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Application of Development Law Theory in Overcoming Legal Voids Related to Land Ownership Restrictions in Indonesia

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Abstract. *Considering that housing is a fundamental human need, the fulfillment of adequate housing constitutes a governmental responsibility. This aligns with the mandate of Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which guarantees a decent standard of living for all citizens. The government has a responsibility to provide decent housing for all Indonesian people. The absence of legal regulations regarding the limitation of ownership of land rights for residential houses for individuals causes a person to freely and without limits buy a residential house. Through a normative legal study, this research aims to examine the dimensions of the theory of developmental law and its application in addressing legal gaps concerning land ownership restrictions in Indonesia. To answer the problems in this research, the researcher uses a normative type of research with a legal approach to fill the lacuna of existing legal regulations in Indonesia since the object of the research is not yet legally regulated. The findings indicate that the theory of developmental law serves as a highly relevant and appropriate theoretical framework to be further explored and applied in filling the existing legal vacuum related to the study's object. The problems faced by each individual (especially people of the middle to lower income) to get a decent house are of course the responsibility of the government. This situation is constitutionally mandated under the 1945 Constitution of the Republic of Indonesia. The answers to the problems, the researcher will approach the study by utilizing the approaches, in particular the Welfare State Theory of John Rawls, and the Law Development Theory of Mochtar Kusumaatmadja.*

Keywords: *Development; Housing; Ownership; Vacancy.*

1. INTRODUCTION

The government bears the responsibility of ensuring adequate housing for all citizens of Indonesia (Gouwgioksiong, 1965). Housing represents a fundamental human need that significantly influences the formation of national character. The fulfillment of the right to housing constitutes a national issue, as its impact is felt across the entire archipelago (Eman Ramelan, 2015). Considering that housing is a basic necessity in human life, the provision of adequate housing is the government's obligation, as mandated by Article 27(2) of the 1945 Constitution of the Republic of Indonesia, which guarantees every citizen the right to a decent standard of living. Furthermore, Article 33(3) of the Constitution similarly affirms that the earth, water, and natural resources shall be controlled by the state and utilized for the greatest prosperity of the people. This

constitutional foundation provides the legal basis for the enactment of legislation governing housing, most notably Law No. 5 of 1960 on Basic Agrarian Principles (hereinafter referred to as the Basic Agrarian Law).

The enactment of the Basic Agrarian Law introduced a more nationalistic framework for land regulation, designed to protect the interests of the Indonesian people. In accordance with Article 33(3) of the 1945 Constitution, Article 2(3) of the Basic Agrarian Law stipulates that state control over land shall be exercised to achieve the maximum welfare of the people, encompassing national prosperity, well-being, and independence within a just and sovereign legal state. Additionally, Article 7 of the Basic Agrarian Law provides that: "In order not to harm the public interest, ownership and control of land exceeding the prescribed limits shall not be permitted." This provision is further elaborated in Article 17, which mandates the government to issue regulations setting maximum and/or minimum limits on land ownership by individuals or legal entities.

In implementation of this mandate, the Regulation in Lieu of Law (Perpu) No. 56 of 1960 on the Determination of Agricultural Land Area was enacted. This law establishes the maximum area of agricultural land that may be owned by a single household or legal entity. The enactment of this law was not only a constitutional mandate but also a response to the socio-economic realities of the time, as indicated in its explanatory memorandum, which noted that approximately 60% of farmers were landless, while vast tracts of agricultural land were concentrated in the hands of a few (Boedi Harsono, 2008). However, these limitations applied only to agricultural land, while the maximum ownership limits for residential land were to be determined by a separate Government Regulation, as required under Article 12 of Law No. 56 of 1960.

The implementation of this provision was attempted through two ministerial instruments: Instruction of the State Minister for Agrarian Affairs/Head of the National Land Agency No. 5 of 1998 on the Granting of Location Permits for Large-Scale Land Control Arrangements; and Instruction of the State Minister for Agrarian Affairs/Head of the National Land Agency No. 2 of 1999 on Location Permits. Both regulations, however, primarily address corporate entities engaged in housing development and do not establish specific ownership limits for individual households. Consequently, the mandate of Article 12 of Law No. 56 of 1960 remains unfulfilled, and to date, no Government Regulation explicitly limits individual ownership of residential land. From the outset, housing-related legislation in Indonesia has failed to clearly define maximum ownership limits for individuals. Neither Law No. 1 of 1964 (which ratified Government Regulation in Lieu of Law No. 6 of 1962 on Housing Principles) nor its subsequent replacements Law No. 4 of 1992 on Housing and Settlements and Law No. 1 of 2011 on Housing and Settlements contain concrete provisions regulating such ownership limits.

