

# STATE CONTROL OF LAND PERSPECTIVE OF INDONESIAN LAND LAW AND ISLAMIC LAW

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**Abstract** - This article shows that the state has the authority to control land as a legal subject on behalf of the people or in the public interest. The normative rules of law, both Indonesian land law and Islamic law have the same perspective, positioning the state as a legal subject who can control the land. In Islamic law, state land is land whose owner is not known and there is no sign of having been owned by a person and the land was conquered. Meanwhile, state land in the context of the Indonesian state is all land within the territory of the Republic of which the owner is not or has not been known. The characteristics of state land, both according to Indonesian land law and Islamic law, are lands that concern the livelihood of many people (public utilities). State control over land to ensure the social functions of land can be guaranteed by various legal instruments to create social harmony.

**Keyword:** Indonesian land law, Islamic law, state, regulation, public interest.

## Table of Contents

### INTRODUCTION

1. STATE AS SUBJECT OF LAND RIGHTS
2. JURIDICAL AND PHILOSOPHICAL FOUNDATIONS OF STATE CONTROL OVER LAND
3. STATE CONTROL OF LAND PERSPECTIVE OF ISLAMIC LAW

### CONCLUSION

## INTRODUCTION

The tradition of state control over land in Indonesia existed before Indonesia was born as an independent country. The pattern of land tenure is centralized in the control of the kingdom, and the king becomes the center of power as well as the owner of the land.<sup>1</sup> In Java, the distribution of land into a variety of mastery or supervision is given by the king to the palace officials. Raja distributed land to palace employees to finance their activities as a substitute for the salary they received. The land distributed by the king and palace officials to residents functioned as a source of income and labor contributions to the kingdom.<sup>2</sup>

According to Werner Roll, during the Kingdom of Surakarta and Yogyakarta, the king was considered an intermediary between God and the people. The king is the only owner of the whole area located in the territory of their power. On this basis, a gap between royal officials and the community is created on the basis of magical-religious land ownership. As long as agricultural -owned land is not used by the king himself, the land can be used as an appanage<sup>3</sup> by members of the king's family or royal employees (state) with noble -blooded, the goal is that they take care of and collect taxes.<sup>4</sup>

The principle of land tenure by the state when entering the colonial era, was first launched by Domein's theory by Reffles (1811-1816) during the British colonialism which was then continued during

<sup>1</sup> Aslan Noor, *Konsep Hak Milik Atas Tanah Bagi Bangsa Indonesia di Tinjau dari Ajaran Hak Asasi Manusia* (Bandung: Mandar Maju, 2006), 161.

<sup>2</sup> Winahyu Erwiningsih, *Hak Menguasai Negara Atas Tanah* (Jogjakarta: Total Media, 2009), 122.

<sup>3</sup> The appanage system is a form of land tenure, which is a gift of the king to the officials with the condition that the obligation to pay tribute to the central government in the form of part of the crops collected from farmers. See, Gunawan Wiradi, "Milestones of Agrarian Wisdom in Indonesia" in the principles of Agrarian Reform Way of Livelihood and People's Prosperity (Yogyakarta: Laper Pustaka Utama, 2001), 5.

<sup>4</sup> Werner Roll, *Struktur Kepemilikan Tanah di Indonesia: Studi Kasus Daerah Surakarta Jateng* (Jakarta: CV. Rajawali, 1983), 50.

the Dutch colonial period.<sup>5</sup> In Articles 519 and 520 Burgerlijk Wetboek is adopted by a principle that the yard and other immovable objects that are not maintained and no owner is the state property. In 1870, the principle was reinforced by a special regulation in the field of agrarian law known as Agrarisch Besluit. In Article 1 of the Besluit agrarisch it is stated that "by not reducing the enactment of the provisions in articles 2 and 3 of the agrarisch wet,<sup>6</sup> the principle is still maintained that all land, which other parties cannot prove it as the right of the eigendom, is the domein (owned) of the state. This is later known as Domeinverklaring (Domein's statement)<sup>7</sup>. Proof of land ownership is charged to other parties (not the government), whereas if considering the objective reality of the community at that time it was not possible to obtain evidence of land ownership.

The discourse of state control over land is a problem when related to individual ownership of land. Claims of state control over land are based on the existence of a single state authority that controls and controls all state assets both in land, air or ocean. The basic argument is lands that have not been overwhelmed by rights by anyone, so it automatically becomes the right of the state to control or manage it. Limitation of land trading by the state is also an interesting discourse. Then, how is the perspective of Islamic law related to the issue of land control by the state according to the Indonesian Land Law. Various literature of classical Islamic law becomes a reference to explore the concept of land control by the state in Islamic history.

### 1. STATE AS SUBJECT OF LAND RIGHTS

After Indonesia's independence, and with the enactment of Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles on September 24, 1960, the domain principle was later revoked. The problem of state authority in the context of the LoGA is limited to controlling in the context of regulating the use and use of land as a public institution as well as the embodiment of the rights of the Indonesian people.

