

*Conceptual Article***Incongruence in the Definition of Land Rights in National Agrarian Law: A Path to Legal Uncertainty**Muh. Afif Mahfud<sup>1\*</sup>, Sia Chin Chin<sup>2</sup><sup>1</sup>Faculty of Law, Universitas Diponegoro, Indonesia<sup>2</sup>Faculty of Business and Law, Taylor's University, Malaysia

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**ABSTRACT**

Legal certainty as one of the goals of national land law will not be created when there is incongruence in the definition of land rights in regulations. This incongruity may affect the formation, implementation and interpretation of law in the agrarian sector. The aim of this article is to analyze the incongruence in the definition of land rights in regulations and the impact of this incongruence in the definition. Based on the analysis, it is concluded that there is an inconsistency in the definition of land rights in Government Regulation no. 18 of 2021 which states that the authority for land rights covering above the ground and underground space is not in line with PP (Government Regulation) No. 43 of 2021. The regulation states that the authority for land rights does not cover the space above the ground and underground space. This misalignment includes horizontal incongruity, formal incongruity and substantive incongruity. It will result in unclear meaning of land rights, loss of predictability of regulations, and affecting the formation, enforcement and interpretation of laws so that there is no clear reference for the community and law enforcers in acting. Ultimately, this will affect legal protection for the community in exercising their rights. It is recommended that the government harmonize the definition of regulatory land rights.

**Keywords:** Misalignment; Definition; Land rights; Legal certainty.

**A. INTRODUCTION**

Law no. 5 of 1960 concerning Basic Agrarian Principles (UUPA) stipulates that there are three main objectives of agrarian law national; creating justice, unity, legal certainty and simplicity in the land sector (Ardani, 2017). Legal certainty (*rechtssicherheit*) is also one of the basic values in law put forward by Gustav Radbruch (Radbruch, 2020). In his view, law requires firmness, predictability, and stability in order to create security and order (Lang, 2017). In this case, legal certainty is related to the existence of harmony between various laws and regulations

including the definition of the terms therein. If the terms between one regulation and another are different, this will cause legal uncertainty in terms of making, interpreting, and even enforcing the law.

Legal certainty in legislation relates to the aspects of language which play a very important role because it is an instrument in expressing legal ideas, a basis for interpretation, and a basis for law enforcement. Legal language must also be understood and expressed clearly because it is different from social language (Ross, 1958). For this reason, the use of language in law is closely

related to legal reasoning. One of the fundamental things in using language in legislation is formulating definitions, including the definition of land rights. A precise definition relating to land and land rights will provide a clear picture of the object being discussed, both its characteristics and the limits of its scope. The definition of land rights in statutory regulations must not be contradictory because it will create legal uncertainty and confusion in the realm of implementation.

Ironically, there is an inconsistency in the definition of land rights in Government Regulation no. 18 of 2021 concerning Management Rights, Land Rights, Flat Units and Land Registration that defines land rights as the rights obtained based on the legal relationship between the right holder and the land, including the spaces above the ground and/or below the surface of the land for the purposes of control and ownership and the use, utilization, and maintenance of the land above the ground and underground space. This definition is clearly different from Article 1 point 9 of Government Regulation no. 43 of 2021 concerning Settlement of Discrepancies in Spatial Planning, Forest Areas, Permits and/or Land Rights. In this regulation, land rights are defined as the rights obtained based on the legal relationship between the right holder and land which does not include the space above the ground and/or the space below the surface of the land. Based on this, the definition of land rights in Government Regulation no. 18 of 2021 clearly states that land rights include the spaces above

the ground and/or underground. Nevertheless, Government Regulation no. 43 of 2021 states that land rights do not include the spaces above the ground and/or underground.

The presence of conflicting definitions of land rights in these two regulations will cause problems in the application of the law because of the different scope of authority in these terms. Clarity of language/terms including their scope plays an important role because it is the main basis for communication between law makers and enforcers. Differences in perception regarding the meaning of a term due to lack of clarity may certainly hinder communication and ultimately have an impact on the process of forming and enforcing laws. In fact, one form of legal certainty in the land sector, particularly land registration, is certainty on the object of rights (land) including the size and other matters related to the physical nature of the land.

Legal certainty, particularly the object of this right, will not be achieved when the definition or scope of the land is not clear. One example of the unclear definition of land is put forward by Caleb J Stevens based on the results of his research in Liberia. He states that the unclear definition of public land in African laws and regulations resulted in various negative impacts including unprotected community rights and the taking of community lands for industrial purposes and natural resource extraction (Stevens, 2014) .

