

The Authority of Local Governments in Land Arrangement and Management Perspective of Maslahah Theory

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Abstract

The purpose of this research is to find out and analyze the rationale of local government in conducting land management and management and to know and analyze the authority of the Regional Government in structuring and managing the perspective of Maslahah's theory. The rationale for the authority of the regional government to arrange and manage land comes from Article 12 paragraph (2) letter d of Law No. 23 of 2014 concerning Regional Government, because the essence of regional autonomy is to bring services closer to the community. The authority of the regional government in structuring and managing the land of the perspective of the maslahah theory includes the Hajjiyah maslahah, the benefit needed by the community to perfect the basic benefit or something needed by humans, but has not yet reached the level of dharuri.

Keywords

authority; local government;
land; maslahah



I. Introduction

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) states that, "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". The derivation of the regulation in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, also contained in Article 2 paragraph (1) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (hereinafter abbreviated as UUPA) states that namely the State as an organization of power for all the people to control the earth, water, space, and the natural resources contained therein.

Article 2 paragraph (4) of the LoGA confirms that the State's right to control land in its implementation can be delegated to autonomous regions and customary law communities as needed and does not conflict with national interests according to the provisions in Government Regulations. Based on the provisions of Article 2 paragraph (4) of this BAL, it can be authorized to local governments in the form of delegation of authority over land by the state. The Regional Government is obliged to maintain and manage land according to its designation on the basis of the delegation of authority granted by the state and must not conflict with national interests which will be regulated by implementing regulations in the form of government regulations.

The use and utilization of land must be used and utilized for the welfare of the owner, benefiting the community, nation and state. Land has a social value so that individual interests will not be disturbed by the interests of the community. Individual interests and

public (society) interests must be balanced in order to achieve the main goal, namely justice, happiness and prosperity for all Indonesian people (Harsono, 2012).

According to Muhammad Bakri (2007), the nature and principle of state authority stemming from the state's right to control land is in the hands of the Central Government. Autonomous regions (now Regional Governments), only have this authority if there is a delegation of authority to exercise land control rights by the state from the Central Government to the Regional Government.

Urip Santoso (2013) states that the state's authority in the land sector centralized, i.e. The main authority lies and is owned by the Central government. This can be seen in the explanation of Article 2 of the LoGA which states that the provisions in paragraph 4 are concerned with the principles of autonomy and medebewind in the administration of regional government. Agrarian matters by their nature and in principle are the duty of the Central Government (Article 33 paragraph 3 of the Constitution). The delegation of authority to exercise the state's right of control over the land is a medebewind. Everything will be carried out according to its needs and of course it must not conflict with national interests. Authority in the agrarian sector can be a source of finance for the region.

The enactment of Law no. 23 of 2004 concerning Regional Government, where regions have the right to manage and regulate their own household, better known as regional autonomy, requires regions to carefully manage the potential possessed by each region. Especially in the arrangement and management in the land sector, between Law no. 23 of 2014 with Law No. 5 of 1960 there was a conflict of norms. Law No. 23 of 2014 confirms that the authority in the land service sector is decentralized from the Central Government to the Regional Government, while the LoGA emphasizes that the authority in the land sector is centralized in the Central Government.

Land is one of the mandatory government affairs which is the authority of the Regional Government which is not related to basic services as regulated in Article 12 paragraph (2) letter d of Law no. 23 of 2014 concerning Regional Government. In this regard, the local government's authority in structuring and managing land must provide benefits for all levels of society.

Departing from the explanation above, the provisions of Article 2 paragraph (4) of Law no. 5 of 1960 concerning the very centralized Basic Regulation on Agrarian Principles (UUPA), in which land matters fall under the authority of the central government, contrary to Article 12 paragraph (2) letter d of Law no. 23 of 2014 concerning Regional Government, that the issue of land affairs adheres to the principle of decentralization so that regions are given the authority to organize and manage the land sector.

