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Controlling Ministerial Discretion in the Designation of State General Reserve Land Utilization Under Government Regulation No. 20 of 2021

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Original Article

Abstract

Government Regulation No. 20 of 2021 establishes State General Reserve Land (TCUN) from abandoned land. Under Articles 27–28 juncto Articles 74 and 87 of ATR/BPN Ministerial Regulation No. 20 of 2021, the Minister holds discretionary authority to determine TCUN allocation. However, broad discretion risks arbitrary land distribution. This study analyzes the legal limits of ministerial discretion in TCUN utilization post-Job Creation Law and formulates control parameters using normative legal research. The study reveals that discretion cannot operate autonomously; it must align with Good Governance Principles (AUPB), the social function of land under Article 6 of the Basic Agrarian Law (UUPA), and agrarian reform goals. This paper proposes a five-stage control model: authority review, discretionary purposes and social function review, agrarian reform relevance review, objectivity and due-care review, and procedural accountability review. Agrarian reform serves as a mandatory consideration whenever TCUN characteristics relate to land redistribution.

Keywords *abandoned land; discretion; State General Reserve Land; social function; agrarian reform.*

Abstrak

Peraturan Pemerintah Nomor 20 Tahun 2021 membentuk Tanah Cadangan Umum Negara (TCUN) dari tanah telantar. Berdasarkan Pasal 27–28 jo. Pasal 74 dan 87 Permen ATR/BPN Nomor 20 Tahun 2021, Menteri berwenang menentukan alokasi TCUN melalui diskresi. Namun, luasnya ruang diskresi berpotensi menimbulkan kesewenang-wenangan alokasi. Penelitian hukum normatif ini menganalisis batas yuridis diskresi Menteri dan merumuskan parameter pengendaliannya pasca-UU Cipta Kerja. Hasil penelitian menunjukkan bahwa diskresi tidak bersifat mandiri, melainkan wajib tunduk pada Asas-Asas Umum Pemerintahan yang Baik (AUPB), fungsi sosial tanah Pasal 6 UUPA, dan agenda reforma agraria. Studi ini merumuskan model pengendalian lima tahap: pengujian kevenangan, tujuan diskresi dan fungsi sosial tanah, relevansi reforma agraria, objektivitas dan kecermatan, serta akuntabilitas prosedural. Reforma agraria menjadi pertimbangan wajib apabila karakter TCUN berkaitan dengan redistribusi tanah.

Kata kunci: *diskresi; fungsi sosial tanah; reforma agraria; tanah telantar; Tanah Cadangan Umum Negara.*

1. INTRODUCTION

Land occupies a distinctive position within the Indonesian legal system. Its control, ownership, use, and utilization are not governed solely within the framework of private rights. Article 33(3) of the 1945 Constitution of the Republic of Indonesia links state control over land, water, and natural resources to the constitutional objective of achieving the greatest possible prosperity of the people. This constitutional orientation is further elaborated in Law No. 5 of 1960 on Basic Agrarian Principles (*Undang-Undang Pokok Agraria, UUPA*), which, among other matters, affirms that all land rights carry a social function. Accordingly, land rights do not merely confer authority upon right holders; they also impose obligations to cultivate, use, utilize, and maintain the land in accordance with the nature and purpose for which the rights were granted.¹

The social function of land provides a basis for state intervention when control over land is no longer exercised consistently with the purpose for which the relevant right was granted. The control of abandoned land cannot therefore be understood merely as an administrative measure to reorganize land records. It concerns the enforcement of obligations inherent in the legal relationship between a right holder and the land under that holder's control. Mujiburohman demonstrates that abandoned land presents issues far more complex than the mere non-use of land. Its designation requires interpretation of intentionality, procedural compliance, protection of right holders, and the possibility of subsequently utilizing the land for the interests of society and the state.²

The relationship between abandoned-land control and structural agrarian problems becomes more apparent when situated within the agrarian reform agenda. Alvian and Mujiburohman find that the implementation of agrarian reform has not fully succeeded in correcting inequalities in land control and ownership. Although asset legalization and land redistribution have been implemented, achievement of their structural objectives remains constrained by problems of leadership, institutional capacity, regulation, and the limited availability of land suitable for redistribution. In this context, state land derived from the control of abandoned land has strategic significance as a source of agrarian reform objects.³

Hamdhani and Hadiyantina argue that agrarian reform during the Joko Widodo administration remained characterized more strongly by asset legalization than by substantive redistribution. They also situate the establishment of the Land Bank and post-Job Creation regulatory developments within a broader critique of land policy that, in their assessment, has increasingly moved toward market-oriented mechanisms. These findings do not necessarily imply that the use of land for development or investment should be rejected. The critical issue is whether adequate legal mechanisms exist to ensure that state land-use policy remains connected to the mandate of agrarian justice.

