The Logic of State Authority on the Control of Agrarian Resource (Socio-Anthropological and Islamic Perspective)

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ABSTRACT

The development of property right to land, in its historical trajectory, has shown a fairly dynamic development. In the Indonesian context, the dynamics, at least seen in the diverse conceptions of the state's rights of control over the land from the colonial era with its Domein Verklaring up to the national era with its State's Right of Control. This paper aims to examine issues of legitimacy and authority of state control over land. By using socio-anthropological approach and Islamic law perspective, this study shows that although the logic of the state authority in land tenure takes place dynamically, the existence of indigenous peoples with their customary law and ulayat rights basically has not experienced significant process of change, even though the ruler and political law are different. Both of these concepts in the realm of practice appear to equally place the indigenous peoples following their customary rights in marginalized positions.

Keywords: *State, Authority, Domein verklaring, State's right of control, Customary law, Land, Property rights, Indonesia, Public interest.*

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Highlights of this paper

- The development of property right to land, in its historical trajectory, has shown a fairly dynamic development.
- In the Indonesian context, the dynamics, at least seen in the diverse conceptions of the state's rights of control over the land from the colonial era with its Domein Verklaring up to the national era with its State's Right of Control (HMN).
- In the perspective of Islamic law, land ownership by a person in the context of individuals in social relations is recognized legally.
- The moral philosophy which is the basis of government in making its political policy must be based on the goodness of its people.
- The concept of public interest (*al-mashlah}ah al-'ammâh*) is the legal basis (*'illah al-hukm*) for the state in implementing agrarian policies.

1. INTRODUCTION

The development of ownership rights to land has shown a dynamic development along with the rhythm of the times (Iqbal and Gill, 2000). The dialectical process of human history in positioning property rights to land ultimately gives birth to a social structure that also affects how humans treat and perceive their land that has built the relation of landowners to their land, landowners with their social environment and landowners with the state as the holder of political authority (Ridwan, 2010). This is because the nature of the land is constant on the one hand, while on the other hand the development of people who need land from time to time is increasing in number (Cohen, 2003).

In Indonesian context, agrarian discourse is closely related to the dynamics of the long journey of the Republic of Indonesia. Social, political and economic developments have had an effect on the existence and substance of the constitution that has prevailed in Indonesia which in turn also affects how agrarian issues are placed in the constitution (Arizona, 2014). If the history of the Indonesian journey is closely examined, it can be said that in addition to the urgency of agrarian reform, there are also various socio-political dynamics which make the implementation of agrarian reform facing various dilemmas, mainly related to the issue of state authority in agrarian policy in turn spawned issues of legitimacy and conception of state control over land and other resources.

The problem of legitimacy and the conception of state control over land and other natural resources has become the theme discussed, studied and made policy since colonial era. Discussion of similar issues continues until the formation of the Republic of Indonesia and in the development of the ruling government in it. Prior to the colonial era, the Indonesian people had possessed land ownership and tenure law based on customary or *adat* law in which this right belonged to them (Noor, 2006). After the Dutch entered and colonized Indonesia, Dutch land law was enacted in Indonesia. As a result, there was a dualism of land law prevailing in Indonesia (Gautama and Robert, 1974).

In this colonial period, the legitimacy and conception of state control over land was based on the principle of Domein Verklaring (Vollenhoven, 2013). Although normatively the applying of this principle is restricted from violating the rights of indigenous peoples' land, but in practice such restrictions tend to be ignored by the authorities, resulting in a very wide and varied interpretation of the extent to which the state domain is exercised in exercising its authority leading to the disappearance of indigenous lands. Post-occupation of the Netherlands, the idea of land tenure by the state departed from the understanding of the 1945 Constitution, which in fact as the general agreement of the Indonesian nation on the main reference norms in the life of the state (Mas'udi, 2013).

The state as the holder of the public mandate at the same time has wide authority to regulate the legal relationships between the landowner and his land and with the surrounding community. The central position of such a state is also clearly illustrated in *the the Basic Agrarian Law Act* (UUPA) which then gave birth to the concept of the *State's Rights of Control* (*Hak Menguasai Negara*/HMN) as the mandate of Article 33 of the 1945 Constitution.