The subject of State land rights is the State of the Republic of Indonesia as an organization of power for all Indonesian people. The Indonesian nation referred to is the Indonesian nation as a subject of civil law (privatrechtelijk) and at the same time as a subject of land rights consisting of individuals (natuurlijkpersoon) and artificial individuals (rechtspersoon). Thus, it can be said that if the state controls, then the nation has the right to the land (the owner of the majazi) as a gift from God Almighty (the true owner)<sup>8</sup>. The state is a permanently organized political society that occupies a certain area, and enjoys within the boundaries of that area an independence from the control of other countries, so that it can act as an independent body in the world.<sup>9</sup> The rationale underlying the direct relationship between the state and the earth and space is the relationship that places the state as the personification of all the people.<sup>10</sup> The state as an organization is run by a body called the government which is a state body that has the power to govern, in a broad sense including the legislative, executive and legislative bodies.<sup>11</sup>

The relationship between the state and land is a property relationship, not a property relationship. This is because, if the relationship between the state and land is ownership, then there

<sup>5</sup> Domein's theory according to Liefrink as quoted by AP Parlindungan, states that the tradition of land ownership in Java is in the control of the king who mastered everything including all of his people (his people), even including his wife and children, so that if the king wants it must be submitted. According to Dutch writers, because the Javanese king had surrendered to the Dutch government, the lands later belonged to the Dutch, unless there was evidence of the eigendom rights owned by someone. See, Ap. Parlindungan, several problems in the LoGA, (Bandung: Mandar Maju, 1993), 57.

<sup>6</sup> Agrarisch Wet 1870 is a Dutch colonial agrarian principal law based on the understanding of liberalism that developed in the Nederland. This law was born as legitimacy as well as providing ways to investors to enter Indonesia and explorators for the people of Indonesia. See, Winahyu Erwiningsih, the right to control the state, 160

<sup>7</sup> Aminuddin Salle, *Hukum Pengadaan Tanah Untuk Kepentingan Umum* (Yogyakarta: Kreasi Total Media, 2007), 55-56.

<sup>8</sup> Aslan Noor, *Konsep Hak Milik Atas Tanah*, 322. Lihat pula, Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaannya* (Jakarta: Djambatan, 2007), 268.

<sup>9</sup> M. Solly Lubis, *Ilmu Negara*, (Bandung: Mandar Maju, 2002), 6.

<sup>10</sup> Winahyu Erwiningsih, *Hak Menguasai Negara*, 162.

<sup>11</sup> The word Government in Dutch is called Overheid, in English, Government and in Indonesian it is often called ruler. The word government in a narrow sense is a combination of the highest state bodies that have the power to govern in the territory of a country. see, M. Solly Lubis, *Ilmu Negara*, 5.

will be no individual ownership of the land and this is contrary to human nature as God's creatures. The relationship of ownership which negates the existence of other ownership is contrary to the nature of human nature which requires the existence of an individual relationship.<sup>12</sup>

The object of state land rights is all land within the territory of the Republic of Indonesia, both land that is not or has not been or has been attached to individual rights. Lands that have not been attached to individual rights by the LoGA are called lands that are directly controlled by the state as stated in Articles 28<sup>13</sup>, 37<sup>14</sup>, 41<sup>15</sup>, 43<sup>16</sup>, and Article 49 paragraph (2) of the Basic Agrarian Law.

In practice, to shorten words, in administrative practice the designation of state land is used. Of course, the term state land has a different meaning from the meaning of state land or "land domain" in the context of "domeinverklaring". As for the lands that are already owned with rights to primary land, they are called rights lands by the name of their rights, such as land with Ownership Rights, Land Right to Cultivate, and others.

In terms of control, in current developments, there is a tendency to further detail the status of the lands that were originally included in the definition of state lands into: first, Waqf lands, namely lands with property rights that have been waqf;<sup>17</sup> second, lands with Management Rights, namely lands controlled with management rights, which are the delegation of the implementation of part of the authority of the Controlling Rights from the State to the rights holders; third, lands with ulayat rights, namely lands controlled by territorial customary law communities with ulayat rights; Fourth, the lands of the people, namely the common lands of genealogical customary law communities; fifth, forest area lands controlled by the Ministry of Forestry based on the Basic Forestry Law. This right is essentially the delegation of part of the authority of the Right to Control from the State. sixth, the remaining lands, namely lands directly controlled by the state, which are not private lands, not waqf lands, not management rights lands, not ulayat land rights, and not forest area lands. These lands are actually directly controlled by the state and are often referred to as state lands. Thus, there are actually two meanings of state lands, namely state land in a broad sense and in a narrow sense.

## 2. JURIDICAL AND PHILOSOPHICAL FOUNDATIONS OF STATE CONTROL OVER LAND

State lands in a narrow sense must be distinguished from lands controlled by other non-ministerial government departments and institutions with usufructuary rights, which are assets or part of state assets whose control is with the Minister of Finance. The control of state lands in the public sense as referred to in Article 2 of the UUPA is at the state minister for Agrarian Affairs/Head of BPN.

State land means state property. In Law No. 1 of 2004 concerning the State Treasury, it is stated that state property is all goods purchased or obtained at the expense of the State Budget or derived from other legitimate acquisitions. Analogously, regional property is all goods purchased or obtained at the expense of the APBD or derived from other legitimate acquisitions.

Regarding state assets in the form of land, the Minister of State for Agrarian Affairs / Head of BPN issues Circular (SE) No. 500-468 dated February 12, 1996 concerning the Ruislag Problem of Government Lands. In the Circular Letter it is stated that what is meant by state land is; (1) lands of non-other parties and have been physically controlled by the agency; (2) the lands are maintained and managed / cared for with government agency funds; (3) the land has been registered in the inventory

<sup>12</sup> Aslan Noor, *Konsep Hak Milik Atas Tanah*, 232.

<sup>13</sup> Article 28 paragraph (1) of the UUPA states "Hak Guna Usaha is the right to cultivate land that is directly controlled by the state, within the period as referred to in Article 29, for agricultural, fishery or animal husbandry companies."