¹ Triana Rejekiingsih, "Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum (Suatu Tinjauan Dari Teori, Yuridis Dan Penerapannya Di Indonesia)," *Yustisia Jurnal Hukum* 5, no. 2 (2016), <https://doi.org/10.20961/yustisia.v5i2.8744>; Julius Sembiring, "Hak Menguasai Negara Atas Sumber Daya Agraria," *BHUMI: Jurnal Agraria Dan Pertanahan* 2, no. 2 (2016): 119, <https://doi.org/10.31292/jb.v2i2.65>.

² Dian Aries Mujiburohman, "Menyoal Penafsiran Tanah Telantar," *Jurnal Yudisial* 11, no. 1 (2018): 1, <https://doi.org/10.29123/jy.v11i1.168>.

³ Fitra Alvian and Dian Aries Mujiburohman, "Implementasi Reforma Agraria Pada Era Pemerintahan Presiden Joko Widodo," *Tunas Agraria* 5, no. 2 (2022): 111–26, <https://doi.org/10.31292/jta.v5i2.176>.

A significant regulatory development occurred through Government Regulation No. 20 of 2021 on the Control of Abandoned Areas and Land, enacted as an implementing regulation of the Job Creation Law framework. The Regulation aims to optimize the use and utilization of land and implement the UUPA provisions concerning the termination of land rights as a consequence of abandonment.

Under this framework, State General Reserve Land (Tanah Cadangan Umum Negara, TCUN) serves as a strategic land pool derived from abandoned land. Articles 27 and 28 of Government Regulation No. 20 of 2021, further elaborated in Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 20 of 2021, outline the primary allocations of TCUN for agrarian reform, National Strategic Projects (PSN), the Land Bank, and other state reserves. Determination of utilization is made by the Minister, taking into account national strategic policies, spatial plans, land suitability, and regional carrying capacity.

Although the regulatory framework establishes structured allocation categories, Article 87 of Ministerial Regulation No. 20 of 2021 grants broad scope for ministerial discretion in determining TCUN allocation to address unpredicted public needs or urgent government priorities. Discretion is intended to overcome concrete administrative impasses or statutory incompleteness. However, this broad discretionary space creates legal uncertainty regarding the substantive limits of ministerial authority, raising concerns that administrative flexibility may evolve into an insufficiently controlled mechanism for allocating state land.

This flexibility intersects with broader changes in administrative law under the Job Creation legislation. Amendments to Law No. 30 of 2014 on Government Administration revised the statutory requirements for discretion, emphasizing conformity with discretionary purposes, Good Governance Principles (AUPB), objective reasons, absence of conflicts of interest, and good faith. As Utami points out, broadening discretionary scope without clear evaluation parameters increases the risk of unconstrained administrative power. In the context of TCUN, ministerial decisions do not merely concern internal administration; they directly affect public access to state agrarian resources.

This article addresses that gap. Rather than focusing solely on abandoned-land control procedures, this analysis examines ministerial discretion in allocating TCUN under Government Regulation No. 20 of 2021 and Ministerial Regulation No. 20 of 2021. The study's novelty lies in formulating a prescriptive five-stage model encompassing authority review, discretionary purposes and social function review, agrarian reform relevance review, objectivity and due care review, and procedural accountability review to ensure that ministerial discretion in TCUN designation remains bound by the constitutional mandate of agrarian justice.

Utami argues that this amendment broadens the scope for exercising discretion and may increase the risk of excessively unconstrained governmental power in the absence of adequate control mechanisms. This assessment is directly relevant to the utilization of TCUN. Ministerial decisions do not merely concern internal governmental administration; they concern state land carrying social, economic, and distributive value and may affect community groups' access to agrarian resources.⁴

⁴ Nur Wahyuni Utami, "Perluasan Pengaturan Diskresi Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," *Jurnal Legislasi Indonesia* 19, no. 4 (2022), <https://doi.org/10.54629/jli.v19i4.973>.

At the same time, discretion remains necessary in public administration. Legal norms cannot anticipate and regulate every concrete circumstance that administrative officials may encounter. Sihotang, Pujiyono, and Sa'adah explain that discretion enables public officials to act where applicable regulation is unavailable or inadequate. Nevertheless, this space must remain subject to limitations so that the exercise of authority does not degenerate into arbitrary action. Rahman et al. demonstrate that the exercise of discretion may become problematic where abuse of authority under administrative law intersects with criminal liability. In such circumstances, their study emphasizes the importance of administrative-law mechanisms in first assessing the exercise of authority and preventing abuse of power.⁵

Academic discussion of Government Regulation No. 20 of 2021 has begun to emerge. Rizqi et al. examine the acceleration of abandoned-land control procedures and the protection of right holders. They find that procedural acceleration may reduce the practical opportunity for right holders to demonstrate that the land has resumed productive use. More detailed evidentiary rules and objection mechanisms are therefore required.⁶ Their study concerns the control phase and the protection of rights before or during the designation of a parcel as abandoned land, rather than the subsequent determination of its utilization after it becomes TCUN.