Based on the provisions of Article 10 paragraph (1) of Law no. 23 of 2014, uabsolute government agency as referred to in Article 9 paragraph (2) covering: foreign policy, defence, security, justice, monetary and national fiscal; and religion. Based on the absolute affairs of the central government above, it does not include land affairs at all. Authority in the land sector can become a regional government affair using the principle of decentralization as regulated in Article 12 paragraph (2) letter d of Law No. 23 of 2014, because the land sector is a mandatory government affair that is not related to basic services.

The existence of a land office in the region which is a manifestation or extension of the National Land Agency (BPN) in the region with the principle of deconcentration, is a denial of the existence of regional autonomy with the principle of decentralization. Land affairs are not under the authority of the regions, but remain the authority of the center.

The principle of *maslahah* in the arrangement and management of land by local governments is to create benefits or for the benefit of human life based on the principle of benefiting and avoiding harm. The arrangement and management of land by the local government must be able to realize the benefit of the *ummah*.

II. Research Methods

To support the research, the author uses a normative research method with legal doctrinal because the results of this study are a concept of the problem being studied, while the contents of the method studied are:

2.1 Types of Research

The type of legal research used is normative legal research. Normative legal research is a scientific procedure to find the truth based on the logic of legal scholarship from the normative side. Scientific logic in normative legal research is built based on scientific disciplines and the workings of normative legal science, namely legal science whose object is law itself.

2.2 Research Approach

The research approach method used is:

1. Legislative approach (statute approach), in the approach to legislation researchers need to understand the hierarchy, and the principles in legislation. Thus, the approach to legislation is an approach using legislation and regulations. Products that are *beschikking*/decree, namely a decision issued by an administrative official that is concrete or special.
2. The conceptual approach is an approach that is taken if there is no or no legal rules for the problems at hand. In this case, it relates to the recruitment of constitutional judges based on the principles of transparency and participation. This approach was taken to obtain the concept of recruiting constitutional judges based on the principles of transparency and public participation. In the conceptual approach, researchers also need to refer to the principles or views of scholars as well as legal doctrines.

III. Discussion

3.1 Rationale for Land Arrangement and Management by Local Government

Land is a very vital support in human life because land is not limited only as a place to build a residence but more than that, land is a place for an individual or a community to build economic, political, social and cultural life. Land regulation in Indonesia is the responsibility of the state.

Etymologically according to the Big Indonesian Dictionary, land has many meanings, including:

- a. Soil is the surface of the earth or layers of the earth
- b. The state of the earth somewhere
- c. The delimited surface of the earth
- d. Materials from the earth (sand, marl, rock, etc.)

Andi Hamzah gave the meaning of land by referring to the agrarian definition as regulated in the UUPA. Article 1 paragraph (4) of the BAL in a general explanation states that at that time only the surface of the earth is what is called land that can be controlled by a person. So the ground is the surface of the earth.

According to customary law, land has a more specific meaning because of its religious magical nature. The relationship between people or groups of people with land is very close, even inseparable, the relationship is eternal. Geologically agronomist Iman Sudiyat explained that soil is the uppermost loose layer of the earth's surface, which is used to grow plants. That's why later known the term arable land, yard land, agricultural land, plantation land. While the land used to construct building land is called building land.

Ter Haar (1981) said that land cannot be separated from humans who are regularly socialized in such a way. The land where they live, the land that feeds them, the land where they are buried and the abode of their guardian spirits and their ancestral spirits. This kind of relationship is deeply rooted in the minds of the people (humans) towards the land.

Following the current development of customary law, I Gede Wiranata noted or explained that "land" has the following characteristics:

1. Land is an object that stores profitable wealth
2. Land is a place of residence for legal alliances and all of their members as well as providing a livelihood for their owners
3. Land is a unit where the owner will be buried after death, as well as an ancestral place for alliances for several generations before.