This legal vacuum has created the potential for large-scale control of residential land by financially capable individuals or corporations. Such a situation undermines the constitutional principle enshrined in Article 33(3) of the 1945 Constitution, which mandates that natural resources must be managed for the collective benefit of all citizens, including low-income communities. This imbalance is reflected in data from the National Land Agency (BPN), indicating that nearly 80% of land in Indonesia is controlled by less than 2% of the population (Badan Pertanahan Nasional, 2010). To address this regulatory gap, the author proposes a normative legal study based on Mochtar Kusumaatmadja's Theory of Developmental Law as a theoretical approach to

conceptualize and formulate solutions to the existing legal vacuum in land ownership regulation.

2. RESEARCH METHODS

The research method encompasses the type of research, research approach, sources of legal materials and data, techniques for collecting legal materials and data, as well as methods for analyzing both legal materials and data. Studies employing a normative legal research method originate from the existence of a normative problem, which may take the form of ambiguity of norms, conflicting norms, or the absence of norms. This research adopts the statutory approach, conceptual approach, and analytical approach. The technique used for collecting legal materials is documentary study, while the analytical process employs qualitative analysis. Research serves as a fundamental instrument in the development of science and technology. This can be inferred from the fact that research aims to reveal truth in a systematic, methodological, and consistent manner. Through the research process, the collected and processed data are subjected to analysis and construction to generate scientifically grounded conclusions (Soerjono Soekanto dan Sri Mamudji, 2003).

The primary function of research is to attain truth. In this context, truth is not understood in a religious or metaphysical sense, but rather from an epistemological perspective meaning that truth must be examined through the lens of epistemology (Peter Mahmud Marzuki, 2014). The type of research employed in this study is normative legal research. Normative legal research, also referred to as library-based legal research, is conducted by examining applicable laws and regulations along with other library materials, commonly referred to as secondary data, which are then applied to address specific legal issues (Soerjono Soekanto dan Sri Mamudji, 2003). The science of law possesses a distinctive character reflected in its normative nature (Johnny Ibrahim, 2003). The primary focus of normative legal science, as a practical discipline, is to transform existing conditions and to propose solutions to both actual and potential societal problems (David Tan, 2021). According to Sudikno Mertokusumo (Sudikno Mertokusumo, 1991), the process of lawmaking constitutes the concretization and individualization of general legal norms in relation to specific events. The lifespan of legislation often results in regulatory gaps within the substantive legal framework. In the context of law enforcement, adherence to the established legal principles remains essential, even when addressing such gaps in existing statutory regulations (Hari Sutra Disemadi, 2022).