The issue of land ownership is one of the problems currently faced by Indonesia, both in terms of equal distribution of ownership and

inconsistency in regulations (Rusliyadi, & Libin, 2018). Epistema states that one of the causes of widespread agricultural problems in Indonesia is legal uncertainty which hampers land management (Susetio, 2013). This condition is in line with objective legal certainty which emphasizes the protection of a person's ownership and actions. Van Apeldoorn states that there are three functions of legal certainty; ensuring law enforcement, protecting individual interests, and facilitating the implementation of regulations. One of the fundamental things in realizing legal certainty is the harmony of laws and regulations (Widiyono & Khan, 2023).

Based on the various theories and concepts above, a clear definition of land rights is something that is really needed to clarify the object of a right. This means that the scope of authority of the object held over land is determined so that it can be used to support its control and use. The discourse regarding rights cannot be separated from the two main substances of rights, such as access and exclusivity. The word access refers to the person's authority to use or exploit the land. The second substance of rights is exclusivity which is the authority of the right holder to exclude other people from using the land. This exclusivity aspect is limited by the social function in its implementation as regulated in the UUPA (the Basic Agrarian Law). One of the interesting articles regarding access is stated by Immanuel Kant in Chapter III of his book *Perpetual Peace* that a person has the right to be treated well when

entering another person's land or yard, which he called the right of hospitality. In fact, land rights have currently been in their second generation which also emphasize the ecological aspects of their uses (Bayefsky, 2013).

The description above shows that there is a gap between the aim of national agrarian law, which creates legal certainty requiring harmony in the regulation and definition of land rights and the reality of inconsistencies in the definition of land in statutory regulations. Government Regulation no. 18 of 2021 concerning Management Rights, Land Rights, Flat Units and Land Registration defines land rights as including the space above the ground and/or the space below the surface of the ground, while Government Regulation no. 43 of 2021 defines land rights as not covering the space above the ground and/or the space below the surface of the land. Incongruence in the definition of land rights creates legal uncertainty which will certainly have an impact on the control and use of land, particularly the rights and obligations that arise in the legal relationship between humans and land. It also has the potential to cause disputes and even conflicts in the agrarian sector.

This article aims to analyze the inconsistency in the definition of land rights in legislation and the impact of the inconsistency in the definition of land rights. The discourse in this article is different from the writings of Lorenzo Squintani and Helena van Rijswick which discuss the incompatibility of the European Union regulations governing environmental

management. There are several fundamental differences between them; the incongruity does not lie in the definition and does not discuss the agrarian aspect either. (Squintani & van Rijswick, 2016). One thing that also serves as a comparison is Andrea Usai's article which discusses legal uncertainty in implementing the principle of non-discrimination because there are no regulations regarding the procedures for implementing this principle. In other hand, this article does not discuss the lack of clarity of procedures but the lack of clarity and overlapping terms in land regulations (Usai, 2014). One article that can also be used as a comparison is the one written by Pamela C. Corley and Justin Wedeking which discusses the importance of the role of language, including in the law enforcement process in court, while this article discusses the incongruity of definitions in two laws and regulations and its relationship with legal certainty (Corley & Wedeking, 2014). This article is different from the writings of Michael Asch and Catherine Bell which discuss land rights for traditional communities without discussing the definition aspect. This article discusses specifically the differences in definitions of land rights based on the perspective of national land law (Asch & Bell, 2017). This article is also different from Wasis Susetio's article which discusses the inconsistency of regulations in the agrarian sector and the natural resources sector. This article focuses on the inconsistency of definitions in statutory regulations (Susetio, 2013).

## B. DISCUSSION

### 1. Incongruity in the Definition of Land Rights in Legislation

Article 1 point 1 of Government Regulation no. 18 of 2021 concerning Management Rights, Land Rights, Flat Units and Land Registration defines land as the surface of the earth in the form of land or covered by water and the use and utilization of which is directly or indirectly related with the use and utilization of the earth's surface. An example of the one directly related to this word is the erection of a house foundation which has a direct relationship or connection with the use of land, while the word that is not directly related can be related to the land above the ground and underground space. The same definition can also be found in Article 1 point 8 of Presidential Regulation no. 65 of 2022 concerning Land Acquisition and Management in *Ibu Kota Nusantara* (Indonesia's new capital).