The package of this Act is a juridical legitimacy for government involvement in determining the direction of public land rights policy, namely the right of state control over land. The existence of UUPA can also be perceived not only as a legal document, but as a historical document or even an anthropological document established when an independent nation tries to explore the legal norms existing in its society to replace the colonial agrarian law system (Asshiddiqie, 2014). The symbolic nature of UUPA is to be equalized as part of a constitution whose existence is outside the codified text Constitution (Rahardjo, 2007).

The state's rights of control over the land is based on the authority of the government as a public institution to regulate the social order of its people. The concept of "*power*" and "*authority*", as well as physical strength become characteristics possessed by the state in the context of policy implementation. Power and authority are related to politics. Thus, politics has a relationship with the law, so that the exercise of power and authority is one form of legal sanction. According to the theory of constitutional law, state power is the rule of law. Therefore, its validity is determined by law (Erwiningsih, 2009).

In its development, the UUPA along with its HMN concept still leaves some crucial issues, both from the conceptual and the implementation side in the field. In relation to the first side, there is a view that UUPA as the main rule still requires derivative rules and therefore every deviation occurred because of deviations of interpretation by the holder of power and bureaucracy (Wiradi and Dianto, 2011). The research findings of Nurhasan Ismail have reinforced this assumption. In reviewing the development of land law by seeing who the group who benefited from the right to control the land by the state, Nurhasan said that for the period 1960-1965 people became more oriented land law with the enactment of various regulations on *land reform*. Meanwhile, in the period 1966-2005, the investors are a group that is more benefited (Ismail, 2006). As well as on the conceptual side, the implementation of the HMN concept also leaved the problem. Many experts pointed out that Indonesia's property rights as a human right, according to Aslan Noor, have not secured sufficient place yet in the land law system in Indonesia. The peculiar perception of property rights of the Indonesian people should be the basis for the regulation, management and state control of the land because in essence the rights of individuals and communities on land are the basis and the purpose of the state's rights of control (Noor, 2003).

Based on the above explanation, this paper intends to further analyze the influence of political logic of the state in the control of agrarian resources, especially land and at the same time to see whether or not there is a substantial shift in the conception of the control manifested in two principles at two different periods, i.e. *Domein Verklaring* principle in the colonial era and HMN principles in the national era. The central question to be answered in this study is: (1) Is there a process of continuity and change in the conception of state control over land and other natural resources contained in the two principles? (2) How also the logic of state authority in the control of the land in terms of Islamic law? This study, therefore, intends to prove that basically there is no substantial shift and change from the conception of state control over the agrarian resource (land) embodied in two principles at two different periods. Moreover, this study also intends to see how the logic of state authority in the control of the land in terms of socio-anthropology and Islamic law.

2. RESEARCH METHODS

The focus of this study is a study of library research which is analytically descriptive and based on policy review and text of the law. The approach method used in this research is normative juridical or doctrinal research (*theoretical rational deductive*) to examine norms that conceivable in the text of the law (*ius constitutum*) and the policy especially in the field of land. The primary data source used in this study is the regulatory product of the existing land, especially policy and regulation in the colonial era with its *Domein Verklaring* policy and the national or

independen era with State's Right of Control (HMN) contained in the basis of modern Indonesian land law, Law Number 5 of 1960, also referred to as *the Basic Agrarian Law Act* (UUPA). In order to analyze the data that has been collected, the author uses socio-anthropological approach and Islamic law perspective.

3. RESULT

3.1. The Concept of Domein Verklaring

In fact, quite a lot of agrarian policies are orbited during the colonial period. *Domein Verklaring* might be said to be one of the monumental agrarian regulations of the period for containing a unilateral declaration by the Dutch colonial government over the lands of its colonies (Partington, 2007). *Domein verklaring* is a principle of land ownership that developed during the Dutch colonial period in the Indonesian archipelago. The principle of *Domein Verklaring* contained in *Agrarische Wet* 1870 and enacted in the State Gazette (Staatsblad) No.55 / 1870 reads: "…All land that is not proven that on the land there is absolute property rights (*eigendom*), is the domein of the state" (Vollenhoven, 2013).

The conception in principle affirms that the colonial government has the right to control lands which are not attached to the rights of individual domination. The individual rights referred to in the *Domein Verklaring* are unfortunately only interpreted to the extent of occupation rights recognized under colonial law. The rights of mastery under customary or *adat* law which were empirically alive and applicable in Indonesian society (*living law*) at that time were simply dismissed.