The use of land must be adjusted to the circumstances and nature of its rights so that it is beneficial for the welfare and happiness of the owner as well as for the community and the state. This provision does not mean that individual interests will be totally suppressed by the public interest of the community. The interests of the community and the interests of individuals must balance each other until the main goal is achieved, namely prosperity, justice and happiness for the people as a whole. The implementation of development must be in accordance with the substance to be addressed in an integrated manner based on the applicable laws and regulations.

Land management ultimately aims to create legal certainty in terms of legal relations between people and the earth, water and space, including legal actions related to these natural resources. Another objective of the implementation of the land management program is to create order in relation to the administration and administration related to the control and use of land which will have a direct or indirect impact on the sustainability of development in Indonesia.

The implementation of state control rights over land can be authorized or delegated to local governments and customary law communities as necessary and does not conflict with national interests according to the provisions of laws and regulations. This statement must be harmonized with Law no. 23 of 2014 concerning Regional Government.

The essence of regional autonomy as regulated in Law no. 23 of 2014 concerning regional government, is to bring the government closer to the people. Regions are given the authority to regulate and administer government affairs based on the principle of decentralization. Including in the field of land management and management for the welfare of the people.

Based on the provisions of Article 16 paragraph (1) of the LoGA and Article 53 of the LoGA, the right to land that can be controlled by the Regional Government is the Right to Use. The Right to Use is regulated in Article 41 to Article 43 of the LoGA. The Right of Use is further regulated in Article 39 to Article 58 of PP No. 40 of 1996 concerning Cultivation Rights (HGU), Building Use Rights (HGB), and Land Use Rights.

Article 41 paragraph (1) of the UUPA states that the right to use is the right to use and or collect proceeds from land controlled directly by the state or land owned by another person who gives the authority and obligations specified in the decision to grant it by the authorized official or by agreement with the owner. The land, which is not a lease agreement or a land management agreement, everything as long as it does not conflict with the spirit and

provisions of this law. Use rights can be used to construct buildings, namely in the word using and or can be used for the interests of agriculture, fisheries, animal husbandry and plantations, namely in the word collecting products from the land.

The provisions of Article 42 of the BAL stipulates that parties who may have the right to use are Indonesian citizens, foreigners domiciled in Indonesia, legal entities established under Indonesian law and domiciled in Indonesia, and foreign legal entities having representatives in Indonesia. The provisions of Article 42 of the LoGA indicate that it is not explicitly stated that the regional government (provincial government, district/city government) is the party with the usufructuary rights. The provision only states that one of the subjects of the usufructuary rights is a legal entity established under Indonesian law and domiciled in Indonesia.

Provisions regarding Regional Government as the subject of usufructuary rights can be seen in Article 39 of PP No. 40 of 1996 which regulates the subject of use rights, namely those who can have use rights are Indonesian citizens, legal entities established under Indonesian law and domiciled in Indonesia, departments, non-departmental government institutions, regional governments, religious and social agencies, Foreigners domiciled in Indonesia, foreign legal entities that have representatives in Indonesia, and representatives of foreign countries and representatives of international agencies. Based on Article 39 of PP No. 40 of 1996, Regional Government is one of the subjects of land use rights.

The main objective of the issuance of regional autonomy policies, among others, is to free the Central Government from unnecessary burdens in dealing with regional affairs. Thus, the center has the opportunity to study, understand, respond to various global trends and take advantage of them. At the same time, the Central Government is expected to be able to concentrate more on the formulation of national macro (broad or general and basic) policies that are strategic in nature. On the other hand, with decentralization, the regions will experience an optimal empowerment process. The initiative and creativity of the Regional Government will be stimulated, so that its ability to overcome various problems that occur will be stronger.

The provisions of Article 18 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia affirm that "Provincial, Regency and City Regional Governments regulate and manage their own government according to the principle of autonomy and co-administration". co-administration principle. The principle of autonomy in these provisions means that the implementation of government affairs by the regions can be carried out directly by the regional governments themselves. Meanwhile, the principle of co-administration means that the implementation of government affairs can be carried out through assignments by the Provincial Government to Regency/City and village Governments or assignments from Regency/City Governments to Village Governments.