This article adopts a different focus. The absence of a hierarchy among categories of utilization is not treated as the primary issue. Instead, the analysis focuses specifically on “certain interests determined by the Minister,” particularly the relationship between Articles 40(1)(e), 44, and 49 of Government Regulation No. 20 of 2021; Articles 27 and 28 of Ministerial Regulation No. 20 of 2021; and the rules governing discretion under the Government Administration Law. The research gap lies in the absence of specific parameters for determining when a particular need may qualify as a certain interest, the interpretive limits of the phrase “other government programs,” and the manner in which such a choice should be reviewed where the relevant TCUN is also pertinent to the agrarian reform agenda.

The study's novelty lies in formulating a model for controlling discretion in the designation of certain interests by integrating principles of government administrative law and agrarian law. The proposed model consists of five components: review of authority; review of the purposes of discretion and the social function of land; review of the relevance of agrarian reform; review of objectivity and due care; and review of procedural accountability. These five components constitute a prescriptive framework developed through this study and are not intended to suggest that positive law has expressly codified them in precisely the same configuration.

2. RESEARCH METHODOLOGY

This study employs normative legal research, using legislation, legal principles, and legal concepts as the primary materials of analysis. It adopts statutory, conceptual, and historical

⁵ Githa Angela Sihotang et al., “Diskresi Dan Tanggung Jawab Pejabat Publik Pada Pelaksanaan Tugas Dalam Situasi Darurat,” *Law Reform* 13, no. 1 (2017): 60, <https://doi.org/10.14710/lr.v13i1.15951>.

⁶ Anwar Sadat, “Discretion and Accountability of Local Government in Administering Governance,” *Journal of Governance* 5, no. 2 (2020), <https://doi.org/10.31506/jog.v5i2.9283>.

approaches. The statutory approach examines the vertical and horizontal relationships among the UUPA, the Government Administration Law and its amendments under the Job Creation framework, Government Regulation No. 20 of 2021, Government Regulation No. 64 of 2021, Presidential Regulation No. 62 of 2023, and Ministerial Regulation No. 20 of 2021. The conceptual approach analyzes governmental discretion, the AUPB, objective grounds, the social function of land, the state's right of control, public interest, and agrarian reform, while the historical approach traces the development of regulations governing TCUN utilization from Government Regulation No. 20 of 2021 to Government Regulation No. 20 of 2021. Primary legal materials consist of relevant legislation, supplemented by secondary materials from scholarly journals, books, and academic studies. The materials are analyzed prescriptively through grammatical, systematic, and teleological interpretation to assess ministerial discretion in TCUN utilization and formulate a legal framework for controlling its exercise.

3. RESULT AND DISCUSSION

3.1. The Legal Construction of Ministerial Discretion in Designating “Certain Interests” for State General Reserve Land

TCUN arises as a legal consequence of the abandoned-land control process. Government Regulation No. 20 of 2021 previously defined TCUN as land that had been designated as abandoned and subsequently confirmed as land directly controlled by the state. A similar framework is retained under Government Regulation No. 20 of 2021, which places TCUN utilization after the stages of inventory, evaluation, warning, and formal designation as abandoned land. The change in status to land directly controlled by the state does not transform the state into a private owner free to determine its use solely on the basis of administrative preference. Under the UUPA framework, state control is a public function directed toward the prosperity of the people, rather than a private proprietary right of the state over agrarian resources. Article 6 of the UUPA likewise affirms the social function as a principle inherent in every land right.⁷

The implications of this principle do not end with the control process but extend to the subsequent utilization stage. If abandonment justifies the state's termination of the previous legal relationship because the land has failed to perform the function inherent in the grant of the right, the subsequent use of that land must likewise demonstrate a more defensible social function. The state must not merely ensure that the land does not again become physically abandoned; it must also explain why the newly selected use is consistent with the social mandate governing control over land.

Control and subsequent utilization therefore have a close conceptual relationship. Control operates as a corrective measure addressing the prior use of the land, whereas utilization determines its new legal direction after the control process has been completed. Separating the two may produce inconsistency: the social function is invoked as the basis for terminating the previous legal relationship, yet ceases to operate as a standard when the state subsequently determines how the land will be used. Article 40(1) of Government Regulation No. 20 of 2021 establishes five permissible uses of TCUN.

⁷ Rejekiingsih, “Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum (Suatu Tinjauan Dari Teori, Yuridis Dan Penerapannya Di Indonesia)”;

Sembiring, “Hak Menguasai Negara Atas Sumber Daya Agraria.”

Agrarian reform, PSN, the Land Bank, and other state reserves have relatively identifiable policy objects, whereas the fifth category is formulated differently because its determination is entrusted to the Minister.

The elucidation of Article 40(1)(e) identifies housing development for low-income communities, transmigration, sustainable food-agriculture land, and other government programs as examples of certain interests. The phrase “among others” indicates that the list is illustrative. At the same time, the reference to “other government programs” creates scope for policies not expressly enumerated in the provision. This drafting technique is understandable because governmental needs continue to evolve and cannot all be anticipated when a regulation is enacted. Flexibility is required so that state land can respond to subsequently emerging social or development needs. The legal problem lies not in the use of an open-textured norm itself, but in determining the substantive limits of that open-textured norm.