An interesting subject about the enactment of *Agrarische Wet* 1870 is what Soetandyo Wignjosoebroto said, that the domein theory is based on Javanese customary law which states who owns the land, he is the one who is entitled to the land. While the land that is not worked on by anybody, according to this concept, belongs to God, and because the king should be positioned as the holder of God's mandate (*khalîfatullah*) (Ongkhoham, 1997) then the king is entitled to the land, with the notion that the people may work on, use and occupy the land. Since the rulers of the time were the Dutch, the Indies territories outside Swapraja were under the authority of the Dutch government. In this case, it appears that the Dutch are building their political argument on the basis of customary law as a justification of their policies.

Although formally the principle of *Domein Verklaring* was first introduced in *the Agrarian Act* of 1870, practically it has actually been applied for a long time even during the VOC (*Vereenigde Oost-Indische Compagnie*). It dates back to the VOC through the 'Lords XVII' (17 VOC rulers), called *octrooi rights* (single rights) to explore the archipelago, monopolize shipping and trade, declare war, make peace and print money. Based on this *octrooi right*, the indigenous territories which have been controlled by the VOC are further regarded as their civil property rights. In subsequent developments, the power of the VOC includes also the territorial territory obtained under an agreement made with the sultanate or other political organization of the indigenous population. These lands are considered to be merged into ownership and become part of the VOC domain (Arts, 2010). This territorialization effort, according to Arizona, is done first by stating that the land belongs to no one, but the 'possession' of the ruler (Arizona, 2014).

The implications of the colonial policy of enforcement the principle of Domein Verklaring is the division of land into two categories of status, that are vrij landsdomein and onvrij landsdomein. Therefore, only the land of a free state is regarded as the domain of the state in which the state's civil rights are included in the land. While the unfree state land (onvrij landsdomein) is the land which is still attached to it customary rights or on which it is burdened with absolute property rights based on the Dutch Civil Code (*Burgerlijk Wetboek*) (Arizona, 2014). So, what is the position of indigenous land rights outside the colonial law? Indigenous lands are conceptualized as state land is not

free in which the state cannot freely give it to another party, because it is limited by the people's right. In colonial law, customary property rights is only referred to as the right of individual use of for generation and then as the right to dominate the country's domain.

The legal relationship between the ruler and the landowner as the relationship of ownership, in the colonial period, was indeed based on this domein verklaring principle. The state according to the conception of *Domein Verklaring* is the subject of property rights and the owner of the land (*eigenaar*). As a consequence, since the state is the owner of the land, the granting of land with eigendom rights is done by transferring state property to the land receiver (Harsono, 1999). The application of the *Domein Verklaring* principle to unification has proved to be a chaos, obscurity and legal shock, not only because of the neglect of indigenous rights but also its inconsistent application for one region with another in the colonies. This is understandable given that the principle of Domein Verklaring is a political product driven by certain interests, in this case primarily the interests of capitalists and foreign businessmen. In relation to this, Van Vollenhoven criticized in his critics that the principle of Domein Verklaring is a further form of violation of indigenous rights carried out in a more polite and subtle manner under the law. Nonetheless, this remains a crime. Furthermore, Van Vollenhoven stated that the principle of Domein Verklaring is an old theory, fiction that has been wilted and worn out and proven to fail and unable to provide the value of power at all (Harsono, 1999).

3.2. The Conception of State's Rights of Control

The birth of the UUPA was one of the most serious attempts of Indonesian law experts to create a new legal rule excavated from the foundations of Indonesian society for replacing colonial rule and its conception with national conception. These new rules and conceptions are at once perceived as derivatives of the agrarian regulatory spirit contained in the constitution (Wignjosoebroto, 2014). After Indonesia proclaimed its independence, the new government was no longer willing to recognize and use the principle of *Domein Verklaring* in relation to state control over land. UUPA 1960 comes with anti-capitalism spirit, because capitalism gave birth to colonialism which caused "exploitation of man by man". UUPA 1960 also opposed the Socialist strategy which was considered "negating the individual rights on the land". Therefore, the legal political ideology contained in the UUPA is Populism, an ideology that recognizes the individual right to the land, but the right to the land has a social function (Rachman, 2003). With the formation of UUPA 1960, it has therefore revoked the enactment of *Agrarische Wet* and at the same time introduced a new conception in the relationship between the state and the land. This conception is then known by the term HMN as contained in Article 2 of UUPA (Santoso, 2006).