Even though the regions are given the freedom to regulate and manage their own government affairs, they are still within the framework and sovereignty of the Unitary State of the Republic of Indonesia. This means that the Regional Government is obliged to obey and respect the authority of the Central Government. To realize the ideals and objectives of the granting of regional autonomy, the Regional Government is required to be more creative and initiative in exploring and utilizing all the potential of the region to achieve progress and welfare of the people in the region.

Land has a very strategic position so that land issues have a significant impact on social, political, economic and cultural conditions in an area. The legal relationship between humans and land is such that in the utilization and use of land, it is possible to create conditions conducive to human life and livelihood, it is absolutely necessary to strive for regulation for the sake of order. Legal certainty as a guarantee for land owners, the

government and other parties is the main basis for the implementation of legal order for social, political, economic and cultural life and livelihoods..

Natural resources which are the gift of God Almighty are one of the main supporting elements for the survival and improvement of the nation's prosperity throughout the ages. The gift giving must also be interpreted as a mandate, in the form of a burden of duty to manage it properly, not only for the current generation, but also for generations to come. The tasks of managing are in the form of regulating and leading the control and use of land and other natural resources by their nature, including the field of public law. The task of managing land rights, which by their nature belongs to the field of public law, cannot be carried out alone by the entire Indonesian nation.

According to Article 12 paragraph 2 letter d of Law no. 23 of 2014 concerning Regional Government states that land affairs are mandatory government affairs that are not related to basic services. In Law no. 23 of 2014 concerning Regional Government, the relationship of authority between the center and the regions is closely related, among others, to the way in which government administration affairs are divided or how to determine regional household affairs. Each region can explore the potential that can be developed, so that the development of each region can increase rapidly. There are various sectors that can be developed, including the trade sector, service sector, agriculture sector, tourism sector and others.

Theoretically, regional autonomy in Law no. 23 of 2014 concerning Regional Government, the definition of autonomy includes the rights, powers, and obligations of autonomous regions to regulate and manage their own government affairs and the interests of local communities in the system of the Unitary State of the Republic of Indonesia. One of the characteristics of regional autonomy is that government units are autonomous, independent and clearly as multilevel government units that are separate from the center in terms of the affairs that have been divided their authority. The Center only controls through the Establishment of Standard Procedure Criteria Norms which are formed in the form of legal products of the central government directly by the center to these units.

So, the constitutional basis for the policy of land development is basically based on the provisions of Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In the era of regional autonomy, this article is translated into Law no. 23 of 2014 concerning Regional Government.

3.2 Land Arrangement and Management by Local Governments Perspective of Maslahah Theory

Regional Autonomy as regional empowerment is a learning and strengthening process for regions to be able to regulate, manage and manage the interests and aspirations of their own people. Gradually the region will strive to be independent and free from dependence on the Center. The magnitude of the benefits of land for human life makes humans compete to get land as a source of life. From ancient times, from generation to generation, humans bequeath a certain area of land to their descendants. The land can be in the form of agricultural land, plantations, forests, or land on which the family house stands. In certain areas within the territory of Indonesia, it is also known that ulayat lands are owned by certain people and cannot immediately proceed with legal actions which are usually on land objects.

Entering the sixth year of the regime of Law no. 23 of 2014 concerning Regional Government, the implementation of regional autonomy still finds many development problems and obstacles, especially in the framework of regional development, namely the ineffective use of spatial planning as a tool for integrated development (regional/sectoral), development management in the regions has not been optimal in supporting development efforts areas, and the accumulation of capital in urban areas. In relation to land and spatial

planning, as the initial basis for planning government activities both at the center and in the regions, especially in terms of determining the location or area.

The regional autonomy policy gives regencies/municipalities greater authority and flexibility in exploring and developing regional potentials. This is proven by many autonomous regions that are creative and take the initiative with their tips to advance their regions, for example, various ways are carried out to increase Regional Original Income (PAD), encourage the rate of investment through promotion and improvement of licensing services, building and improving the quality of supporting infrastructure investment activities, and improve the quality of human resources. To achieve goals in the context of economic decentralization through the utilization of regional potentials to support central and local economic development, this can be done through a combination strategy, namely regional authority to be independent, wider economic area.

