

# Application of Business Rights Over Management Rights Based On Government Regulation No. 18 of 2021

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## ABSTRACT

The purpose of this study is to review the application of regulations on The Right to Business regulated in Pemerintah Regulation No. 18 of 2021 on Management Rights, Land Rights, Flats Units, and Land Registration. After the enactment of this regulation, all other implementing regulations were revoked and declared invalid. In fact, this implementing rule is contrary to the law on it, namely Law No. 5 of 1960 on the Basic Rules of Agrarian Trees. One of the conflicting rules related to the Right to Business regulations stipulated in Law No. 5 of 1960 on Basic Rules of Agrarian Principals, that The Right to Business can only stand on state land, regulated differently in its implementing regulations, namely in the Regulation of Pemerintah No. 18 of 2021, which states that The Right to Business can stand on the land of Management Rights. So that not only the clash of rules but also contrary to the principle of legal preferences. So that the existence of this rule even though legal fiction has been applied still causes controversy and debate in the world of academics and practitioners. This legal research research method uses *statute approach* and *conceptual approach* to analyze two legal issues, namely the regulation of Hak Guna Usaha on land Hak Pengelolaan in the laws and regulations in Indonesia and the problem of applying the rules Hak Guna Usaha on land Hak Pengelolaan. The result of this study is that due to the conflict of legal preference principle related to implementing regulations with laws on it, until now, The Right to Business can only be granted on State Land, not above Management Rights.

**Keywords:** Right to Business, Management Rights, State Land, Government Regulations.

## 1. INTRODUCTION

Indonesia is an Agrarian country where most of the population lives as farmers. Agriculture is one of the main economic sectors in Indonesia (Kusniati, 2013). To make it, of course, the land is a needed as an object. As described in the General Explanation (11 number 1) as formulated in Article 1 paragraph (3) and Article 4 paragraph (1) of Law No. 5 of 1960 on the Basic Rules of Agrarian that is meant by "land" is the surface of the earth (Nurjannah, 2014).

After September 24, 1960 the enactment of the Agrarian Basic Law, the dutch colonial rule was abolished (Sutadi et al., 2018). This law contains basic provisions related to land in Indonesia. This law is further called UUPA. UUPA contains the basic rules of National Land Law in Indonesia. However, the implementation of this UUPA is regulated in implementing regulations in various forms, namely government regulations, presidential regulations, ministerial regulations, and other regulations (Hadisiswati, 2014). However, these implementing regulations should not conflict with the legal rules contained in the Agrarian Basic Law.

Starting from the provisions contained in Article 33 of the Constitution of the Republic of Indonesia year 1945, states that the Earth, water, and wealth contained therein are controlled by



theState and used as much as the prosperity of the people. Therefore UUPA as a rule that is applied with the aim of the greatest prosperity of the people(Utomo, 2020).

In UUPA, especially in Article 16 paragraph (1), it is mentioned:

"The rights to land as referred to in Article 4 paragraph (1) are:

- a. Proprietary
- b. Right to Business
- c. Building Rights
- d. Right to Wear
- e. Rental Rights
- f. Right to Open Land
- g. Right to Collect Forest Products
- h. Rights not included in the above rights shall be established by the Act as well as temporary rights as mentioned in Article 53."

Furthermore, in Article 28 paragraph (1) of UUPA, that is meant by the right to business is:

"The right to business is the right to cultivate land controlled directly by the State, within the period as stated in Article 29, for agricultural, fisheries or livestock companies." So it can be concluded that the Right to Business, which is regulated and established by UUPA, stands on state land. While the implementing rules of The Right to Business mentioned in Article 31, that: "The Right to Business occurs due to Government Determination".

More clearly explained in Article 2 paragraph (4) of UUPA mentioned that:

*"The right of control of the State above its implementation can be exercised to swatantra regions and indigenous peoples, only necessary and not contrary to the national interest, according to the provisions of government regulations."*

So that the issuance of a regulation that regulates the registration of land rights for business. One of the implementing rules governing the latest On Business Rights is Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration.