The designation of an initiative as a “government program” cannot serve as a self-sufficient justification. If “other government programs” were interpreted solely by reference to the institutional identity of the program, its scope could become exceedingly broad. If designation as a government program were considered sufficient in itself, “certain interests” could become a residual category accommodating various forms of land use that cannot be placed within the other four categories. Such an interpretation would diminish the function of Article 40 as a norm limiting governmental authority. The phrase “other government programs” should therefore be interpreted to encompass programs having a demonstrable relationship with the purposes of TCUN management, the public interest, the characteristics of the relevant parcel, and the social mandate of agrarian law. The program’s administrative status alone is insufficient; there must be a rational and demonstrable basis for concluding that the use of TCUN is necessary to achieve the program’s objectives.

Additional constraints can be identified in Article 40(3), which requires TCUN utilization to take into account national strategic policies, spatial plans, land suitability, and regional carrying capacity. These four factors provide an initial filter for utilization decisions. They do not, however, resolve every issue where a parcel is suitable for several alternative uses. In such circumstances, Article 40 must be read together with government administrative law. The Government Administration Law defines discretion as a decision and/or action taken by an official to resolve a concrete problem where legislation provides alternatives, fails to regulate, is incomplete or unclear, and/or where governmental stagnation occurs. Article 23 expressly includes decisions based on legislation that provides alternatives within the scope of discretion.

Against this legal background, choices made by the Minister under Article 40 cannot be categorically separated from the concept of discretion. Where a concrete problem exists and the Minister must choose among several alternatives permitted by legislation, that choice may fall within the scope of discretion under the Government Administration Law. This does not mean, however, that every administrative act in the utilization process is automatically discretionary. Acts for which the parameters and legal consequences have been comprehensively predetermined remain exercises of bound authority. Article 44 of Government Regulation No. 20 of 2021 clarifies this relationship by authorizing the Minister to exercise discretion under conditions that are substantively consistent with the framework of the Government Administration Law. This provision is particularly significant

where the category of “certain interests” gives rise to circumstances not yet regulated in detail by implementing regulations.

The exercise of discretion under Government Regulation No 20 Of 2021 must also be understood in light of the amendment to Article 24 of the Government Administration Law following the Job Creation legislation. In its original 2014 formulation, one requirement for discretion was that it not conflict with the provisions of laws and regulations. That requirement was subsequently removed. The current rules require conformity with the purposes of discretion, compliance with the AUPB, objective reasons, the absence of conflicts of interest, and good faith. Removal of the former requirement does not place discretion outside the legal system. The Minister’s authority continues to derive from law, while its exercise remains constrained by the purpose for which the authority was conferred, the AUPB, and the prohibition against abuse of authority. The amendment is better understood as removing one formal restriction without eliminating substantive controls based on the purposes of discretion, objectivity, the AUPB, conflicts of interest, and good faith.

Utami cautions that expanding the scope of discretion may increase the risk of overly open-ended exercises of governmental power unless corresponding control mechanisms are strengthened. This risk is particularly sensitive in the utilization of TCUN because ministerial decisions determine who ultimately gains access to land that was previously under another right holder’s control. The elucidation of Article 44 of Government Regulation No 20 Of 2021 does refer to the AUPB, objective reasons, conflicts of interest, and good faith. Its failure to expressly repeat the requirement of “conformity with the purposes of discretion,” however, does not eliminate that requirement. It remains applicable under the Government Administration Law as a higher-ranking norm, and the elucidation of a Government Regulation cannot diminish requirements established by statute.⁸

Any decision exercising discretion to designate certain interests must therefore first be connected to the purposes of discretion established by Article 22 of the Government Administration Law: facilitating government administration, addressing legal gaps, providing legal certainty, or overcoming governmental stagnation in specified circumstances for the purposes of public benefit and the public interest. Discretion cannot be exercised merely because a particular policy alternative appears administratively more convenient to the decision-making official.

The relationship between Government Regulation No 20 Of 2021 and Ministerial Regulation No. 20 of 2021 raises a further issue. Article 49 of Government Regulation No 20 Of 2021 provides that implementing regulations issued under Government Regulation No. 20 of 2021 remain applicable insofar as they do not conflict with the new Government Regulation. At the time this study was prepared, the BPK legal database continued to record Ministerial Regulation No. 20 of 2021 as being in force. Article 74 of that Ministerial Regulation recognizes only four permissible uses of TCUN and requires their determination by the Minister to be based on the National Team’s technical considerations. Those considerations are prepared using national strategic policies, spatial plans, land suitability, regional carrying capacity, and data from ministries/agencies, Regional Offices/Land Offices, and local governments. The National Team is also specifically tasked with preparing analyses and technical considerations for the Minister.

⁸ Utami, “Perluasan Pengaturan Diskresi Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja.”