Article 1 point 5 of the government regulation states that land space is the space above the surface of the land with its control, ownership, use and utilization is separate from the control, ownership, use and utilization of the land plot. The word separate is also used in the definition of basement. Thus, it shows that the authority to use land space is not identical to the land because the position of the object is separate from the land which is the surface of the earth. It is the difference in the definition of land in this regulation because it raises the question of whether a land holder (owner) is also given the rights to a body of land with its use that is directly

or indirectly related to the use of the land or only related to the land. This uncertainty in the scope of land clearly does not fulfill one of the conditions for creating legal certainty (calculability/predictability). It means that the regulations can make the *adresat* (legal subject) that make predictions on the scope of its authority to act and legal consequences (Haldemann, 2005).

There is a difference between the definition of land in Article 1 point 1 of Government Regulation no. 18 of 2021 with land coverage in

Article 1 number 2 of Government Regulation no. 24 of 1997 concerning Land Registration which defines land as part of the earth's surface which is a unit of bounded land. This also occurs in Article 1 number 1 of the Regulation of the Minister of Agrarian and Spatial Planning/ Head of the National Land Agency No. 17 of 2021 concerning Procedures for Determining Destroyed Land which defines land as part of the earth's surface in the form of a limited unit area.

**Table 1 Differences in Land Definitions**

Definition of Land	
Government Regulation no. 24 of 1997	PP No. 18 of 2021
part of the earth's surface which is a bounded unit area	the earth's surface, whether in the form of land or covered by water, with the use and utilization of which is directly or indirectly related with the use and utilization of the earth's surface.

The general definition of land by only limiting it to the surface of the earth as in Government Regulation No. 24 of 1997 shows the use of general definition patterns as in Scharpell's view that determining a definition too strictly could be a mistake because a definition that is too strict or detailed could hinder operationalization of a legal policy. Then, too strict definition also has the potential to hinder the achievement of goals (Humphrey, 1945). It also shows that there is an open texture pattern in the definition of land which is only limited to the surface of the earth because it can provide flexibility in its application and can also be interpreted extensively, thus providing space for law enforcers to carry out their duties

and to achieve substantive justice. HLA Hart states that a rule is open textured because it is formed to be applied in various conditions (Bix, 1991). With this broad formulation, law enforcers are given space to interpret properly and not rigidly as conducted by the adherents of legal positivism (Krishnakumar, 2018).

Different conditions are found in the definition of land according to PP (Government Regulation) No. 18 of 2021 in which it contains the aspects of land use and utilization that are broader in scope because they include the authorities directly and indirectly related with the use and utilization of the earth's surface. The

expansion of authority in the use or utilization of land should be included in the definition of land rights because in this right an authority is actually present. It is also to clarify the difference between the object of rights and authority over the object.

The words use and utilization related directly or indirectly with the use and utilization of the earth's surface in this definition is clearly contrary to Article 4 paragraph (2) of the UUPA (the Basic Agrarian Law) which gives authority to use the land as well as the body of the earth and water and the space above it, merely as needed for the purposes directly related to the use of the land within certain limits.

When there are differences in authority regarding land rights, a resolution is needed through legal principles, which in this case is the principle of *lex superior derogate legi inferior*, which means that higher law overrides lower law. Therefore, the scope of the meaning of land that applies should be the regulations in the UUPA (the Basic Agrarian Law). On the other hand, there is also the principle of *lex posterior derogate legi priori* or new law overriding old law. When this legal principle is used, Government Regulation

no. 18 of 2021 applies so that land coverage also includes the body of the earth or space above the land which is directly or indirectly related to land use. In such conditions, the question that arises is: which of these two principles should be the basis? The answer is the principle of *lex superior derogate legi inferior* because this principle takes precedence over other legal principles.

The other problem that also arises is that there is no harmony in the definition of land rights in Government Regulation no. 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration and the definition of land rights in Article 1 point 13 of Government Regulation no. 12 of 2023 concerning Providing Business Licensing, Ease of Business, and Investment Facilities for Business Actors in *Ibu Kota Nusantara* (Indonesia's new capital). The definition of land rights in these two regulations is contrary to Article 1 point 9 of Government Regulation no. 43 of 2021 concerning Settlement of Discrepancies in Spatial Planning, Forest Areas, Permits and/or Land Rights. The differences in definitions of land rights in the three regulations are illustrated in the following table:

**Table 2 Differences in Definitions of Land Rights**

Government Regulation no. 18 of 2021	Government Regulation no. 12 of 2023	Government Regulation no. 43 of 2021
Land rights are the rights obtained based on the legal relationship between the right holder and the land, including the space above the ground and/or the space below the ground for the purposes of control,	Land rights are the rights obtained from the legal relationship between the party entitled to the land, including the space above the land, and/or the space below the ground to control, own, use and exploit, as well	Land rights are the rights obtained based on the legal relationship between the right holder and the land which does not include the space above the ground and/or space below the ground

ownership, use and utilization and maintenance of the land, the space above the ground and underground space.	as maintain the land, the space above the land, and /or underground space	
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The table above shows that there is no harmony between the definitions of land rights in Government Regulation no. 18 of 2021 which states that land rights also include the space above the ground and/or underground space. The same substance can also be found in Government Regulation no. 12 of 2023. These two regulations are clearly different from Government Regulation no. 43 of 2021 which regulates that land rights do not include space above the ground and/or space below the ground. When the provisions in Government Regulation no. 43 of 2021 is enforced, there is no authority to use the space above the ground and/or underground space. This means that the authority of land rights holders in this regulation is narrower than that in the other two regulations.

In addition, the condition of conflicting laws and regulations above is not in accordance with the concept of the argumentative nature of law which prioritizes two things; rationality and coherence. The first aspect means that legal provisions must be rational or reasonable, while coherence means that there must be harmony in statutory regulations. This alignment can be divided into two; vertical alignment (hierarchical alignment between regulations) and horizontal alignment (alignment of regulations with an equal position in the sequence of statutory regulations). In this problem, what occurs is horizontal

misalignment. This incongruity with legal rules will also have an impact on the validity of the law because the normative function of law, which means the ability of the law to influence the actions of the people to whom it is subject, is determined by normative force which is the harmony between norms or rules (Alexy, 2008).

## 2. The Impact of Incongruence in the Definition of Land Rights in Legislation

The problem of inconsistency in the substance of legal regulations in Indonesia is one of the fundamental problems in the field of law (Astariyani et al, 2023). The presence of overlap in the definition of land in various laws and regulations will have a negative impact. Philosophically, it will influence the achievement of the values of legal certainty and justice in the land sector. It is stated that it does not contain legal certainty because its substance does not meet the principle of legality as stated by Lon L. Fuller, particularly the principle of non-contradiction, or there is no conflict between one rule and another rule as well as the aspect of clarity. The principle of non-contradiction is the basis of the rule of law and must be the guideline in making laws because it determines the basis for making and enforcing laws which ultimately determines people's obedience to the law (Fuller, 1964) . Then, the lack of clarity in this definition is

not in accordance with the aim of the definition to create legal certainty and to avoid ambiguity in the law (Dahlman, 2022).

Regarding the legal uncertainty due to inconsistency in statutory regulations, the statement put forward by Humberto Avila can be quoted which divides the harmony of statutory regulations (coherence) into two, i.e.: (Avila, 2016)

1. Formal coherence; fulfilling aspects of consistency and completeness. Consistency means that there are no different propositions between laws and regulations, no conflicting definitions or propositions between the two, and no inferential cohesion meaning that there is no logical unity or logical consequence.
2. Substantive coherence occurs because there are logical implications (the truth of the premise leads to the truth of the implication) which are in harmony between propositions and the presence of logical equivalence (the content of truths in one proposition acts on the content of truth for another and vice versa).

If we refer to the division proposed by Humberto Avila above, the inconsistency in the definition of land rights in statutory regulations shows that there is an inconsistency both in terms of formal coherence and substantive coherence. It is stated that it does not have formal coherence due to the inconsistencies between propositions in the definition of land and land rights between one and another statutory regulation.

Substantial incoherence also occurs when there is no logical harmony between one and

another statutory regulation because the definition is fundamental to a statutory regulation and the basis for compiling the entire article in a regulation as well as interpreting other statutory regulations (Weinrib, 2014). If the definition of something is fundamentally different, the logical consistency of a legal regulation will not be achieved. The ambiguity in the definition above should be avoided in Indonesia by overcoming legal ambiguity and legal contradictions from the unclear definition of land in Indonesia (Oermann & Ziebarth, 2015).

There is a separation for the space above the ground and underground space with land in land use, so it should not be part of the definition of land in order to be in line with the *hoorizontale scheiding* principle in national land law. The use of the *hoorizontale scheiding* principle based on customary law, apart from being applied in Indonesia, is also applied in Japan as regulated in Article 265 of the Civil Code which regulates the use of land belonging to other people to grow plants on the land belonging to other people as well as Article 270 of the Regulation which regulates the right to manage and carry out development on land belonging to other people (Dwiyatmi, 2020).