In Article 21 pp Number 18 of 2021 it is mentioned that:

"Land that can be granted with the Right to Business includes:

- a. Land of the State, and
- b. Land Rights Management"

What is mentioned is a debate among academics and practitioners of agrarian law. Clearly what is written here is contrary to what is written in UUPA.

In 2020, Law No. 11 of 2020 on Copyright Work, hereinafter referred to as UUCK, aims to create an ease of business climate in Indonesia. In Article 138 paragraph (2) UUCK mentions that(Zulkarnaen, 2020):

"On land Management right, whose utilization is given to third parties either partially or in whole, can be given "Hak Guna Usaha", Hak Guna Bangunan" or "Hak Pakai" in accordance with the provisions of the laws and regulations. ""

This is contrary to what is stipulated in Article 28 of the UUPA which states that "Hak Guna Usaha " can only occur on state land only. Dasar made a rule regarding the provision of HGU on HPL land aims to minimize the potential for land conflict in the community, where some people assume that HGU land that has not been extended will be state land that can be occupied by others. In addition, in order to create efficiency in the bureaucracy of land services, so there is no need for first-time giving, extension and renewal. However, with the contradiction of regulations and UUPA that are not listed as a basis for weighing from PP Number 18 of 2021, it can then cause problems in its application(Nurlinda, 2016).

UUPA does not explicitly regulate "Hak Pengelolaan" ,but is implied in General Explanation II number (2) in the UUPA where the State can give land to a person or legal entity with a right according to its regulations and needs or provide it in management to a ruling body such as departments, positions or swatantra to be used for the implementation of their respective duties.

The term of Management right, here in after referred to as HPL, first appears in Article 2 of the Regulation of the Minister of Agrarian Affairs No. 9 of 1965 concerning the Implementation of The Conversion of State Land Tenure Rights and Provisionson The land other than its own use is also intended to be granted a right to a third party, then converted into Management Rights.

Thus, Management Right is the right of control of the state whose implementation authority is partially delegated to the holder of Management Right, which is guided by Article 2 paragraph (4) of the UUPA where the right to control of state land can be delegated to the agency. Hak Pengelolaan is given to government legal entities in the field of public services or businesses whose functions are related to land, so that not all legal entities can be given land HakPengeloaan.

In addition to the contradictions of the arrangement, there is a change in the term HPL in Article 7 paragraph (1) letter b pp Number 18 of 2021, that hpl holders are given the authority to use and utilize all or part of HPL land for their own use or cooperation with other parties. While in reality hpl land is given to agencies to cooperate with third parties, not for their own use.

Moving from the existing problems related to the latest regulations governing both Business Use Rights and Management Rights in PP Number 18 of 2021, it is necessary to conduct a deeper study related to the regulation and implementation of Business Use Rights on land Management Rights to present solutions to existing legal issues.

## 2. RESEARCH METHODS

This research is *legal research* that uses a *statute approach* and a *conceptual approach*. The legal approach is carried out by reviewing applicable laws and regulations related to legal issues that are being addressed (Pawliuk et al., 2021). The statutory approach will open up opportunities for researchers to study whether there is consistency and conformity between one law and another or between legislation and the Constitution or between regulation and legislation. While the conceptual attachment moves from the views and doctrines that develop in the science of law, where then will be obtained an understanding and ideas that give birth to the understanding of law, legal concepts and legal principles that become the basis for researchers to build arguments in solving legal issues (Draper & Newton, 2017). With both approaches, there will be a review of laws and regulations that are directly and indirectly related to related issues, and also by studying views and doctrines to gain understanding and understanding of law, legal concepts, and legal principles so as to build a legal argument in solving legal issues.