In terms of regulatory substance, this technical-consideration mechanism does not conflict with Government Regulation No 20 of 2021. Indeed, several of its parameters are identical to those in Article 40(3). The analytical and technical-consideration mechanism therefore remains relevant to the decision-making process. Its continued relevance, however, cannot be equated with an assumption that Article 74 automatically accommodates the fifth category. Textually, Article 74(1) regulates only the four forms of utilization recognized under the earlier regime. Application of the entirety of the Article 74 procedure to “certain interests” therefore cannot simply be presumed. This regulatory incompleteness should be addressed through a new Ministerial Regulation as mandated by Article 41 of Government Regulation No 20 of 2021.

Pending the adoption of a new implementing regulation, the principle of due care requires that the decision-making standards applicable to certain interests be no lower than those applicable to the four pre-existing categories. From a systematic perspective, it would be difficult to justify requiring technical analysis for agrarian reform, PSN, the Land Bank, and other state reserves while allowing the most open-textured category to be determined through a less rigorous procedure.

The transitional problem therefore extends beyond the numerical difference between the categories recognized by the Government Regulation and the Ministerial Regulation. The principal deficiency lies in the absence of a control architecture for the new category. The expansion of the Minister’s substantive authority has not yet been accompanied by a commensurate adjustment of administrative procedures. The first limitation derives from the purpose of the authority itself. TCUN consists of land under the direct control of the state for subsequent utilization. Because this authority originates in agrarian law, ministerial decisions must remain constrained by the social function of land and the constitutional mandate to achieve the greatest possible prosperity of the people.

The next limitation concerns the purposes of discretion. Discretion must be directed toward resolving a concrete problem and must relate to one of the purposes established by the Government Administration Law. The phrase “other government programs” cannot itself justify discretion unless the concrete problem to be resolved has first been clearly identified. The AUPB provides an additional set of constraints. In TCUN utilization, the principle of due care requires decisions to rest on adequate physical, legal, social, and spatial-planning data. The principle of impartiality requires an assessment that is not directed solely toward the interests of the proposing party. The principle of public interest requires demonstrable public benefits, while the principle of openness requires the reasons underlying the decision to be accessible and reviewable by affected parties within the limits established by freedom-of-information law.

Objective reasons provide a further constraint. A utilization decision cannot be justified merely by the identity or label of a program. A factual relationship must be established between the program’s needs and the location, area, characteristics, and capacity of the land to support the intended objective. Without such a relationship, TCUN risks being treated merely as a pool of land allocable according to administrative preference rather than measurable need. Additional constraints consist of the prohibition against conflicts of interest and the duty to act in good faith. Because TCUN utilization decisions may bring public interests, economic interests, and bureaucratic authority into direct interaction, the control of conflicts of interest warrants particular attention. Transparency concerning

the proposing party, prospective beneficiaries, and any relationship between decision makers and interested parties is an important element in controlling discretion.

This analysis demonstrates that the central problem arising from Article 40(1)(e) is not the existence of discretion itself, but the absence of adequate operational parameters for translating general constraints on discretion into specific standards governing the designation of certain interests for TCUN.

3.2. Parameters for Controlling Discretion in the Designation of Certain Interests Based on the Social Function of Land and Agrarian Reform

Controlling choices concerning TCUN utilization cannot be achieved merely by establishing a fixed hierarchy among agrarian reform, PSN, the Land Bank, other state reserves, and certain interests. The circumstances of individual TCUN parcels are not uniform. Their physical, social, economic, and spatial characteristics may differ substantially. Land demonstrably occupied by farmers in an area affected by agrarian conflict presents circumstances different from land objectively required for public infrastructure development for which no alternative location exists. Andea has demonstrated the importance of clearly defined priorities to prevent agrarian reform from being displaced in competition over TCUN utilization. Protection of that agenda remains necessary, but this article proposes a different instrument. Rather than establishing an absolute priority, the emphasis is placed on the capacity to review consistently the legal process through which the Minister arrives at a particular choice.

As a prescriptive construction proposed by this study, a control model combining procedural and substantive dimensions makes it possible to adapt the assessment to variations among land parcels. Within this framework, agrarian reform remains protected through a mandatory assessment of its relevance and an obligation to provide reasons where agrarian reform is not selected. On this basis, the study formulates five components for reviewing discretion in the designation of certain interests.

The first component concerns the legal basis for ministerial action. At this stage, it must be determined whether the decision constitutes direct implementation of Article 40 on the basis of already available parameters, or whether recourse to Article 44 is genuinely required because the concrete case involves a choice among alternatives, a regulatory gap, incompleteness, ambiguity, or governmental stagnation. This distinction is necessary because discretion is not simply an administrative justification attached to a decision after it has already been made. As a legal construct, discretion requires the prior existence of specific circumstances capable of being identified.

Under the proposed model, a decision concerning the “certain interests” category should, at a minimum, answer three principal questions: which program is to be facilitated; why the program qualifies as a certain interest within the meaning and purpose of Government Regulation No 20 of 2021; and why the particular TCUN parcel is required to resolve the concrete problem faced by that program.