The process of the birth of the provisions of Article 2 which contains the Conception of HMN is preceded by a long academic debate. Imam Soetikno, for example, in his study of the basic conception of state relations with land in the formulation of the UUPA, stated that there are three possible alternatives to the conception of this issue. *First*, the conception of the state as the subject. In this conception the state can be likened to an individual, so that the relationship between state and land has private properties, which means the state as owner. The right of the state is a dominant right. *Second*, the concept of the state as a subject which is given the position not as a subject, but as a state body. The relationship between the state and the land in this conception is *publiek rechtelijk*. The right of the state is dominium right as well as in the first conception. This model is applied in *Domein Verklaring* principle. The difference with the first conception, in this second conception in addition to positioning the state as the owner of the land, also positioned the country as a party that can rent and give concessions to the private sector. *Third*, the conception of the state as the subject, in a sense not as an individual and not as a state body. This conception positions the state as the personification of the people in its entirety, so that in this conception the state cannot be

separated from the people, the state is only a founder, a supporter of the unity of the people. According to this conception, the right of the state is the right of communes if the state as personification holds power over the land; and the right of empire if the state holds the power of the use of the land only (Soetiknjo, 1994).

In Soetikno's view, the relationship referred to the first form conception is not in accordance with the Second Principle of Pancasila which recognizes the existence of the dual nature of man. The second form conception is also unsuitable because it is only concerned with the social nature of mere humans, regardless of their individual characteristics. Soetikno considered that the third form conception, which perceives the state as the personification of the people as a whole, is the most logical and appropriate concept to be applied to Indonesian society, since human beings as individuals and social creature have a place. Therefore, Soetikno proposes that the relationship between the state and the land is not in the form of the conception of property rights, but takes the form of conception of the right to control (Soetiknjo, 1994).

The meaning of state control over land is the state has the authority to determine the necessary policy in the form of regulating, managing and supervising the use and utilizing of the land. The substance of the meaning of mastery is contained the obligation of the state to use and utilize the land resources for the welfare of the people. According to Hartono, the meaning of 'control' by the state is equally meaningful to the 'empire' in Roman law, or the authority of the state in the sense of public law, not in the sense of 'possession' or 'dominium' in Roman law or 'property rights' 'in civil law, as the colonial period through its one-sided ownership statement known as *Domein Verklaring*. Through the concept of HMN stated in this UUPA, we can understand how the logic of the state in using its authority to manage and control the land and natural wealth.

The conception of HMN in the UUPA can also be perceived as the right of the Indonesian nation which at the highest level is authorized to the Republic of Indonesia as an organization of all people's power (Soimin, 2004). The legal relationship of this right is therefore of a public legal nature, as stated in the UUPA (Harsono, 2007). The conception of HMN gives authority to the state to set and organize allotment, use, provision, maintenance of matters relating to agrarian (Soemadiningrat and Otje, 2002). The right of Indonesian nation as the subject of law can be seen in civility and also as subject of land right consisting of individual (*natuurlijkpersoon*) and artificial individual (*rechtspersoon*). Thus, it can be said that if the state controls, then it is true that the nation has the right to the land (*the pseudo-owner*) as the gift of God Almighty (*the true owner*) (Noor, 2006).

In the view of Moh. Mahfud MD, the conception of HMN is stronger than the right of ownership and other rights to the land. The word "regulating" and "determining" states, Mahfud asserted, means including the transfer of allotments and legal relations between people and the land in accordance with the will of the state in translating or interpreting the principle of the social function of the land (Mahfud, 2002).

The state's control over land and other natural resources in the UUPA through the conception of HMN authorizes the state as the power organization of the Indonesian nation at the highest level to act in several respects. *First*, set and organize the use, provision, and maintenance of the earth, water and space. *Second*, determine and regulate the rights that can belong to (part of) the earth, water, and space. *Third*, determine and regulate the legal relationships between people with the earth, water, and space (Mahfud, 2002). All authority to manage the land is intended to achieve the greatest prosperity of the people.

4. DISCUSSION

4.1. Authority, Continuity, and Changes in Conceptions of State Control over Land

The development of land ownership, in its historical trajectory, has shown a dynamic development along with the rhythm of the times. This is also true in the national context, where the discourse on the state's right of control

over the land is also very dynamic (Ahmad, 2015). The dynamics are at least visible in the diversity of conceptions of the state's rights of control from the colonial era with its *Domein Verklaring* to the national era with its HMN.