<sup>14</sup> Article 37 letter a of the UUPA states that "Building Use Rights occur: regarding land which is directly controlled by the state, due to government determination"

<sup>15</sup> Article 41 paragraph (1) of the UUPA states "Hak use is the right to use and/or collect proceeds from land controlled directly by the State or land owned by another person, which gives the authority and obligations specified in the decision to grant it by the official authorized to give it. ..."

<sup>16</sup> Article 43 paragraph (1) of the UUPA states "As long as the land is directly controlled by the state, the usufructuary right can only be transferred to another party with the permission of the authorized official."

<sup>17</sup> According to Abdul Gani Abdullah, the inclusion of the normative formulation of Article 49 paragraph (3) of the UUPA regulating waqf land is an entry point for the transformation of Islamic law into national law. From the provisions concerning the waqf of owned land, PP No. 28 of 1977 concerning the Waqf of Owned Land which was then born Law no. 41 of 2004 concerning Waqf. Look, Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia*, (Jakarta: Gema Insani Press, 1994), 14.

list of the relevant government agency; (4) land that is physically controlled or used or utilized by another party based on a legal relationship made between the other party and the said government agency.<sup>18</sup>

The State's Right to Control is a designation given by the LoGA to legal institutions and concrete legal relations between the state and Indonesian land, the content and objectives of which are stated in Article 2 paragraph (2) of the LoGA. The state's authority in the land sector is the delegation of the nation's public duties. The concept of state control over land is different from the concept of domeinverklaring in administrative land law in the era before the enactment of the UUPA, because it is clear that the domeinverklaring principle has been revoked. According to Erman Rajagugkuk, the State's Right to Control over land which is then often abbreviated as state land has a narrower scope than the definition of land domain, because it only covers land that is not controlled by a certain party.<sup>19</sup>

In General Elucidation II of the LoGA it is stated, "The LoGA is based on the stance that in order to achieve what is stipulated in Article 33 paragraph (3) of the Constitution 145 it is neither necessary nor appropriate that the Indonesian people or the state act as land owners. It is more appropriate if the state as a power organization of the entire people (nation) acting as the ruler". In Boedi Harsono's view, the use of the term state control by the LoGA is more appropriate because it reflects the conception of modern constitutional law, whereas if the concept of state ownership is used, it reflects the concept of feudal constitutional law.<sup>20</sup>

The State's Right to Control over land is based on the authority of the government as a public institution to regulate the social order of its people. The concepts of power and authority as well as physical strength are the characteristics possessed by the state in the framework of policy implementation. Power, power and authority have a relationship with politics. Thus, politics has a relationship with law, so that the exercise of power, strength, and authority is one form of legal sanctions. According to the legal theory of the state, state power is the power of law, so its validity is determined by law.<sup>21</sup>

In the context of the Nation's Rights and the State's Right to Control, no land is "res nullius", which everyone can freely control and use. Controlling land without any basis of rights granted by the state or without the permission of the party who owns it is not justified, even threatened with criminal sanctions.<sup>22</sup>

The rationale underlying the direct relationship between the state and the earth and space is the relationship that places the state as the personification of all the people.<sup>23</sup> The state as an organization is run by a body called the government which is a state body that has the power to govern, which includes the legislative, executive and legislative bodies.<sup>24</sup>

The process of nonmotivating Article 33 of the 1945 Constitution into the UUPA and its implementing regulations constitutes the legitimacy of the government's involvement in determining the direction of policy on public land, namely the right of state control based on Article 33 paragraph (3) of the 1945 Constitution. The meaning of state control rights is the authority to determine policies that needed in the form of regulating, managing and supervising the use and utilization of land. The meaning of substance with the existence of state control rights over land is the responsibility and obligation of the state to use and utilize land resources for the prosperity of the people. The implementation of this right is that the state has the authority to make various regulatory packages related to the use and utilization of land.<sup>25</sup>

<sup>18</sup> Maria S.W. Sumardjono, *Tanah dalam Perspektif Hak Ekonomi Sosial dan Budaya* (Jakarta: Penbit Kompas, 2008), 211.

<sup>19</sup> Erman Rajagugkuk, *Hukum dan Masyarakat* (Jakarta: Bina Aksara, 1983), 23.

<sup>20</sup> Boedi Harsono, *Hukum Agraria Indonesia Indonesia*, 268-269.

<sup>21</sup> Winahyu Erwiningsih, *Hak Menguasai Negara*, 39-41.

<sup>22</sup> Boedi Harsono, *Hukum Agraria Indonesia*, 271-272.

<sup>23</sup> Winahyu Erwiningsih, *Hak Menguasai Negara*, 162.

<sup>24</sup> The word Government in Dutch is called Overheid, in English, Government and in Indonesian it is often called ruler. The word government in a narrow sense is a combination of the highest state bodies that have the power to govern in the territory of a country. See M. Solly Lubis, *Ilmu Negara*, 5.

<sup>25</sup> Aslan Noor, *Konsep Hak Milik Atas Tanah*, 21.

### 3. STATE CONTROL OF LAND PERSPECTIVE OF ISLAMIC LAW

The state's authority to control all lands within the territorial scope of its power is also known in Islamic law, especially to conquered lands that are part of Islamic territory. The basic principle of control over land conquered by Islamic governments is that the regulation of the land becomes the full authority of the government.