Where a program substantively falls within one of the specifically regulated categories, “certain interests” should not be used to avoid requirements applicable to that category. A residual category

must not function as a regulatory bypass. The second component integrates the rules of administrative law with principles of agrarian law. Every exercise of discretion must conform to the purposes of discretion under the Government Administration Law. Because the subject matter of the decision is land, consistency with the social function of land must also be demonstrable.

The social function cannot be reduced to the question of whether land is being physically used. The principle also recognizes the relationship among individual, social, and public interests in land utilization. Economic productivity does not automatically demonstrate fulfillment of the social function, particularly where the benefits of land use accrue only to a limited group while simultaneously intensifying the exclusion of communities from access to land. A decision designating certain interests should therefore explain, at a minimum, the public benefits to be achieved, the beneficiary groups, the relevance of the location and area of the TCUN to the program's objectives, and the relationship between the chosen use and the interests of communities surrounding the land.⁹

Accordingly, designation as a "government program" merely identifies the program's institutional character. That status cannot constitute conclusive evidence that the relevant land use fulfills the social function. Government programs remain subject to substantive scrutiny. The third component connects the framework for controlling discretion with the agenda of correcting the agrarian structure. Presidential Regulation No. 62 of 2023 situates agrarian reform within strategies involving asset legalization, land redistribution, economic empowerment of agrarian reform beneficiaries, institutional strengthening, and public participation. Its implementation is expressly directed toward the principles of justice, sustainability, participation, transparency, and accountability.

Under the framework proposed in this study, agrarian reform need not invariably prevail over every other form of land utilization. However, where TCUN is located in an area affected by agrarian conflict, has been occupied or cultivated by communities for a certain period, has been proposed as a Land Object for Agrarian Reform (*Tanah Objek Reforma Agraria*, TORA), is relevant to correcting inequality in land control, or is strongly suitable for redistribution, those circumstances must constitute mandatory considerations. A mandatory consideration means that the government may not bypass this stage of assessment. If, after conducting the assessment, the Minister nevertheless designates the land for certain interests, the decision should state concrete reasons explaining why that choice is more appropriate than utilizing the land through agrarian reform.

This construction is more proportionate than establishing agrarian reform as an absolute priority for every TCUN parcel. For some parcels, agrarian reform may represent the strongest alternative, while others may involve more urgent public needs. What must be prevented is a situation in which agrarian reform is formally listed as one permissible use but its relevance is never seriously examined. This approach also has an empirical basis in the work of Alvian and Mujiburohman, who identify the availability of redistributable land as one of the challenges confronting agrarian reform. If land with potential to become TORA is diverted through an open-ended category without assessing

⁹ Rejekiingsih, "Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum (Suatu Tinjauan Dari Teori, Yuridis Dan Penerapannya Di Indonesia)."

redistribution needs, limitations in the supply of land for agrarian reform will continue to be reproduced by state policy itself.¹⁰

Objective reasons constitute one of the express statutory requirements governing discretion following the amendment of the Government Administration Law. In relation to TCUN, objectivity cannot be established merely by stating that a program is a government priority. Decisions must instead be based on verifiable data, including the characteristics of the parcel, spatial plans, land suitability, regional carrying capacity, the amount of land required, alternative locations, the number and characteristics of beneficiaries, existing patterns of use, existing conflicts or claims, and the potential socioeconomic impacts of each alternative use.

This assessment is directly connected to the principle of due care. Land that has already undergone an abandoned-land control process should not subsequently be allocated through a decision based only on minimal examination. Errors at the utilization stage may increase the risk of new agrarian conflicts even where the preceding procedure for designating the land as abandoned was correctly conducted. The technical considerations of the National Team under Ministerial Regulation No. 20 of 2021 are important at this stage. The National Team is responsible for preparing analyses and providing technical considerations to the Minister. A collective assessment model can reduce the possibility that a decision becomes wholly dependent on a single sectoral interest or proposing party.