An alysis of legal materials in this study will be done by studying existing legal concepts using methods of interpretation or interpretation of law. Grammatical interpretation is used to determine the meaning of the provisions of the law based on the arrangement of words or sounds of the text of the law and explained according to a common colloquial and interpreted logically (Mengersen et al., 2007). Systematic interpretation is used to interpret laws as part of the entire statutory system by linking them to other laws so that interpreting them must not deviate from the system of laws and regulations. In this study, grammatical interpretation was used to interpret the sound of articles in PP Number 18 of 2021 as the object of study. In terms of reviewing the rules, there are other rules with hierarchies above them that must be connected with the arrangement by using systematic interpretation to ensure the absence or absence of contradictions between laws and regulations (Barnes, 2018).

## 3. RESULTS AND DISCUSSIONS

Based on Article 4 of Law No. 5 of 1960 on the Basic Rules of Agrarian Trees, it is mentioned that land is the surface of the earth that can be given rights on the land, which gives authority to the holder of his rights, to use along with the body of the earth, water and space above it for the benefit that is directly useful for the use of the land. In Customary Law, land has a favorable property property, a means of living that also provides livelihood, and a place where the landowner and his generation will be buried when he dies.

The land rights granted to the landowner are called land rights, which are divided into 3 types, namely land rights that are fixed, land rights that are temporary, and land rights that will be established by law. Land rights that are fixed are the right to land whose existence remains

recognized and not removed, including Property Rights, Building Use Rights, Business Use Rights, and Right to Use.

The right to business, as stipulated in Article 28 paragraph (1) of UUPA is the right to cultivate land directly controlled by the state for agricultural, fisheries and livestock businesses, so that if it is based on UUPA then "Hak Guna Usaha" can only be given on state land only. Another characteristic of the Right to Business stipulated in UUPA, that land can be given to individuals and legal entities. For Business Use Rights that can be given to individuals is a minimum of 5 hectares and a maximum of 25 hectares, while for Business Use Rights granted to legal entities is at least 5 hectares and maximal stipulated by the Head of the National Land Agency. The legis ratio given the minimum area rule of 5 hectares is that to be able to guarantee the welfare of the community as a rights holder, it takes a minimum of 5 hectares of land.

Prior to the issuance of Government Regulation No. 18 of 2021, the implementing regulations related to The Right to Business were regulated in Government Regulation No. 40 of 1996 on Business Use Rights, Building Use Rights and Land Use Rights. Government Regulation No. 40 of 1996 is not contrary to UUPA which is more hierarchical higher than government regulation. It is stated in Article 4 paragraph (1) of PP Number 40 of 1996 that: "Land that can be granted with The Right to Business is state land. "So that there is harmony between the laws and regulations on it, namely Law No. 5 of 1960 on Basic Rules of Agrarian Principles and its implementation of the Implementation Of The Right to Business, namely Government Regulation No. 40 of 1996 on Right to Business, Right to Use Building and Land Use Rights.

However, since the issuance of the Copyright Law, The Right to Business mentioned in the Law is in Article 138 paragraph (2) mentions that above the Right of Management, whose use is given to Third Parties, either in part or in whole, can be granted The Right to Business Use, Right to Use Building and or Right to Use in accordance with the provisions of the laws and regulations." Furthermore, because of the above, the implementation regulation is issued, namely Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration.

So that after the issuance of Government Regulation No. 18 of 2021 immediately revoked the previous regulations, one of which is Government Regulation No. 40 of 1996 on Business Use Rights, Building Use Rights and Land Use Rights, Government Regulation No. 24 of 1997 on Land Registration, and many other regulations.

However, the Right to Business stipulated in this latest Government Regulation is mentioned if the Right to Business can be granted on State Land and Land Management Rights. So that there is a discrepancy in what is written in Law No. 5 of 1960 on the Basic Rules of Agrarian Subjects, as a basic provision of Indonesia's national agrarian law regulations with this newly

published implementing regulation. More clearly when reading the consideration of this government regulation does not mention the Agrarian Basic Law as a basis for remembrance. This Government Regulation mentions Law No. 11 of 2020 on Copyright Work as a basis for remembering.