In Agrarian society, as Vincent Harding pointed out, that freedom meant the right to land- the land they had nurtured (Harding, 1981). In the view of Robert Mahoney land is part of the culture of a nation, and at the national and individual levels are ready to fight to defend it Mahoney *et al.* (2007). Throughout history, land ownership has often been a politically sensitive and controversial issue. In economic studies, land is one of the most essential factors of production, so in the law of ownership it is very important (Al-Mishrî, 2012). Therefore, the prosperity of a nation depends on the settlement fairly and wisely in the land issue. It is in the context, M. Bashir's affirmation of the urgency of property rights to be institutionalized and recognized as a legal and economic institution finds its significance. The State, in the view of M. Bashir, should make regulations relating to property rights based on two basic ethical values, that are "socio-economic-justice" (*al-'adl*) and "mutual benevolence" (*al-ihsân*) (Bashir and Abdel, 2002).

In the context of Indonesia, the intersection is seen clearly, for example, how the logic of state authority in interpreting the agrarian constitution which then gave birth to the debate surrounding the legitimacy and conception of state control over land and other natural resources. The question of legitimacy and the conception of state control over the land has become a widespread theme discussed, studied and made policy since the colonial period. The debate continues until the formation of the State of the Republic of Indonesia and in the development of the ruling government along with the values or ideologies carried on it. So, how is the existence of customary law with customary rights as a collective right that is authoritative in the colonial and independence period? Is there, borrowing the theory of Voll (1982) and Hallaq (2001) the process of continuity and change on the conception of customary law with its *ulayat* right in the context of its intersection with the authority of the ruler in the controlling of agrarian resources, both in the colonial and the independent period?

In matters relating to the indigenous land and customary people, the conception of *Domein Verklaring* is actually intended to limit the state's control over land and other natural resources because the country's domein will be restricted if the land already exists its owner. In practice, however, these restrictive measures have proved unsuccessful in protecting the indigenous rights and customary peoples because the interpretation of the *Domein Verklaring* is so widespread as those lands that are not managed intensively by the indigenous people. This principle clearly violates the principle of customary law which does not have the concept of written evidence for communal ownership of customary land (Burns, 1989; von Benda-Beckmann and von Benda-Beckmann, 2008). As a result, all the customary land fell into the property of the Dutch East Indies government so that they could use it for the benefit of their colonialism. Moreover, the colonial authorities deliberately never facilitated the registration of property rights, either property rights under Western law or under the laws of the indigenous people. This ignorant attitude of the rulers in turn further widens the span of control of *Domein Verklaring*.

Meanwhile, all lands, in HMN conception, whether have owner or not, are under the control and power of the state. All rights to land, according to this conception, are absorbed into land controlled by the state. In relation to customary rights, the HMN conception stated that for existing indigenous peoples it can be recognized the existence of their *ulayat* rights or empowered by the government to ensure that land controlled by the state can be cultivated by indigenous and customary peoples. However, the recognition of customary land rights can only be given on condition that the right is still customary and not contrary to the national interest. Unfortunately, in practice the protection of indigenous peoples with their *ulayat* rights is very weak. This is due to the implementation of the three authorities of HMN as stated in Article 2 paragraph 2 of UUPA is not accompanied by good implementation because of its weak supervisory and control functions. As a result many indigenous peoples with

customary rights are harmed and sacrificed in order to provide the welfare of other community groups. In other words, the application of the state rights of control stated in the UUPA by state property rights according to *Domein Verklaring*, seems not much different.

The existence of indigenous peoples with their customary rights when viewed from a two-period span with these two distinct principles, namely *Domein Verklaring* during the colonial era and HMN in the independence era, basically did not undergo significant change process even though the rulers and political laws were different. *First*, the community loses its authority over common land so that the main source of livelihood is lost without any successor. It is unclear on what basis that the state's rights of control easily eliminate the rights to land that existed before the state itself was formed. *Second*, the use of rights of control from different sectors (land, mining, forestry and fisheries), does not show the same interpretation of the content and its limits, so the impression of overlap is inevitable. For this reason, it is necessary to determine the limits of the use of state rights of control (for the public interest), since the disappearance of customary rights is in fact a violation of a just and civilized humanity (Sodiki, 2013). The presence of state rights of control that intersects with customary rights should be a benefit to the local community and vice versa not a disaster for them.

