Article 129 paragraph (2) of Law No. 6 of 2023 creates new norms regarding

business use rights, because the article states that business use rights, building use rights and use rights can be given above management rights. In fact, this provision is the same as that regulated in PP No. 18 of 2021, because this PP states the same thing that above management rights, business use rights, building use rights and use rights can be granted. Even though PP No. 18 of 2021 was implemented as an implementing regulation of Law No. 11 of 2020 concerning Job Creation, after Law No. 11 of 2020 it was revoked and replaced with Perpu No. 2 of 2022, which then became Law No. 6 of 2023, but PP No. 18 of 2021 remains in effect. This can be seen from Article 184 of Law No. 6 of 2023 which confirms that all implementing regulations remain in effect as long as they do not conflict. So the provisions regarding Cultivation Rights can be granted over state land and management rights, as well as the provisions that over management rights can be granted cultivation rights, building use rights and usage rights, remain in effect.

If you pay attention, the provisions regulated in PP No. 18 of 2021 are different from those stipulated in the UUPA, because the UUPA regulates that cultivation rights are granted on state land. Meanwhile, Article 21 of PP No. 18 of 2021 states that land that can be granted with cultivation rights includes state land and land with management rights. Judging from the hierarchy of legislation as regulated in Law No. 12 of 2011 concerning the Formation of Legislative Regulations, it is determined that the types and hierarchy of statutory regulations consist of: a) The 1945 Constitution of the Republic of Indonesia; b) Decree of the People's Consultative Assembly; c) Laws/Government Regulations in Lieu of Laws; d) Government Regulations; e) Presidential Regulation; f) Provincial Regional Regulations; and g) Regency/City Regional Regulations. This hierarchy serves as a guideline so that the regulations below implement the regulations above it.

Observing the provisions of Article 21 of PP No. 18 of 2021, the contents of which conflict with Article 28 of the UUPA, it can be seen from the naked eye that PP No. 18 of 2021, which has a lower position than the UUPA, regulates things that are different from the UUPA. In law there is a legal principle, namely the principle of *lex superior derogate inferiori*, namely the principle that laws and regulations which have a lower level in the hierarchy of laws and regulations must not conflict with those which are higher. As a rule of law, all aspects of life must always be based on law, so an orderly order is needed in the formation of laws and regulations. Hans Kelsen has constructed the *Stufenbau* theory, namely that the legal system is a ladder system with tiered rules where the lowest legal norms must adhere to higher legal norms, and the highest legal norms must adhere to the most basic legal norms (*grundnorm*). (Nurhasan Ismail, 2018: 231).

There are differences between what is regulated in PP No. 18 of 2021 and the UUPA, so it can be seen that the PP, which is a lower regulation than the Law, has

regulated things that are different from those regulated by the Law. This shows that there is an inconsistency in the substance of the cultivation rights in PP No. 18 of 2021 with the UUPA. It also shows that law makers do not consistently apply the *lex superior derogate inferiori*. This inconsistency has the potential to give rise to legal uncertainty.

Legal certainty is considered to exist if: 1) norms contain consistency between one another both internally, vertically and horizontally; 2) norms contain concepts or formulations that contain a single meaning; 3) norms contain legal consequences in the form of rights and obligations as well as legal consequences and methods that can be taken by each person if these rights and obligations are violated. These three measures are not cumulative, but function independently. (Nurhasan Ismail, 2018: 233)

The inconsistency between PP No. 18 of 2021 and the UUPA shows that there is no vertical consistency because the PP is under the Law but regulates different things from those regulated by the Law. UUPA regulates cultivation rights on state land, while PP No. 18 of 2021 regulates cultivation rights granted on state land and management rights. This shows that there are norms that do not contain a single meaning, because they are different.

Furthermore, inconsistencies were found regarding management rights, namely in General Explanation II. (2) UUPA confirms that the state can give land to a person or legal entity with ownership rights, business use rights, building use rights, use rights or give it under management to a ruling body (department, agency or autonomous region). So management rights are not land rights, but are part of the state's control rights, which are given to the subjects of management rights, namely government agencies and legal entities whose capital is state or regional property. In essence, management rights are on state land. However, Article 4 of PP No. 18 of 2021 states that management rights can come from state land and customary land. This clearly shows that the PP is inconsistent with UUPA. The author understands that state land is different from customary land. State land is land that is controlled directly by the state, while ulayat land is land that is in the area controlled by customary law communities which in reality still exists and is not attached to any land rights. The subject of customary law rights is the customary law community, so management rights on customary land cannot be granted without the consent of the customary law community as the holder of customary law rights.

Article 8 PP No. 18 of 2021 stipulates that above management rights, business use rights, building use rights and use rights can be granted. This means that there are rights to this land that are given above management rights that are on state land, and there are also rights to land that are given above management rights that are on customary land. In the case of cultivation rights, building use rights are given over management rights that are on ulayat land, it is necessary to understand that management rights originating from ulayat land are assigned to customary law

communities, if the term of the right to the land expires, then the land retain management rights over customary land. Article 15 of PP No. 18 of 2021 confirms that the removal of management rights over customary land results in the land returning to the control of customary law communities. All inconsistencies found clearly result in no legal certainty.

4. Conclusion

It turns out that in PP No. 18 of 2021 the substance of business use rights is regulated in the UUPA, the substance of business use rights is regulated differently. If the UUPA clearly states the right to cultivate on state land, in PP No. 18 of 2021, the right to cultivate is granted on state land and land with management rights. It turns out that there are also inconsistencies regarding the substance of management rights. This article shows the existence of juridical problems with cultivation rights over management rights due to violations of the principle of *lex superior derogate legi inferiori*. Law makers do not consistently apply this principle, this has the potential to give rise to legal uncertainty.

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