The government has realized the importance of legal certainty regarding the ownership of land rights for the welfare of the community. Article 19 of the UUPA states, among other things, that to ensure legal certainty, the Government holds land registration throughout the territory of the Republic of Indonesia. Thus, the delegation of authority to exercise control rights from the state over the land is a *medebewind*, meaning that everything will be carried out according to its needs and of course it must not conflict with national interests.

The authority in the agrarian sector is a source of finance for the region and then the attachments to letter J and attachments to letter Z of Law no. 23 of 2014 concerning Regional Government which gives authority to local governments to carry out land management and land acquisition. This shows that legal certainty from implementation through local government authority policies in determining the location of land in the public interest in the context of managing and developing tourism destinations related to nature and tourism has a positive impact on the economy and people's welfare, with this realization being an administrative activity. Land to provide legal certainty as intended, it is the responsibility of each regional government.

If the land is controlled by the regional government, if the status is right to use, then the authority over the land is to use the land right to use it for the purpose of carrying out its duties. If the land with usufructuary rights is not used for the purpose of carrying out its duties, then the usufructuary rights will be nullified and the land will return to state land or land directly controlled by the state.

There are several provisions that must be considered regarding the use rights controlled by the regional government, as follows:

1. Based on the aspect of land use, this right of use is used for the purpose of carrying out the duties of the regional government
2. Based on the aspect of the tenure of the land, this right of use does not have a certain period of time but is valid as long as the land is used for the purpose of carrying out its duties
3. Based on the aspect of its nature, this is right to use, namely the right to only use the land for the purpose of carrying out its duties, not the right of disposal, which is not entitled to transfer or make debt guarantees.
4. Based on the aspect of the transfer of rights, this right of use cannot be transferred in any form to other parties through buying and selling, exchanging, grants, company income or auctions.
5. Based on the aspect of encumbrance of rights, this usufructuary right cannot be used as collateral for a debt with encumbered mortgage rights.

If the land is controlled by the regional government, if it has the status of management rights, then the regional government has several powers, namely:

1. Planning the allocation and use of land

The regional government as the holder of management rights has the authority in the form of planning the allocation and use of land for housing, industry, trade, shops, or offices. The designation and use of land planned by the regional government is guided by the regency/municipal spatial layout plan (RTRW) determined by regional regulations.

2. Use the land for the purposes of carrying out their duties.

The Regional Government as the holder of the management right has the authority to use the land with the management right for the purposes of carrying out its duties, for example housing, industry, trade, shops, or offices.

3. Handing over parts of the land with management rights to third parties and or in collaboration with third parties.

The Regional Government as the holder of management rights is not authorized to rent out parts of the land with management rights to third parties. If the management right holder rents out parts of the land with management rights to a third party, then it is contrary to the provisions of Article 44 of the UUPA, namely that land that can be leased to other parties is only land with property rights. The authority of the Regional Government as the holder of management rights is to hand over parts of the land with management rights to third parties in the form of building rights, usufructuary rights or property rights. Parts of land with management rights that are handed over by the holder of the right to a third party must have a management right certificate, so that the holder of the management right has the authority to enter into a legal relationship with a third party.

Maria SW Sumardjono (2007) stated that in order to obtain a right to use a building over a management right, a third party must obtain approval from the holder of a management right which is contained in the agreement for the transfer, use and management of land rights, because the agreement is the basis for the granting of the right to use a building on a land right. management. Third parties who obtain building use rights or usufructuary rights originating from parts of land with management rights through land use agreements between local governments as management rights holders and third parties.