When viewed from the framework of authority, continuity, and change, it can be said that the property rights and property rights of Indonesia as the most basic and authoritative rights. In Boedi Harsono's view, the right of the nation is a kind of *ulayat* right which is the ultimate right of domination (Harsono, 2007). The existence of customary law with its ulayat right in the context of the Unitary State of the Republic of Indonesia (NKRI) basically get its own place. This is reflected in Article 18B paragraph (2) of the Constitution which reads:

> "The State recognizes and respects the unity of indigenous and customary peoples along with their traditional rights as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia as governed by constitution."

The sentence in the above article is still written in the tradition of absolute and hegemony and shows how the state feels to have all the authority and power to determine what happens in this Unitary State of the Republic of Indonesia (NKRI), including whether customary law is still applied or not. In reading and understanding the Article of the Constitution, of course, it is not enough if only understood normatively-prescriptive as widely used by legal scholars, but with optical sociology of law. The sociology of the law, in this case, does not depart from the will and commands of the Constitution, but from the reality of customary law itself.

The presence of customary law basically does not think about and consider whether it will be recognized or not by state power, but because it must indeed arise. The words "must arise", according to Rahardjo that it indicates the authenticity of customary law (Rahardjo, 2007). Customary law basically arises from the content of society itself autonomously and is therefore called authentic. By borrowing Hart's term, customary law is closer to the *"primary rules of obligation"* order than the state law that is purposeful and therefore closer to the *"secondary rules of obligation"* order (Hart, 1961).

Customary law is therefore comfortable and strongly linked with the local culture. The word "culture" in this context indicates a strong emotional-traditional element of customary law. It is also a law is full of *values laden*. Even in certain areas, such as Aceh, for adherents, customary law is identical with religious law. So by accepting and living the customary law, people feel cultured and religious at the same time (Pha, 2005).

4.2. The Conception of Property Law and the Logic of State Authority

Associated with the concept of ownership of land, the scholars divide the type of land ownership into three kinds. *First*, the individual property rights (*al-milkiyyah al-khâshshah*), ie the right which the individual possesses to

exercise his/her property autonomously. *Second*, collective property rights (*al-milkiyyah al-'âmmah*), ie ownership rights owned by society collectively on certain property. *Third*, the state property rights (*al-milkiyyah al-dawlah*), the right which is owned by the state as an institution mandated by God through the people to manage all assets for the public interest (Al-Khathîb, 1989; Al-Mishrî, 1993). The three categories of property rights, in the context of their social relations, are likely to occur due to different interests, not excluding the political interests of the rule.

Referring to the distribution of types of land rights mentioned above, *ulayat* rights can be regarded as collective property rights (*al-milkiyyah al-'âmmah*), ie ownership rights owned by the community collectively on certain property. The concept of ownership and control over land under customary law has existed before the colonial period. Such a concept of ownership can be called the "epistemic authority", the scientific authority that became the paradigm of society at that time. A paradigm of ownership and control over land officially embraced by, or at the same time, binding on a society. In other words, that customary law with all the rights attached to it is a law that typically contains the socio-anthropological matter of Indonesia.

Moreover, socio-anthropological reading of the existence of indigenous and customary peoples should at least take into account several matters. *First*, the state needs to reposition first of all their positions of confrontation with customary law. This is where the necessary deep study to the level of paradigm about how to organize social life. The paradigmatic choice here is whether the state as a representation of public institutions and the authority in making the land regulation only regulates to regulate, or regulate in a spirit of protecting the interests of society based on the value of the benefit that makes this nation feel happy in its own country (Jalauddin, 1991). *Second*, realizing that local people and *adat* law with their *ulayat* right is part of the state body is the flesh blood from the country itself. The government does not come to simply regulate, as if most know what is best for the people. This *"father know best"* paradigm is time to be abandoned and replaced by "*people know best"* (Rahardjo, 2007).

Third, indeed the government has the privilege to regulate and intervene in society. In the socio-anthropological context of Indonesia, the right should be subordinated to the spirit of sharing, caring and about how local communities receive their customary laws and their local laws. Governing and organizing a nation so diverse can not only rely on the brain, but rather with a conscience. *Fourth*, the stakeholders should be able to correct the mistakes made in the past, that is "to allow customary law to be eaten by state law (modern law). In many areas, customary law has been able to demonstrate its ability to be a good organizer of its people, although it uses modern law for its entire territory (Rahardjo, 2007). Therefore, it is time for the rulers to act affirmatively, progressively and actively creative in seeking for customary law to survive in modern times.