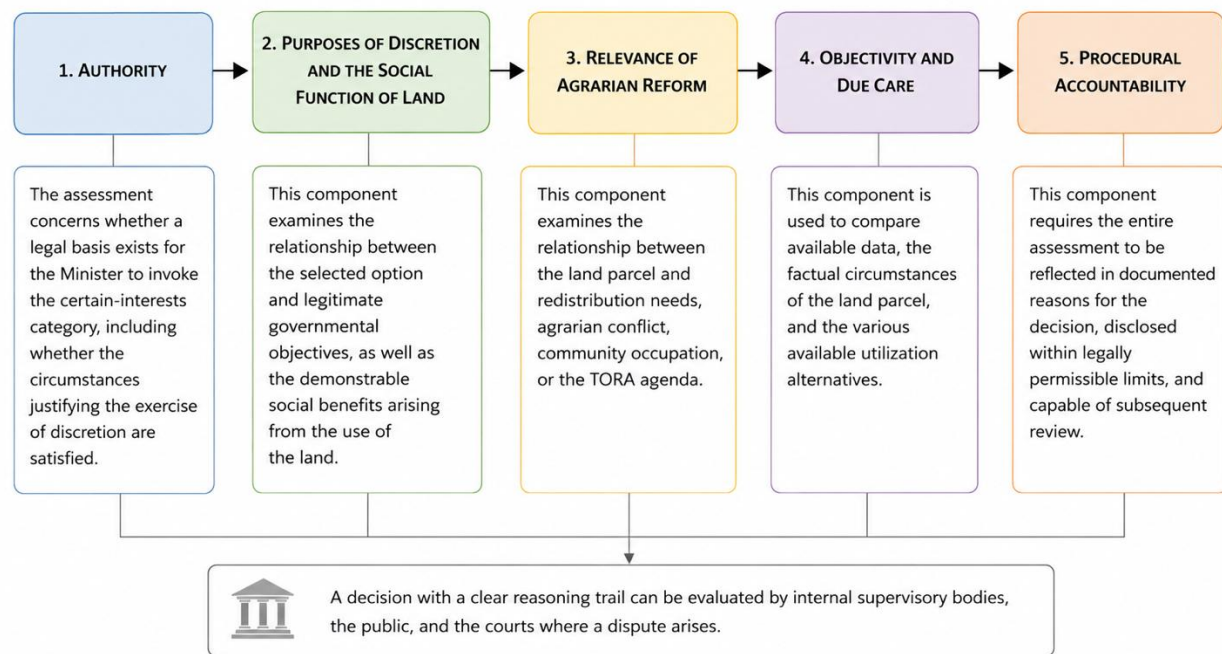
Because Article 74 has not yet incorporated the certain-interests category, the new implementing regulation should ensure that the fifth category is subject to technical scrutiny of at least equivalent quality. Indeed, its more open-textured normative character may justify a more rigorous standard of review. The final component concerns the ability to identify and review all reasons relied upon in the preceding four components. Accountability is necessary not only once a decision becomes the subject of a dispute; it should be embedded in the decision-making process from the outset.

As a proposed accountability parameter, the instrument designating certain interests should, at a minimum, contain the identity of and legal basis for the proposal; the concrete problem to be resolved; the reasons for qualifying a program as a certain interest; an analysis of alternative uses of the TCUN; the results of the assessment of agrarian reform relevance; data concerning land suitability and spatial planning; the objective reasons for the selected option; the beneficiaries; and a declaration concerning the absence of conflicts of interest. Where a decision is made through the formal exercise of discretion, its documentation must also comply with the procedures prescribed by the Government Administration Law concerning its purpose, objectives, substance, and relevant administrative or financial consequences.

This form of accountability is not intended to eliminate the Minister's policymaking space. Its function is to transform an initially broad range of choices into an administrative decision supported by traceable reasoning. A decision with a clear reasoning trail can subsequently be evaluated by internal supervisory bodies, the public, and the courts where a dispute arises. On this basis, the model for controlling discretion may be formulated as follows:

¹⁰ Alvian and Mujiburohman, "Implementasi Reforma Agraria Pada Era Pemerintahan Presiden Joko Widodo."

Authority → Purposes of Discretion and the Social Function of Land → Relevance of Agrarian Reform → Objectivity and Due Care → Procedural Accountability.



Under the authority component, the assessment concerns whether a legal basis exists for the Minister to invoke the certain-interests category, including whether the circumstances justifying the exercise of discretion are satisfied.

The purposes of discretion and social function component examines the relationship between the selected option and legitimate governmental objectives, as well as the demonstrable social benefits arising from the use of the land.

The relevance of agrarian reform component examines the relationship between the land parcel and redistribution needs, agrarian conflict, community occupation, or the TORA agenda.

The objectivity and due care component is used to compare available data, the factual circumstances of the land parcel, and the various available utilization alternatives.

The procedural accountability component requires the entire assessment to be reflected in documented reasons for the decision, disclosed within legally permissible limits, and capable of subsequent review.

This five-part model does not constitute a rule of positive law expressly formulated in a single legal instrument. It is a prescriptive construction derived from the systematic relationship among the UUPA, the Government Administration Law, Government Regulation No 20 of 2021, Presidential Regulation No. 62 of 2023, and the technical mechanisms contained in Ministerial Regulation No. 20 of 2021. Article 41 of Government Regulation No 20 Of 2021 delegates further regulation of TCUN utilization to a Ministerial Regulation. This delegated authority can be used to address the regulatory gap between the norms contained in the Government Regulation and the mechanisms established

under Ministerial Regulation No. 20 of 2021. Prescriptively, a new Ministerial Regulation should not merely restate the five categories of utilization but should regulate at least seven substantive matters.

First, an operational definition of certain interests is required to clarify the characteristics of the public interest that must be satisfied. Second, criteria for “other government programs” should be established so that government programs do not automatically gain access to TCUN. Third, proposal and verification procedures should require data on land requirements, alternative locations, and intended beneficiaries. Fourth, a mechanism should be established for assessing the relevance of agrarian reform. Fifth, collective technical consideration should remain a prerequisite before determination by the Minister. Sixth, disclosure of the reasons for decisions and mitigation of conflicts of interest should be clearly regulated. Seventh, a post-utilization monitoring mechanism is required to ensure that the land is actually used in accordance with the purpose for which it was allocated.