The right to lobbying is not explicitly mentioned in Article 16 of the UUPA, but the term "management" in the UUPA can be found in the general explanation number II of the UUPA, that: "The State can give such land to a person or legal entity with a right according to its designation and needs, such as Property Rights, Business Use Rights, Building Use Rights, and Right to Use or provide it in management to a ruling body to be used for the implementation of their respective duties."

The understanding of Management Rights in new laws and regulations first appeared in the Regulation of the Minister of Agrarian Affairs No. 9 of 1965 (PMA 9/1965). That the term management rights in PMA 9/1965 is a form of conversion of state land control stipulated in Government Regulation No. 8 of 1953 on The Control of State Lands. So it is clear if the authority of the right to control the land of the state is given to the Ruling Body. The form of granting the right to control the land of the country is further regulated in PMA 9/1965 which regulates the conversion of land rights. That control over the land of the country when it has been granted to the departments, directorates, and areas of swatantra can be converted into Right of Use or Management Rights. In Article 1 PMA 9/1965 mentions that when the land is used for the benefit of the agency itself, it is converted into the right of use, while in Article 2 PMA 9/1965 mentions when the land is mentioned in addition to being used for its own interests, it is also intended to be granted a right to a third party, it is converted to Management Rights (Silviana, 2019).

The existence of Management Rights based on PMA 9/1965 was then first recognized in the Law, namely in Law No. 8 of 1965 on Flats. However, there is no further definition of Management Rights. The understanding of the new Management Rights is given in PP 40 of 1996, namely in Article 1 paragraph (2) that the Right of Management is the right of control of the State whose implementing authority is partially delegated to the holder. The same understanding is also mentioned in the latest PP, namely PP 18 of 2021 in Article 1 paragraph (3) (Santoso, 2015).

Regarding Management Rights, there are several authorities that will be obtained by management rights holders. In PMA 9/1965 it is mentioned in Article 6 that the authority granted to the holder of the Management Rights is: planning the allocation and use of the land, using the land for the purposes of carrying out its duties, and handing over parts of the land to third parties with a Six-month period of Use Rights (Fairuzabadi & Khisni, 2018). The authority obtained by the Holder of Management Rights in Article 7 pp Number 18 of 2021 is to give the authority to draw up a plan for the allocation, use, and utilization of land in accordance with the spatial plan; use and

utilize all or part of the land Management Rights for self-use or cooperation with other parties and determine annual mandatory tariffs and / or money from other parties in accordance with the agreement. There is one authority that looks different from the provisions of PMA 9/1965, namely related to the use of all land for its own benefit, which is different from PMA 9/1965 which provides conversion to the use of all land into Right of Use, and by PP Number 18 of 2021 granted Management Rights(Hajati, 2019; Hajati et al., 2017). So that according to this Government Regulation, if the holder of the Management Rights to work on his own land is not converted into Right of Use but still Management Rights(Riza et al., 2018; Romadhon et al., 2018, 2020).

The contradiction of the enactment of this Government Regulation with the number of laws and regulations on it becomes a debate and legal issue. Where clearly this rule ignores the rules of legal preferences that apply, where hierarchically in Article 7 of Law No. 12 of 2011 on the Establishment of Laws and Regulations mentioned that "(1) The type and hierarchy of laws and regulations consists of:

- a. The Constitution of the Republic of Indonesia of 1945;
- b. The Decree of the People's Consultative Assembly;
- c. Government Laws/Regulations In lieu of the Act;
- d. Government regulations;
- e. Presidential Regulations;
- f. Provincial Regulations; and
- g. District/City Regulations.

Referring to Law No. 12 of 2011 then by using the principle of legal preference that is *lex superior derogat legi inferior*, then the position of Law No. 5 of 1960 is higher than the Government Regulation under it. So that principles and anything contained in government regulations should not conflict with the law above. If we review the consideration of this Government Regulation by including the Work Copyright Law as a basis considering that it is not UUPA then of course there are legal defects in it(Et al., 2021; Hajati et al., 2014; Sekarmadji et al., 2017). The confusion of this rule that should be the implementing rule of granting The Right to Business above management rights certainly cannot be applied(Irfani, 2020).