In the religious domain, this state authority is based on the justification of the theological-normative of the Qur'ân (al-Nisâ': 59) on the political mandate possessed by the state (*ûlil al-amr*). In order to explain this aspect, the paradigmatic framework of al-Ghazalî (1058-1111) on relationship between religion and state may be used. Related to this, al-Ghazâlî stated that "religion is the foundation, while power is its guardian, something did not have foundation will collapse and something did not have guardian will be in vain. According to him the establishment of the world system is a requirement for the establishment of the religious system (*nizhâm al-dunyâ shartun li nizhâmi al-dîn*) (Al-Ghazâlî, 2003). This operationalization of the al-Ghazâlî's concept seems parallel to al-Mawardi's statement (w.1058 AD) on the function of government in organizing social and religious institutions. In his view, the government (*al-imâmah*) was established to continue the prophetic mission (*khilâfah al-nubuwwah*) in order to safeguard religion and regulate social institutions (*lihirâsah al-dîn wa al-dunyâ*) (Al-Mawardî, 2000).

However, the rights of individual land and the rights of indigenous land should not be marginalized by the authorities under any pretext. Because both rights are equally essential rights that must also be protected. Islam views the state as the institution that manages the society. On this basis, Islam provides the right and obligation to

the institution to regulate the relationships between individuals, individuals and communities, as well as individual and community relationships with the state. In terms of regulating the social functions of the land, the government has the authority to make land-related regulations, to regulate and manage the use of land to create a public interest.

In the perspective of Islamic law, land ownership by a person in the context of individuals in social relations is recognized legally. The land owner has the authority to use his land as he wishes. Human authority over property ownership (*haq al-milkiyyah/property right*), in Islamic legal philosophy, is protected in the framework of "protection of property" (*hifdz a-mâl*) as one of the basic principles and fundamental needs for life (*al -kulliyât al-khams / ush ûl al-khamsah*) (Hasaballah, 1997). Land, besides being an economic instrument, also has a humanistic social content. Therefore, Islam prohibits monopoly actions on assets. Thus, ownership of property by a person must be accompanied by moral accountability.

The moral philosophy which is the basis of government in making its political policy must be based on the goodness of its people (*tasharruf al-imâm 'alâ al-ra'iyah manûthun bi al-mashlahah*). In order for the benefit aspect not to be an abstract and absurd value, it is necessary to have a basic criteria as a reference standard based on the concept offered by al-Ghazîlî as quoted by al-Shaukânî (1173-12500) that the criteria of *mashlahah* are: 1) the benefit must be essential; 2) the benefit should not be against the spirit of religion; 3) the benefit must represent the common good and universal (*kullî*) (Al-Shaukânî, 1992: 370). In basing this theoretical framework, the government policy in formulating the land regulation is part of its political authority as an inseparable part of the implementation of the concept of "organizing the world" (siyâsat al-dunyâ) in order to actualize the ideals of benefit in the midst of society. The concept of public interest (*al-mashlah}ah al-'ammâh*) is the legal basis (*'illah al-hukm*) for the state in implementing agrarian policies.

5. CONCLUSION

Some conclusions that can be drawn from this paper are included in the following points of view: *First*, that the logic of state authority in the control of agrarian resources, primarily land, takes place dynamically, along with the process of institutionalization of property itself that runs evolutively. The dynamics, at least, are conceptually seen in the diversity of conceptions of the Right to State's Control from the colonial era with its *Domein Verklaring* to the national era with its HMN. Nevertheless, the existence of indigenous peoples with their law and *ulayat* rights when viewed from the two-period span with these two different principles, namely *Domein Verklaring* during the colonial period and HMN in the independence period basically has not experienced significant process of change, even though the ruler and political law are different. Both of these concepts in the realm of practice appear to equally place the indigenous peoples following their legal and customary rights in marginal and marginalized positions. *Second*, since customary law is an important socio-anthropological pillar for the life of a nation and a state, the government as the holder of the political policy in the agrarian field should be able to take a more affirmative and progressive step to maintain the customary law. In the perspective of Islamic law, government policy in formulating land regulating is part of the political authority it possesses as an inseparable part of the implementation of the concept of *siyâsah al-dunyâ* in order to actualize the ideals of benefit in the midst of society (*al-mashlahah al-'ammâh*, public interest). The concept of public interest is the legal basis for the state in implementing agrarian policies.

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