There are several types of land whose ownership is with the state as an institution that has a mandate from the community to regulate social order in the context of the nation and state. The characteristics of land ownership or assets that must be controlled by the state are all matters relating to the interests / needs of the community in general.<sup>26</sup> Some types of land whose control is in the state are the bottom of the ocean, mining goods at the bottom of the earth, and big rivers.<sup>27</sup> In relation to state land objects, Abu Yusuf is of the opinion that all conquered lands whose owners are unknown and have no signs of having been owned by someone, are entirely the rights of the government, including state-owned land, including property of the king. Persia and her family, as well as the treasures of the slain or fleeing enemy soldiers.<sup>28</sup> The same thing was also conveyed by Abu Ubayd, that land with no owner (al-mawat) is under the authority of the government as a public official.<sup>29</sup>

Thus, all attachments to land ownership rights from conquered lands are new, the process of which ownership must go through a stipulation (taqrir) from the government.<sup>30</sup> From this it is clear that the position of the state as a public institution has the authority to make regulations on land ownership in the field of redistribution for the benefit of the general public.

The legal authority owned by the state, in the concept of Islamic law, gives the state the right to exercise control over the land ownership rights of its citizens. If the state sees that there is control over state lands by someone without legal rights (not certified), then the state has the right to withdraw ownership of the land, unless that person can prove their legal ownership rights (*hujjah al-shar'iyah*).<sup>31</sup> This conclusion proves that, in essence, land tenure in Islamic law rests with the state.

The concept of land ownership by the state in the Logga, when viewed from the perspective of Islamic law regarding the state's authority in regulating and making legal regulations on land ownership, has a common ground. This writer can show this by putting forward two arguments.

*First*, is the right to manage dead land (mawat al-ard), which is land that is not managed and owned by no one, then the land is in the control of the state. The land may not be owned individually, unless mandated by the state to manage it and includes kharraj land.<sup>32</sup> The normative argument is that state ownership of this land is based on the Qur'an surah al-Anfal verse 1<sup>33</sup> and the first three Hadiths of the Prophet "The land of 'Ad belongs to Allah and His Messenger, then to you"<sup>34</sup> second, "Whoever takes an inch of land without rights, then he will be crushed with seven layers of the soil", third, "Whoever brings life to death, then the land belongs to him, and there is no right for the wrongdoers".

According to Qutb Ibrahim Muhammad, several conclusions can be drawn from the Hadith above. First, land is the property of Allah as the ultimate owner. Second, land belongs to the state, not to the rulers of the state. Third, the state is obliged to regulate the distribution of land rights based on the value of the common good. Fourth, the granting of land rights to someone is not an absolute right of ownership as indicated by the Prophet, so whoever takes land without rights, is threatened with seven

<sup>26</sup> S.A. Siddiqi, *Public Finance in Islam* (New Delhi: Adam Publisher & Distributors, T.tp), 73.

<sup>27</sup> 'Isa Abduh, *Al-Nuzum al-Maliyah fi al-Islam* (Kairo: Ma'had al-Dirasat al-Islamiyyah, tt), 70-72.

<sup>28</sup> Abu Yusuf Ya'qub ibn Ibrahim, *Kitab al-Kharraj* (Pakistan: Idarat al-Qur'an wa al-'Ulum al-Islamiyyah, T.tp), 58-59. Lihat juga, Sabahuddin Azmi, *Islamic Economics*, 117-118.

<sup>29</sup> Abu Ubayd al-Qasim ibn Salam, *Kitab al-Amwal*, 297-298. Bandingkan dengan, Muhammad ibn Muflih al-Maqdisi, *Al-Furu' juz 2*, 235.

<sup>30</sup> Muhammad 'A'la al-Faruqi al-Tahanuwi, *Ahkam al-Arabi*, 162.

<sup>31</sup> Muhammad 'A'la al-Faruqi al-Tahanuwi, *Ahkam al-Arabi*, 174-175.

<sup>32</sup> Abu Yusuf Ya'qub ibn Ibrahim, *Kitab al-Kharraj*, 65-66. Bandingkan dengan, 'Adnan Khalid, *Al-Madhhab al-Iqtisadi al-Islami* (Jidah: Maktabah al-Sawadi, 1990), 288.

<sup>33</sup> Al-Qur'an surah al-Anfal verse 1 which means "They ask you (O Muhammad) about (the distribution of) the spoils of war. Say, the spoils of war belong to Allah and His Messenger, therefore fear Allah and improve relations among yourselves, and obey Allah and His Messenger if you are believers."

<sup>34</sup> Muhammad ibn Ismail al-San'ani, *Subul al-Salam juz 3* (Bayrut: Dar Ihya' al-Turath, 1379 H), 83. see, Ali ibn Musa Abu Bakar al-Bayhaqi, *Sunan Bayhaqi al-Kubra juz 6* (Makkah Mukarramah: Maktabah Dar al-Baz, 1994), 143.



layers of land. Fifth, land ownership by a person must be legalized by the government.<sup>35</sup> In the context of the legal relationship between the state and land, the state is in a position as the subject of land rights.

The reason for the revelation of Surah al-Anfal verse 1, according to Baqir al-Sadr,<sup>36</sup> stems from the presence of a number of people who asked the Prophet to give their share of the spoils of war. The revelation of this verse provides evidence that the spoils of war belong to Allah and His Messenger.<sup>37</sup> Therefore, the distribution authority lies with the Prophet as the head of government. This verse also confirms that the spoils of war, including land controlled by the state, may not be owned by individuals permanently. The control of the state over the spoils of war is also justified through the Hadith of the Prophet which means "No one has the right to dead land, except what the imam / head of state wants".<sup>38</sup> Thus, the basic principle of ownership of dead land lies in state control and places the state as an institution that has the right to regulate and manage the designation and use of land on the basis of the common good.