The authority of local governments in structuring and managing land from the perspective of *maslahah* theory is to realize community welfare. *Maslahat* What is to be achieved can be divided into several types based on different points of view. Amir Syarifuddin describes it in terms of its strength as evidence in establishing the law, there are three kinds of *mashlahah* as follows:

- a. *Maslahah Dharuriyah*, namely the benefit whose existence is needed in human life. Human life has no meaning if only one of the five points that must be maintained is lost. All efforts that guarantee the maintenance of the five points are *mashlahat* at the *dharuri* level, therefore Allah has ordered the implementation of these efforts. Everything that causes its destruction or damage is bad, so Allah forbids it. Thus Allah forbids apostasy to maintain religion, forbids killing to preserve the soul, forbids adultery to maintain offspring, and forbids stealing to preserve property.
- b. *Maslahah Hajiyah*, namely the benefit that the level of human need for it is not at the *dharuri* level. It does not directly meet the five basic needs of the five but indirectly leads to it, as in matters that make it easy for the fulfillment of the needs of human life. For example, in the field of worship, *qashar* prayers are given and *iftar* breaks for people who are traveling; in the field of *mu'amalah* it is permissible to hunt animals and eat good food, it is permissible to buy and sell orders (*bay' al-salam*), cooperation in agriculture (*muzara'ah*) and plantations (*musaqqah*). All this is prescribed by Allah to support the basic needs above.

- c. Masalahah Tahsiniyah, namely the benefit for which the needs of human life are not up to the level of dharuri, nor are they up to the level of hajj, but these needs need to be fulfilled in order to give perfection and beauty to human life. Masalahah in the form of tahsini is also related to the five basic human needs. For example, it is recommended to eat nutritious food, dress well, perform circumcision services as additional charity, and various ways to remove najis from the human body.

These three benefits need to be distinguished, so that a Muslim can determine priorities in taking a previous benefit. The benefit of the dharuriyah must take precedence over the benefit of the hajiyyah, and the benefit of the hajiyyah must take precedence over the benefit of the tahsiniyah.

Wahbah al-Zuhaili put forward several conditions that must be met to be able to use mashalih mursalah, the following are the conditions:

1. The benefit must be in accordance with the objectives of sharia, not contradicting the principles of sharia and not contradicting the texts or qath'i arguments.
2. The benefit must be accepted by the mind that it does contain benefits for sure, not just a guess, let alone a weak assumption. This means that the application of the benefit must really produce benefits and avoid harm.
3. The resulting benefits must be general for all humans, not only felt by certain individuals or groups. This is because the shari'a law is applied to all mankind. From here, the application of benefits that only applies to the leader, family and close people is not valid.

If the authority of local governments in land management and management is studied from the masalahah theory, it is very relevant, because the essence of regional autonomy is to bring services closer to the community, including in the land sector. Viewed in terms of its strength as a proof in establishing the law, there are three kinds of Masalahah Dharuriyah, Masalahah Hajiyyah, Masalahah Tahsiniyah, Masalahah mursalah, and an evil that is supported by the rule of law.

The authority of the local government in the arrangement and management of land. In the implementation of government politics in the regions, it is not possible to only prioritize one aspect (economics) but it is important to pay attention to other aspects, namely environmental sustainability so that the implementation of green government is very important in supporting environmental sustainability in the political process of government in the regions (Dama, 2021). The Government of the Republic of Indonesia was formed to protect the whole of the Indonesian people (Angelia, 2020). This includes the hajiyyah masalahah, the benefits needed by society to perfect the basic benefits or something that is needed by humans, but has not yet reached the dharuri level. Local government is a local government that is local, right? understand and better understand the intricacies of the region, because he is essentially a representative of the central government in the region.

IV. Conclusion

Land is one of the mandatory government affairs which is the authority of the Regional Government which is not related to basic services as regulated in Article 12 paragraph (2) letter d of Law no. 23 of 2014 concerning Regional Government. The authority of the local government in structuring and managing land. This includes hajiyyah masalahah, but has not yet reached the dharuri level. In the future, land arrangement and management must be left fully to the regional government, because the essence of regional autonomy is to bring services closer to the community.

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