Although theoretically, it is not wrong if the Right to Business is granted above the Management Rights, but it must be remembered in terms of the area of Business Use Rights that are at least 5 hectares, then the land area of The Management Rights must be much wider than the Right to Use the Business that is intended to be requested. In terms of such area alone, it becomes impossible because there will be various questions related to the granting of Management Rights with such a large area. Why not just be given the Right to Business on state land but must first be given the Right of Management first on the subject holder of the new Management Rights then

given the Right to Business on it. Furthermore, there will be other problems related to land registration. Registration of Land Right to Business on land Management Rights is much more difficult because it requires approval from the holder of Management Rights. If viewed from the point of view of the applicant of The Right to Business, of course, he would prefer to apply for land of Right to Business on state land.

In addition to the area, and the difficulty of land registration procedures that occur, it is also related to the position of Management Rights which basically when granted rights to other land on it requires approval from the holder of management rights. The Applicant for The Right to Business must first obtain approval to be able to obtain The Right to Business on the land. Maria S.W. Sumardjono stated that the basis for granting land rights by holders of Management Rights to third parties is the legal relationship stated in the Land Use Agreement Letter (Sitorus et al., 2016).

In addition to the application for rights that must first get approval from the holder of the Management Rights, the complexity of the arrangement of Business Rights on land Management Rights is also related to the transition and guarantee of the land. The Right to Business as mentioned in Article 30 PP Number 18 of 2021 can be used as a guarantee of debt, and can be transferred, or transferred. This is certainly different from the loading of guarantees and transitions as can happen to the Right to Business on State land. If done on land Management Rights, then it is actually the same as other land rights that are on land Management Rights, requires approval from the holder of Management Rights first.

The approval of the holder of this Management Rights is regulated in nature Article 29 of Government Regulation No. 18 of 2021 that: "The Holder of The Right to Business has the right: use and utilize the land granted in accordance with its designation and requirements as stipulated in the decision and agreement of its grant". So if there is indeed a Right to Business is granted on the Right of Management, then there is also a Land Use Agreement between the Holder of The Right to Business and the holder of the Management Rights as previously mentioned. This agreement is made in the presence of a Notary or under the hand. In Practice, this Agreement has several terms of agreement including Land Use Agreement Letter (SPPT), Submission Agreement, Use and Management of Land Rights. After obtaining approval from the Holder of Management Rights, prospective holders of Business Use Rights apply to the City / Regency Land Office. In Article 23 paragraph (2) of this Government Regulation, that the Right to Business on Land Management Rights is granted by decision granting rights by the Minister with the approval of the Management Rights Holder. After the issuance of the Decree on The Right to Business from the Minister, re-registered with the Land Office after that, then there is a Right to Business as well as the issuance of the Certificate of Right to Business in question.



Basically, in land registration there are some underlying foundations. Article 2 pp Number 24 of 1997 regulates some of these principles, namely simple principles, peace principles, affordable principles, mutkahir principles, and open principles. When associated with the granting of Business Use Rights on land Management rights, there are some principles that are not appropriate and not applied in the grant. Some of the principles that are not applied in the granting of Business Use Rights on Land Management Rights are as follows:

- a. "The simple principle in land registration is intended so that the provisions and procedures can easily be understood by interested parties, especially land rights holders.
- b. The safety Principle is intended to show that land registration needs to be carefully and carefully organized so that the results can provide guaranteed legal certainty in accordance with the purpose of land registration itself.
- c. The principle of affordable is intended for affordability for those in need, especially with regard to the needs and capabilities of the weak economic class. Services provided in the framework of land registration must be affordable by the parties in need.

With the granting of The Right to Business on land, it may not be possible to do a simple basis. This is because there are still doubts related to the implementation of the granting of Business Use Rights on land Management Rights. Provisions that are still vague and not in accordance between the land that can be given the Right to Business in UUPA and PP 18 of 2021 is one of the factors that cannot realize the simple principle.