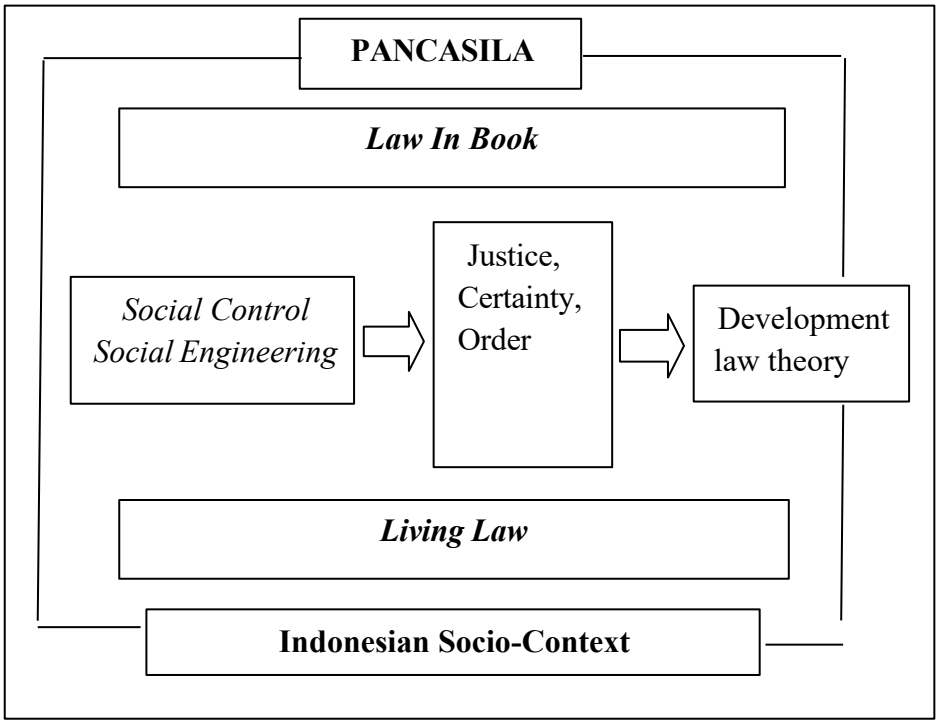
3. RESULTS AND DISCUSSION

3.1. The Dimensions of Developmental Law Theory in the Restriction of Land Ownership in Indonesia

According to the Legal Dictionary, a right is defined as something that is true, genuine, real, or a legitimate authority over something (Yudha Pandu, 2008). Meanwhile, Mr. L.J. van Apeldoorn defines a right as "Law that relates to a particular human being or legal subject, and thereby manifests as a power; a right emerges when the law begins to operate" (CST Kansil, 1986). A right possessed by an individual imposes a corresponding obligation on others either to perform a certain act or to refrain from doing something. Hence, rights and obligations are inherently interrelated, with each reflecting and presupposing the existence of the other (Satjipto Rahardjo, 2000).

The Theory of Developmental Law proposed by Mochtar Kusumaatmadja represents an elaboration of the concept of legal development, modified and adapted from Roscoe Pound's theory of "Law as a Tool of Social Engineering," which originated in the United States. This elaboration was further influenced by the Policy Approach of Harold D. Lasswell and Myres S. McDougal, in addition to Pound's legal theory though excluding its mechanistic conception. The concepts formulated by Kusumaatmadja synthesized these theoretical perspectives and subsequently adapted them to the socio-legal context of Indonesia (Shidarta, 2020). The illustration of the Theory of Developmental Law seeks to balance positive law (law in the books) with the living law. In this regard, law functions simultaneously as an instrument of social order the most conservative function of law and as a tool of social engineering. Thus, law is directed toward achieving social order as a prerequisite for the realization of legal certainty and justice (Shidarta, 2020). The aforementioned theoretical illustration can be summarized through the following schematic representation:

Table 1. Mochtar Kusumaatmadja's Legal Framework for Development Theory



Source: Shidarta, "Integrative Legal Theory in the Constellation of Legal Philosophy Thought (Interpretation of a "Reconstruction Theory"), accessed from http://shidarta-articles.blogspot.co.id/2012/05/teori-hukum-integratif-dalam-konstelasi.html , on February 10, 2025.

The emergence of Mochtar Kusumaatmadja's Theory of Developmental Law was driven by the following considerations (Otje Salman dan Eddy Damian, 2002):

1. The assumption that law cannot play an effective role and may even hinder social change;

2. The fact that Indonesian society has experienced a transformation in legal thinking toward modern legal concepts.

Based on these premises, Kusumaatmadja asserted that the primary purpose of law when reduced to its most essential form is to ensure order, which constitutes the

fundamental prerequisite for the existence of an organized society (MOchtar Kusumaatmadja, 2020). Another objective of law is the attainment of justice, the substance and standards of which vary according to societal context and historical period. To achieve order, it is essential to maintain legal certainty within social interactions, as human beings cannot optimally develop their God-given potential without the assurance of legal certainty and social order (Mochtar Kusumaatmadja, 2020). Legal certainty is a crucial element in the development of a legal system that reflects Indonesian characteristics. Considering that Indonesian legal thought largely follows the positivist school of jurisprudence, all forms of law must therefore be codified in written form (Lili Rasjidi dan Liza Sonia Rajidi, 2012).

Kusumaatmadja's Theory of Developmental Law can be summarized as follows (Mochtar Kusumamadja, 2002): "Law is a tool for maintaining social order. By its nature, law is conservative, meaning that it preserves and protects the achievements of society. Such a function is necessary in every society, including a developing one, because there are accomplishments that must be safeguarded, protected, and secured. However, in a developing society which, by definition, is one undergoing rapid change law cannot merely fulfill this conservative function. It must also assist the process of social transformation. The outdated view that emphasizes only the maintenance of static order and the conservative nature of law wrongly assumes that law cannot play a meaningful role in the process of reform."

The contextual emphasis of this concept reveals two core dimensions at the heart of Kusumaatmadja's Theory of Developmental Law (Lilik Mulyadi, 2020):

1. Order and stability are indispensable prerequisites for reform and development;

2. Law, as a system of norms and regulations, can function as an instrument of social control and as a means of channeling human behavior toward the desired direction of reform.