Post-utilization supervision is particularly important. The abandoned-land control regime would become internally inconsistent if the state applied strict standards to former right holders but failed to conduct comparable evaluations of recipients or users after TCUN had been allocated. Utilization should therefore be accompanied by an evaluation mechanism enabling the state to determine whether the social benefits and public interests relied upon to justify the allocation have actually been realized.

The proposed framework for controlling discretion is not designed to position agrarian reform in binary opposition to development or the Land Bank. Government Regulation No. 64 of 2021 expressly assigns the Land Bank the function of ensuring the availability of land for the public interest, social interests, national development, economic equity, land consolidation, and agrarian reform. Accordingly, the categories established by Article 40 do not necessarily represent a conflict between the “interests of the people” and “development interests.” Several categories may share a common public orientation while operating through different legal mechanisms. What must be examined is the justification for selecting one mechanism over another.

Where TCUN is allocated to the Land Bank, for example, the decision should explain why management through the Land Bank is more appropriate than direct redistribution or another form of utilization. Transferring land to a state agency cannot, in itself, constitute the ultimate purpose of utilization.

The same principle applies to the certain-interests category. The development of housing for low-income communities has a clear social orientation. Nevertheless, selection of a particular TCUN parcel must still be preceded by an assessment of locational suitability, intended beneficiaries, land governance, and the possibility that the land may have stronger relevance to agrarian reform. A control model of this kind is not intended to impede development. On the contrary, a clear structure of justification can strengthen the legal legitimacy of using TCUN for development while increasing the decision’s resilience against administrative disputes.

The analysis yields three principal findings. First, the open-textured nature of Article 40(1)(e) operates at two levels. The first arises from the openness of the “certain interests” category through the phrase “other government programs.” The second arises from the discretionary space created by

Article 44 where the Minister must resolve a choice among alternatives or address regulatory incompleteness. The interaction of these two forms of openness increases the need for effective control instruments.

Second, Article 49 of Government Regulation No 20 Of 2021 creates both continuity and regulatory incompleteness during the transitional period. The technical mechanisms contained in Ministerial Regulation No. 20 of 2021 may continue to apply insofar as they do not conflict with the new Government Regulation. Article 74, however, remains structured around the four pre-existing categories and does not incorporate certain interests. Control of the new category is therefore inadequate if it depends solely on the previous implementing regulation.

Third, agrarian reform is more proportionately treated as a mandatory consideration than as an absolute priority. This position allows redistributive objectives to remain protected without foreclosing the use of TCUN for other public needs that, in particular circumstances, are supported by stronger objective reasons. Where there is a concrete indication that a TCUN parcel may constitute potential TORA, a decision not to select agrarian reform as the form of utilization must be accompanied by reasons capable of justification and review.

4. CONCLUSION

Article 40(1)(e) of Government Regulation No 20 Of 2021 introduces a category of TCUN utilization consisting of certain interests determined by the Minister. The elucidation includes within its scope housing development for low-income communities, transmigration, sustainable food-agriculture land, and other government programs. The use of the phrases “among others” and “other government programs” renders the category open-ended. This openness intersects with Article 44, which provides scope for discretion where regulations provide alternatives, fail to regulate an issue, are incomplete or unclear, or where governmental stagnation occurs. Such authority is not unfettered. Its exercise remains subject to the purposes of discretion, the AUPB, objective reasons, the prohibition against conflicts of interest, and good faith, as prescribed by the Government Administration Law following its amendment through the Job Creation legislation. At the implementing level, Article 49 of Government Regulation No 20 Of 2021 preserves the applicability of Ministerial Regulation No. 20 of 2021 insofar as it does not conflict with the new Government Regulation. Article 74 of that Ministerial Regulation, however, does not yet incorporate certain interests, leaving a regulatory gap at the implementation level.

Based on the prescriptive framework developed in this study, control over the exercise of discretion in designating certain interests should consist of five components: authority; the purposes of discretion and the social function of land; the relevance of agrarian reform; objectivity and due care; and procedural accountability. This model is intended to ensure that designation as a government program does not become the sole justification for the use of TCUN. Agrarian reform need not constitute an absolute priority for all TCUN, but its relevance must be examined where the characteristics of the land concern redistribution, community occupation, conflict resolution, or the correction of agrarian inequality. A Ministerial Regulation implementing Article 41 of Government

Regulation No 20 Of 2021 should therefore establish a definition and criteria for certain interests, delimit the scope of “other government programs,” preserve collective technical-review mechanisms, require assessment of the relevance of agrarian reform, and regulate disclosure of reasons, prevention of conflicts of interest, and post-utilization evaluation. Such a framework would preserve necessary administrative flexibility without severing TCUN utilization from the social function of land and the constitutional orientation toward the greatest possible prosperity of the people.

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