The second principle that cannot be implemented is the principle of peace. With there are still many doubts and no clearer provisions related to the procedure of granting Right to Business on Land Management Rights, there may be inaccuracies in the granting of Business Use Rights on land Management Rights, especially because the Rules of Right to Business on land Management Rights are new rules, so it cannot be realized carefully if not regulated further and clearly in other provisions.

The third principle that cannot be implemented is an affordable base. If the prospective holder of The Right to Business wants to apply to get The Right to Business on The Right of Management then it can be ascertained that it will require a large cost considering the new provisions so that more costs may be incurred to get certainty related to the granting of Business Use Rights on the land of Management Rights.

Granting Business Use Rights on land Management Rights on the one hand benefits management rights holders because there can be income money through land use agreements. Of course, with the income money, it will increase the benefits for holders of Management Rights and

the land can be utilized to the maximum. But on the other hand, it is likely to be detrimental for prospective holders of The Right to Business, where it is known that there are complex procedures in the acquisition, loading, and underwriting that require prior approval from the holder of the Management Rights, and the costs that will be incurred are greater than by applying for The Right to Business on State land because it must be paid income money to the holder of the Management Rights as a form of the land use agreement.

#### **4. CONCLUSIONS**

The Right to Business on Management Rights stipulated in Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration cannot be applied in the granting of Business Use Rights because in addition to hierarchically that this regulation is contrary to the article related to The Right to Business stipulated in Law No. 5 of 1960 on Basic Rules of Agrarian Principals. Regulation Pemerintah as the implementing regulation under it should be subject to the laws and regulations on it, considering Law No. 5 of 1960 as the main provisions of the Indonesian National Agrarian Law. If we use principle *lex superiori derogat legi inferiori* which is the highest regulation beating the regulations under it, then there is a legal flaw in this recently published Government Regulation. Thus further if we read the considerations in this Government Regulation does not include UUPA as a basis for remembering. In addition to the provisions in contrast to the rules that are domiciled above, the arrangements regarding The Right to Business on Management Rights are also contrary to principle-principle of land registration. What is set forth in several articles related to The Right to Business over The Right of management in addition to contrary to principle law is also contrary to the U.S. in land registration. Biaya that must be issued for land registration and payment of income money by the Holder of Business Rights to the Management Rights Holder causes discrepancies with the affordable principle in land registration. The Right to Business on Management Rights issued by the Minister must also be granted with the approval of the Holder of Management Rights, so that the process of granting rights is considered more complicated when compared to the granting of Business Use Rights on state land. The more complicated and lengthy procedure is not in accordance with the simple principle in land registration that prioritizes the ease of the procedure for obtaining the right of a land bag.

Supposedly in making a new rule of law, the government pays attention to these things, so that the rules can be applied properly and appropriately in the field. The Right to Business on Land Management Rights may be applied by changing the provisions contained in the UUPA. This is a solution to the contradiction of laws and regulations between the regulation of Right to Business on Management Rights regulated in UUPA and regulated in PP Number 18 of 2021. The

government cannot necessarily ignore or make new rules related to the implementation of the granting of Business Use Rights above Management Rights, because in the highest rules, namely UUPA, The Right to Business is only regulated to be obtained on State Land. Another step that can be done is to revoke PP Number 18 of 2021 to be replaced with rules that do not conflict with UUPA. The rules that must be changed include relating to the various land rights that can be granted the Right to Business on it, and also regarding the obligation to make a land use agreement between the holder of the Management Rights and the holder of the Right to Use the Business to frame the legal relationship of granting land for use by other parties. The obligation to make the agreement is intended so that in the granting of Business Use Rights on The Right of Management is not done arbitrarily by the holder of the Management Rights in relation to the period and determination of the income money that must be paid by the holder of the Right to Business. With a comprehensive arrangement, it will create good legal protection for the community (Mahmud Marzuki dan Peter Mahmud, 2011; M. P. M. Marzuki, 2019; P. P. M. Marzuki, 2008).

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