In relation to the function of law, Kusumaatmadja defined law in a broader sense not merely as a set of principles and norms governing human life in society, but also encompassing the institutions and processes through which those norms are implemented and realized in practice (Mochtar Kusumaatmadja, 2020). The dimensions of the Theory of Developmental Law articulated by Mochtar Kusumaatmadja represent a legal theory that emerged from Indonesia's pluralistic society, grounded in the philosophy of Pancasila. This theory was conceived, developed, and refined by an Indonesian scholar and is therefore relatively compatible with the socio-legal realities of Indonesian society. Furthermore, the theory conceptualizes law as a means of social renewal, rather than merely as a tool of social engineering, emphasizing law's dynamic role in guiding societal transformation (Lilik Mulyadi, 2020).

3.2. The Implementation of Developmental Law Theory in Regulating Land Ownership Limitations in Indonesia

Within the context of Indonesia's existing agrarian law, the provisions regarding the restriction of land ownership are mandated under Article 7 of Law No. 5 of 1960 on the Basic Agrarian Principles (Undang-Undang Pokok Agraria). This study also refers to that article to examine the legal vacuum surrounding the regulation of limitations on individual ownership rights over residential land in Indonesia. Article 7 of Law No. 5 of

1960 stipulates that: "In order not to harm the public interest, ownership and control of land exceeding the prescribed limits shall not be permitted." This article consists of two clauses: the main clause, "in order not to harm the public interest," and the subordinate clause, "ownership and control of land exceeding the prescribed limits shall not be permitted."

Based on these two clauses, the author identifies two possible interpretations:

1. First interpretation: ownership and control of land exceeding the prescribed limits are prohibited so as not to harm the public interest;

2. Second interpretation: ownership and control of land exceeding the prescribed limits may be allowed, if they do not harm the public interest.

From a textual perspective, the phrasing of this article leaves room for the possibility of land ownership and control beyond reasonable limits. Therefore, the structure of Article 7 of Law No. 5 of 1960 still contains ambiguity that opens a gap in the effective restriction of land ownership and control. Despite this ambiguity, the implementing regulations that operationalize Article 7 tend to adopt the first interpretation that ownership and control of land exceeding the prescribed limits must not occur under any circumstances, as such actions would harm the public interest. This interpretation forms the basis for various implementing regulations concerning the restriction of land ownership rights, including those examined in this study.

Furthermore, Article 12 of Law No. 56 Prp of 1960 on the Determination of Agricultural Land Area explicitly mandates the formulation of regulations concerning the control of land rights for residential purposes. To implement this mandate, the government has issued several regulatory instruments, including:

1. Instruction of the state minister for Agrarian Affairs/Head of the National Land Agency No. 5 of 1998 on the Granting of Location Permits in the Framework of Large-Scale Land Control Management; and

2. Instruction of the state minister for Agrarian Affairs/Head of the National Land Agency No. 2 of 1999 on Location Permits.

Based on the author's observation of these two legal instruments, it can be concluded that both primarily regulate corporate entities engaged in housing development projects. Neither of them explicitly addresses restrictions on individual ownership or control of residential land rights. Consequently, the mandate contained in Article 12 of Law No. 56 Prp of 1960 has not been fully implemented by the government. This regulatory gap allows individuals to acquire and control residential land rights without limitation. Such unrestricted ownership and control of residential land pose a significant risk of social inequality, thereby undermining the realization of social justice for all Indonesian people. Economically privileged individuals are capable of purchasing and controlling multiple residential properties without limitation, exacerbating disparities in land ownership and access.

A The situation described above has the potential to disadvantage individuals who are economically less capable particularly those belonging to low-income groups. This inequality is reflected in the report of the National Land Agency of the Republic of Indonesia (Badan Pertanahan Nasional/BPN) presented during a hearing with Commission II of the House of Representatives (DPR RI), which revealed that nearly

80% of land in Indonesia is controlled by less than 2% of the population.Based on this report, the author observes a significant disparity in land ownership among Indonesian citizens. Although this study does not present specific data on the percentage of individuals owning residential land, the aforementioned figures clearly indicate the necessity of establishing regulatory measures to limit individual ownership and control of residential land as a means of balancing land distribution in Indonesia.