Based on the entire description above, land should be defined as the surface of the earth, including those under water. Land rights can be defined as the rights obtained based on a legal relationship, namely the rights obtained from a legal relationship between the right holder and the land which can be expanded so that it includes



the space that is directly related to the use of the land as well as the use of the space above the land and/or underground space that is separate from land use. In this definition, there is an extensive pattern because the scope includes not only land but also the space that is directly related to the land as well as the uses that are separate from the use of the land, namely the space above the ground and underground space which of course in their use are closely related to the land.

The definition of land rights which includes the space above ground and underground space is actually in line with the view of Alf Ross who states that the validity of a law depends on its ability to describe a social fact (Ross, 1958). By placing a broad definition of land rights, it includes the space above the land and underground space, and it is also to show the reality that occurs in society regarding the use of the space above the ground and underground space which is common such as the use of the underground space of the *Karebosi* field in Makassar for commercial purposes, the use of underground space for Mass Rapid Transit (MRT) in Jakarta, and various other forms of use in big cities (Alrip & Kadarudin, 2021).

For the consistency or harmony with statutory regulations, two conditions of logical consistency and flexibility in application must be met. The presence of logical consistency will provide clarity and direction in carrying out law enforcement to realize the goal of national agrarian law for the greatest prosperity of the people. Legal definitions will provide direction in

making laws, explaining laws, or analyzing/interpreting a statutory regulation. For example, the definitions play an important role in deciding the *Eisner vs Macomber* case in America (Alexy, 2008).

Definitions are very important and helpful in law, even in deciding cases, for example Justice Pitney adheres to the definition of income and pays attention to the social conditions of society. For this reason, the definition must be clear, not contain contradictions, and at the same time not lose its open texture (Dahlman, 2022). The open texture nature is important so that judges can later contextualize in interpreting a term or statutory regulation, and even in interpreting they must also understand the *implicature* of the law makers (Hartig, 2016). This reminds the author of the research conducted by Corley and Wedeking that the clarity of the language formulated in the court of appeal decision will determine the validity of the decision as a precedent in law enforcement in the lower court (Corley & Wedeking, 2014). By using an analogy, it can be stated that the clarity of a legal rule, including the consistency of the terms in it, will determine the application of the rule in the law enforcement process.

The lack of clarity in the scope of authority in the definition of land rights will give rise to legal uncertainty primarily for rights holders in acting. Legal uncertainty will have implications for legal protection for the rights holders. Legal certainty will protect a person's rights because there is a legal guarantee and a clearly defined scope of authority to control, use, and exploit the object of

his or her rights. This condition is called *animi tranquillitas* (Nótári, 2004). A similar opinion was also expressed by Immanuel Kant who stated that land rights are one of the human rights with their existence which is not determined by positive law. However, in order to protect a person's ownership of land, positive law with clear substance is needed (Haldemann, 2005).

### C. CONCLUSION

The inconsistency in the definition of land rights is contained in Government Regulation no. 18 of 2021 concerning Management Rights, Land Rights, Flats and Land Registration with Government Regulation no. 43 of 2021 concerning Settlement of Discrepancies in Spatial Planning, Forest Areas, Permits and/or Land Rights. PP (Government Regulation) No. 18 of 2021 regulates that land rights include the space above the ground and underground space, while PP (Government Regulation) No. 43 of 2021 states that the space above the ground and underground spaces are not included in the scope of land rights. This incongruence in statutory regulations is a horizontal incongruity, which is the incongruity of statutory regulations in an equal position that both regulations are government regulations. In addition, this is not in line with the argumentative nature of law which prioritizes the aspects of coherence or harmony of rules. This contradiction does not meet the requirements of formal coherence because there is a conflict of definitions and substantive coherence due to a logical contradiction. The presence of this

incongruity is clearly not in accordance with non-contradiction as one of the principles of legality.

The impact of the incongruence in the definition of land rights is the creation of legal uncertainty clearly contradicts the aim of national agrarian law to create legal certainty. At a more concrete level, this makes the law lose its predictability because there is no clear reference regarding the authority of land rights holders in utilizing land as the object of their rights. This lack of predictability causes legal certainty not to be created. On a more concrete level, this also creates confusion for law enforcers and administrative officials in carrying out their duties, and there is no clear legal protection for the actions of land rights holders. Therefore, efforts are needed to harmonize the definition of land rights in statutory regulations.

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