The establishment of a state<sup>39</sup> is a must in a Muslim community.<sup>40</sup> The state is intended to protect the lives of the people, serve them and maintain the common good (al-maslahah al-mushtarakah). According to the majority of Sunni scholars, the obligation to establish this state is only a facultative obligation (fardu kifayah), so that if some people have already taken care of the establishment of the state, then other obligations fall.<sup>41</sup> Therefore, the concept of establishing a state in the view of Sunni scholars is not one of the pillars (pillars) of faith as believed by Shi'ah scholars. However, Sunni scholars do not allow a protracted vacuum (vacum) without a government. This is different from the concept of Khawarij which allows the Muslim community without an imam if the people are able to regulate themselves.<sup>42</sup>

The need to appoint a leader to manage the country is based on the consideration that, by nature, humans are creatures who like to cooperate, and help each other in order to fulfill their lives. However, because in the process of cooperation and mutual assistance, disputes and competition often occur, to overcome them, the state is needed as an institution that is mandated to regulate social and religious orders or government. According to Ibn Taymiyyah (661/1262-728/1328), appointing a community leader (imam) is an absolute must. The argument he uses is the Hadith of the Prophet, "If there are three people going on a journey, let one of them be the leader."<sup>43</sup>

<sup>35</sup> Qutb Ibrahim Muhammad, *Al-Siyasah al-Maliyah*, 160-161.

<sup>36</sup> Muhammad Baqir al-Sadr, *Iqtisaduna*, 458.

<sup>37</sup> One-fifth of the total spoils of war are for Allah and the Messenger of Allah. As a prophet and head of state, the Prophet is entitled to the treasure of ghanimah as a gift from Allah. However, the Prophet himself stated that the fifth property was then returned to the Muslims.

<sup>38</sup> Ali ibn Abi Bakar al-Haithami, *Majma' al-Zawaid juz 5* (Bayrut: Dar al-Kutub al-'Araby, 1407), 331. Lihat juga, Ahmad ibn Said ibn Hazm al-Zahiri, *Al-Muhalla juz 8* (Bayrut: Dar al-Afaq al-Jadidah, T.tp), 234.

<sup>39</sup> Tawfiq bin 'Abdil 'Aziz defines a state as a group of people who occupy a certain area and are subject to certain political authorities. Look, Taufiq bin Abdil Aziz, *Al-Islam wa al-Dustur*, (Madinah: Wizarah al-Shu'un al-Islamiyyah wa al-Auqaf wa al-Da'wah wa al-Irshad, 1425 H), 49. Meanwhile, Saltau defines the state as an agency or authority that regulates or controls common problems on behalf of the community. Look, Budi Suryadi, *Sosiologi Politik, Sejarah, Definisi dan Perkembangan Konsep* (Jogjakarta: IRCiSOD, 2007), 35. Compare with, A. Syafi'i Ma'arif, *Peta Bumi Intelektualisme Indonesia*, (Bandung: Mizan, 1993), 12.

<sup>40</sup> This opinion is the consensus of the majority of Sunni scholars. For Sunni clerics, the vacuum of political power can create social harm (chaos) and it needs to be avoided. Abu Hamid al-Ghazali make a statement that describes the interdependence relationship between religion and the state, namely: *ان نظام الدين لا يحصل الا بنظام الدنيا*. Look, Abu Hamid al-Ghazali, *Al-Iqtisad fi al-I'tiqad* (Bayrut: Dar al-Kutub al-'Ilmiyah, T. tp), 148. Compare with, Tahir ibn Muhammad al-Baghdadi, *Al-Farq baina al-Firaq* (Mesir: Maktabah Ali Sabih wa Auladuhu, T.tp), 349-350.

<sup>41</sup> Ibn Taymiyyah, *Al-Siyasah al-Shar'iyah fi Islahi al-Ra'i wa al-Ra'iyah*. Alih bahasa, Muhammad Munawir al-Zahidi, (Surabaya: Dunia Ilmu, 1997), 158-159. See also al-Ghazali, *Al-Iqtisad fi al-I'tiqad*, 147. Compare with Muhammad Azizi Nazami Salim, *Al-Fikr al-Siyasi wa al-Hukmi fi al-Islâm*, (al-Muassasah Lubab al-Jami'ah, t.tp), 104-105. See also, Muhammad al-Khatib al-Sharbini, *Al-Iqna' li al-Sharbini juz 2* (Bayrut: Dar al-Fikr, 1415 H), 500. lihat pula, Said Agil Siradj, " *Ahlus Sunnah Wal Jama'ah dalam Lintas Sejarah*, (Yogyakarta: LKPSM, 1997), 74 - 75.

<sup>42</sup> According to the research of Subkhi 'Abduh Said, the group of scholars who stated that the issue of the caliphate was the main element of religion (arkan al-din) was a minority group, on the contrary the majority of scholars said that establishing a caliphate was only a facultative obligation based on for the benefit of the ummah. Further see, Subkhi 'Abduh Saidd, *al-Sultah al-Siyasah fi al-Mujtama' al-Islami* (Cairo: Jammi'ah al-Qa hirah, 1991), 80. Also compare with, Muhammad Azizi Nazami Salim, *Al-Fikr al-Siyasi*, 104 -116.