In addressing this issue, the application of Mochtar Kusumaatmadja's Theory of Developmental Law provides a conceptual foundation to fill the existing legal vacuum. This theoretical framework contributes to the development of a national legal system capable of promoting social welfare and justice for all Indonesians. The author elaborates on this framework through the principles of legal certainty, justice, and order as integral aspects of social engineering in the construction of Indonesia's national law governing the restriction of individual land ownership.

a. Legal Certainty

According to the Theory of Developmental Law, law functions as a means of social renewal rather than merely as a tool of social engineering (Lilik Mulyadi, 2020). Legal certainty is indispensable in social relations, as each individual possesses competing interests that require regulation. Therefore, the existence of law must provide predictability and stability within society. Legal certainty in this context can be realized through the issuance of a Government Regulation specifically addressing restrictions on individual ownership and control of residential land. Such a regulation would fulfill the mandate of Article 12 of Law No. 56 of 1960 on the Determination of Agricultural Land Area, which calls for the creation of implementing regulations. The establishment of this Government Regulation is necessary to achieve social justice for all Indonesians and ensure a fair distribution of land resources, as mandated by the Constitution of the Republic of Indonesia.

b. Justice

The concept of social justice for all Indonesians must be recognized as a fundamental moral imperative for human life. This principle is enshrined in the Pancasila, particularly in the Second Principle (Just and Civilized Humanity) and the Fifth Principle (Social Justice for All the People of Indonesia). These principles embody the nation's moral and integralistic conception of justice and serve as the ultimate ideals (cita-cita) to be realized (Anil Dawan, 2004). The principles of justice must be carefully considered, given that any legal regulation inevitably affects society. Justice can be operationalized by granting reasonable opportunities to landholders whose ownership exceeds the prescribed limits. This is in line with Article 6 of Law No. 56 Prp of 1960, which allows holders of land exceeding the legal limit to relinquish their rights within one year of acquiring ownership. Such a provision is equitable, as individuals may inadvertently acquire excess land—for example, through inheritance or donation.

This grace period ensures fairness for good-faith landholders and provides a mechanism to prevent inadvertent legal violations. Furthermore, the principle of justice also requires the provision of fair and reasonable compensation to those whose land ownership rights are reduced as a result of legal enforcement. Notably, the existing law does not clearly stipulate compensation mechanisms for excess land relinquishment. The amount of compensation should reflect fairness and account for the financial costs incurred by the landholder when acquiring the property. In this regard, Arie Sukanti Hutagalung, in his

expert testimony before the Constitutional Court of Indonesia (Case No. 11/PUU-V/2007), asserted that the absence of compensation contradicts the principles of national land law and the doctrines governing land acquisition, which underpin Indonesia's legal development framework (Mahkamah Konstitusi, 2007). This position aligns with the context of social justice embedded within Kusumaatmadja's Theory of Developmental Law, which incorporates Indonesian socio-cultural values in the pursuit of equitable legal reform.

c. Order

One of the key dimensions of Kusumaatmadja's Theory of Developmental Law is that order and stability are essential prerequisites for reform and development (Lilik Mulyadi, 2020). To achieve this, law must ensure legal certainty within social relations, since individuals cannot fully develop their God-given potential in the absence of order and stability (Mochtar Kusumaatmadja). In the context of legal development concerning restrictions on individual ownership of residential land, the author proposes the improvement of Indonesia's land administration bureaucracy. Bureaucratic reform is essential to establish administrative order in the registration of land rights at the National Land Agency (BPN), both at the central and regional levels.

The author recommends the development of an integrated land information system that provides comprehensive and systematic data on individual land ownership. Such a system would facilitate the monitoring and regulation of residential land control and ensure transparency and accountability in land administration across Indonesia. As a legal theory rooted in Indonesia's pluralistic society and founded upon the Pancasila philosophy, Kusumaatmadja's Theory of Developmental Law remains highly relevant. Developed by an Indonesian scholar to reflect Indonesian realities, it provides a contextually appropriate framework for addressing contemporary legal challenges (Lilik Mulyadi). In line with the application of this theory, the author recommends that the government formulate a new Government Regulation pursuant to Article 12 of Law No. 56 Prp of 1960 on the Determination of Agricultural Land Area, as a concrete step toward achieving equitable land distribution and strengthening the national legal framework on land ownership restrictions.

4. CONCLUSION

Regulations regarding the restrictions on ownership and/or control of land rights have generally been regulated under the Agrarian Law and its implementing regulations, but they do not limit the rights of individuals to own and/or control the land rights for residential houses. Therefore, the issuance of Government Regulations related to these restrictions must be realized by the Government immediately. The existing legal vacuum regarding land ownership restrictions in Indonesia necessitates the immediate formulation of a clear and comprehensive regulation to ensure equal legal protection and justice for all members of society. One possible approach to developing such regulation is through the application of the theoretical dimensions of Mochtar Kusumaatmadja's Theory of Developmental Law, which offers a framework for addressing legal gaps by aligning lawmaking with the goals of national development and social justice.

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