<sup>43</sup> The editorials of the Hadith in question are:

According to Ibn Taymiyyah (661/1262-728/1328), establishing a state is part of a doctrinal and practical obligation. According to him, the arrival of the Prophet as a messenger of Allah is not only to preach and provide some rules of behavior. Indeed the Prophet came to create an eternal and universal social order. Even in his book *al-Siyasah al-Shar'iyyah*, he argues that establishing a state is the greatest obligation in religion (*min a'zam al-wajibat fi al-din*).<sup>44</sup>

The main task of the state towards its people, in the view of Islam, is to create the welfare of the people it leads. The leader of the state is not a ruler, but as a servant whose main task is to serve the people he leads. In relation to the position of the state that provides a service function, it is interesting to note the opinion of Muhammad Faruq al-Nabhani, who stated that the state in the view of Islam is an instrument that is intended as a public servant, while the community is the principal. Efforts to maximize the happiness of members of society is the goal. Creating justice, security, and regulating society are instruments to achieve the intended goal.<sup>45</sup>

In order to carry out service tasks to create a good life for its people, the state has the authority to make legal instruments as basic guidelines for state management to protect the rights of citizens in their lives.<sup>46</sup> Therefore, all laws made by the state must be oriented towards creating the benefit of its people.<sup>47</sup> Thus, on the contrary, it is prohibited if the state makes laws that are actually detrimental or even as an instrument of state power so that the people are positioned as a disadvantaged group.

*Second*, there is a historical argument that proves that the state has the right to control and regulate land affairs, especially on lands subject to war as the Prophet and the Khulafa' al-Rashidun did.

The legal provisions of land ownership by the public whose ownership is in this country, are based on historical precedents from the policies carried out by the Prophet and his later caliphs namely the caliph Abu Bakr al-Siddiq (r. 632-634), 'Umar ibn al-Khattab (reigned 634-644), Uthman ibn 'Affan (reigned 644-656) and 'Ali ibn Abi Talib (reigned 656-661). The Prophet's policy regarding this matter was the Prophet's decision to give the land of Khaybar after it was conquered to the natives (the Jews) as cultivators with a profit-sharing pattern divided between the Prophet and them.<sup>48</sup> The decision of the Prophet (as head of state) indicated that the land of Khaybar was a public land whose management was with the state and should not be owned individually. Likewise, Caliph 'Umar ibn al-Khattab who did not

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عن أبي سعيد الخدري ان رسول الله صلى الله عليه وسلم قال إذا خرج ثلاثة في سفر فليؤمروا احدهم  
 Look, Ibn Taymiyyah, *Al-Siyasah al-Shar'iyyah*, 158. Abu Dawud al-Sijistani, *Sunan Abu Dawud juz 3* (Bayrut: Dar al-Fikr, T.tp), 36. See also, Musa Abu Bakar al-Bayhaqi, *Sunan al-Bayhaqi al-Kubra juz 5* (Makkah al-Mukarramah: Maktabah Dar al-Baz, 1994), 257. See also, Muhammad ibn Muhammad al-Shaukani, *Nayl al-Autar juz 9* (Bayrut: Dar al-Jil, 1973), 157. See also, Muhyiddin ibn Sharaf al-Nawawi, *Al-Majmu' juz 4* (Bayrut: T.p, 1976), 330.

<sup>44</sup> The complete statement of Ibn Taymiyyah regarding the obligation to establish a state and the functions of the state is as follows:

يجب ان يعرف ان ولاية أمر الناس من أعظم واجبات الدين بل لا قيام للدين ولا للدنيا إلا بها فان بنى آدم لآتم مصلحتهم إلا بالاجتماع لحاجة بعضهم الى بعض

<sup>45</sup> The statement of al-Nabhani referred to is:

الدولة في نظر الاسلام هي الاداة المسخرة لخدمة المجتمع فالمجتمع هو الاساس وتوفير السعادة لافراد هو الغاية واقامة العدالة وقرار الامن  
 .Lihat, Muhammad Faruq al-Nabhani, *Mabadi al-Thaqafati al-Islamiyyati*, (Kuwait: Dar al-Buhuth al-'Ilmiyyah, 1974), 399-400.

<sup>46</sup> According to E. Adamson Hobel and Karl Llewellyn, as quoted by Soerjono Soekanto, state that the law has a very important function for the integrity of society, namely; (1) determine the relationship between community members by determining which behaviors are allowed and which are prohibited; (2) make an allocation of authority (authority) and determine carefully the parties who can legally carry out coercion as well as provide sanctions; (3) disposition of disputed issues and (4) adapting relationship patterns to changing living conditions. More see Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum* (Jakarta: RajaGrafindo Persada, 2003), 74.

<sup>47</sup> The value of the general benefit (*al-maslahah al-'ammah*) as the basis for legal policies made by the government is based on the spirit of the presence of religious law intended to create benefit and reject the birth of harm. Al-Shatibi (d. 790 H) in his book *al-Muwafaqat states: الجلب المصالح المفساد* See, Ibrahim ibn Musa al-Sha tibi, *Al-Muwafaqat juz 1* (Bayrut: Dar al-Ma'rifat, T.tp), 195. Compare with, Ali ibn Muhammad al-Amidi, *Al-Ihkam li al-Amidi chapter 3* (Bayrut: Dar al-Kitab al-Arabi, 1404 H), 317.

<sup>48</sup> Abu Ubayd al-Qasim ibn Salam, *Kitab al-Amwal*, 151. see also, Abi Yusuf Ya'qub ibn Ibrahim, *Kitab al-Kharra j*, 51-52. See also, Abdurahman ibn Ahmad ibn Rajab al-Hanbali, *Al-Istikhraj li Ahkam al-Kharraj*, 35

distribute Sawad<sup>49</sup> land in Iraq, but for the common good and handed over its management to the natives with the obligation to pay taxes (kharraj).<sup>50</sup>

Another policy that describes the land as being owned by the state is a narration from Abi 'Awn al-Thaqafi that a man named Dihqan converted to Islam during the caliphate Ali ibn Abi Talib. Caliph Ali said to Dihqan, "You are not obliged to pay jizya, while your land is our share (government)". The obligation of jizyah automatically ends with Dihqan's conversion to Islam, said Abu Ubayd when commenting on the above narration.<sup>51</sup>

In the view of Baqir al-Sadr (1353-1400 H), the policy of the Prophet or 'Umar ibn Khattab not to distribute the spoils of war proves that the state has the authority to take over individual rights for a nationalization program ( ta'mim al-milkiyyah al-khassah) for the greater public interest. Furthermore, according to Baqir al-Sadr, the nationalization policy was based on two general needs of the Islamic community at that time, namely to finance government activities in carrying out its obligations to Islamic society and to create social balance and improve the very low standard of living of the people.<sup>52</sup> The legal status of land ownership by the public essentially returns to state control as an institution that is mandated to regulate the community in various regulatory policies related to the regulation of land rights.

The government in front of the people is a servant, therefore the main task of the government is to serve and protect its people.<sup>53</sup> One of the government's obligations in meeting the needs of its people is the existence of a state social security system related to their welfare. The government is obliged to provide its people with various skills / skills in certain professions, as well as the government is obliged to find / create jobs for its people.<sup>54</sup> The task of the state to make the lives of its people more prosperous as the main task of the government was also conveyed by the caliph 'Umar ibn Khattab to one of his governors, namely Abu Musa al-Ash'ari.<sup>55</sup>

In this sense, politics in Islam is not only a matter related to government and is limited to structural politics, but includes clear and broad political culturization, namely to build a social order that is prosperous and just so that a harmonious social life occurs.<sup>56</sup> It has been agreed by the fiqh scholars that the government's political and economic policies must be oriented towards the creation of the good of the people they lead, as stated in the fiqh rules, "tasarruf al-imam manutun bi al-maslahah"<sup>57</sup> (policy). the leader must be oriented to the benefit of the people. Based on the fiqh rules above, Imam al-Shafi'i states that the position of the head of state (imam) with his people is like the position of guardian to orphans.<sup>58</sup> This metaphorical expression gives the meaning that it is the duty of the head of state the state to protect its people by providing policies for the good of their lives. In the context of legal philosophy, the theoretical formulation proposed by al-Shafi'i parallels the utilitarianism<sup>59</sup> school

<sup>49</sup> The term Sawad (black) land is the nickname given by the Muslims to the land of Iraq because when Muslim soldiers entered Iraqi territory for a holy mission (jihad), they saw the leaves, plants and trees there looked black. See, Muhammad Baqir al-Sadr, *Iqtisaduna*, p. 444.

<sup>50</sup> <sup>50</sup>Abi Hasan al-Mawardi, *Kitab Ahkam al-Sultaniyah*, 174. See also, Abu Yusuf Ya'qub ibn Ibrahim, *Kitab al-Kharraj*, 28. See also, Abu Ubayd al-Qasim ibn Salam, *Kitab al-Amwal*. 151.

<sup>51</sup> Abu Ubayd al-Qasim ibn Salam, *Kitab al-Amwal*, 87.

<sup>52</sup> Muhammad Baqir al-Sadr, *Iqtisaduna*, 447-451.

<sup>53</sup> The task of the head of state to ensure the welfare of the lives of its citizens is clearly illustrated by Abu Yusuf's advice to the caliph Harun al-Rashid. According to Abu Yusuf: "Every ruler must be responsible for the welfare of his people, and must do everything that leads to efforts to create the good of their lives" See, Abu Yusuf Ya'qub ibn Ibrahim, *We b al-Kharraj*, 119.

<sup>54</sup> Abdul Aziz al-Badri, *Hukm al-Islam fi al-Ishtirakiyah* (Madinah al-Munawwarah: Dar al-Kutub al-'Ilmiyyah, Tt), 66-67.

<sup>55</sup> Abu Yusuf Ya'qub ibn Ibrahim, *Kitab al-Kharraj*, 14-15.

<sup>56</sup> Abul Khair Moh. Jalaluddin, *The Role of Government in an Islamic Economy* (Kualalumpur: AS. Noordeen, 1991), 25-25.

<sup>57</sup> Abdurahman ibn Abi Bakr al-Suyuti, *Al-Ashbah wa al-Naza'ir* juz 1 (Bayrut: Dar al-Kutub al-'Ilmiyyah, 1403 H), 121. See also, Muhammad Amin, *Hashiyah ibn 'Abidin* juz 2 (Bayrut: Dar al-Fikr, 1386 H), 337. See also, Sulaiman ibn 'Umar ibn Muhammad al-Bujayrimi, *Hashiyah al-Bujayrimi* chapter 3 (Turkish: al-Maktabah al-Islamiyah, T. tp), 202.

<sup>58</sup> Abdurahman ibn Abi Bakar al-Suyuti, *Al-Ashbah wa al-Naza'ir*, 121.

<sup>59</sup> The figure of the school of utilitarianism is Jeremy Bentham (1748-1832). As an expert in legal philosophy, he places more emphasis on the legal ontology dimension, namely the emphasis on what a legal system should do. According to him, humans act to increase happiness and reduce suffering. Consequently, lawmakers (the state) must make laws that are fair to all citizens. This theory was later developed by Rudolph von Ihering with his teachings



of law sociology which makes the people the main goal of law, namely the creation of their happiness in life. One form of protection of the public interest, according to Abul Khair Mohd Jalaluddin, is the government ntaah has the right to regulate individual ownership so that it continues to carry out its social functions.<sup>60</sup>

The duties and functions of the state are related to the rights of its citizens, in Islam the Caliph 'Umar ibn Khattab has given an example when delivering a speech, first when he was temporarily in allegiance as caliph. Broadly speaking, the contents of the speech contained the political and economic policies of 'Umar ibn Khattab using the following principles; First, the Islamic state takes public wealth properly and does not take the results of the *kharraj* and *fay*' that Allah gives to its people except through the right mechanism. Second, the state gives rights to public property, there are no expenditures except in accordance with their rights, and the state adds subsidies and covers debts. Third, the state does not receive dirty wealth. Fourth, the state uses wealth properly.<sup>61</sup>

Based on the policy order made by the caliph 'Umar ibn Khattab, it is clear what the rights and obligations of the state are to its people or the obligations of the people to their country. Then, another important point from the direction of the caliph's policy in managing state assets is the exemplary attitude of the leader.

In the Islamic economic law system, the concept of ownership must be based on a legal order that binds the legal relationship between the owner and his property in relation to the interests of others. In this regard, there are two basic principles that serve as the basic reference for ownership in Islamic law. First, in the relationship between milk rights and the official rule of law, the head of state (imam) has the right to force every person who is a *mukallaf* to obey the legal rules that have been made. Second, in the relationship between property rights and the moral dimension of the owner, ownership must be attached to the frame of faith (spiritual) so that one's submission to state rules must be positioned in the context of obedience as a religious duty, not out of compulsion.<sup>62</sup>

Putting the concept of ownership in Islam, including in terms of land ownership, is not placed at two poles that face each other between individual interests and social interests. Therefore, Islamic law prohibits a person from controlling assets that are communal property rights that are indeed provided as public facilities. Likewise, the government (*uli al-amr*) has no right to take over private property rights for the benefit of the congregation (development interests), unless there is a public interest that requires it to be taken over. When the public interest (*maslahat 'ammah*) requires the revocation of private property rights, the government has the right to revoke it, either on the basis of the owner's willingness or by force by giving compensation.<sup>63</sup>

The presence of the state as a subject of rights in the context of setting property rights in the midst of society, is intended to provide boundaries for relations between community members with one another.<sup>64</sup> One concrete example is the need for regulations related to the implementation of *zakat* obligations as an instrument of economic equality for the community taken from rich groups of people to support the lives of the poor. On the basis of this thought, Islam forbids one group of humans from

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called social utilitarianism. According to him, law was created as a tool for people to achieve their life goals. More see, Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum*, 40-41.

<sup>60</sup> Abul Khair Mohd Jalaluddin, *The Role of Government*, 27.

<sup>61</sup> Quthb Ibrahim Muhammad, *Al-Siyasah al-Maliyah li 'Umar ibn Khattab*, alih bahasa Ahmad Syarifudin Shale (Jakarta: Pustaka Azzam, 2002), 33-34.

<sup>62</sup> Mahmud ibn Ibrahim al-Khatib, *Al-Nizam al-Iqtisadi al-Islamy fi al-Islam*, (Riyad : Maktabah al-Haramayn, 1989), 83. Compare with, Abdul Khair Moh. Jalaluddin, *The Role of Government*, 36-38.

<sup>63</sup> Kamil Musa, *Ahkam al-Muamalah*, (Bayrut: Muassasah al-Risalah, 1998), 18. The revocation of property rights to land occurred at the time of the Prophet when he will restore the mosque by first asking the owner's approval and he will provide compensation according to the market price of the land to the people whose land has been evicted. See, Siti Mariam Malinumbay S. Salasal, "The Concept of Land Ownership: Islamic Perspective" *Geoinformation Bulletin*, Volume 2, pp. 285-304, December 1998, 292.

<sup>64</sup> The restriction on the concentration of property rights (reducing concentration in ownership) by the Islamic government is intended to change the policies of the Capitalist group that are unfair in terms of wealth distribution, in contrast to the view of the Socialists who negate private property rights to become collective rights, thereby eliminating the creativity of the community in building work ethic and morale. entrepreneurship. Government restrictions are intended to realize a fair, egalitarian distribution of wealth in accordance with the spirit of Islamic law. See, M. Umer Chapra, *Islam and Economic Development* (New Delhi: Adam Publisher & Distributors, 2007), 73-74.

colonizing with their wealth to another human group that violates human dignity. When 'Umar ibn Khattab saw human slavery to other humans, he forbade it by saying "Since when did you enslave people, even though they were born by their mothers in a state of freedom ..?".<sup>65</sup> Private property can change its status to become common property if there is a will from the owner, such as someone surrendering his property into waqf property that can be used for the public interest or because of the will of syara', such as the urgent need of the community to build a public road on privately owned land. In this case, the ruler can use private land for public purposes.<sup>66</sup>

The transformation of individual ownership into public property (al-milkiyyah al-'ammah) with reasons for the common good is called ta'mim al-milkiyyah.<sup>67</sup> The policy of nationalization of assets has clearly placed the government as an institution that has the authority to intervene in the form of making policies related to land use as well as to prove that land issues are a source of production with a public dimension. Property that may be taken over by the government is property that is indeed obtained by means of vanity or private ownership (al-milk al-khassah) on something that concerns the interests of the people and if this ownership is controlled by individuals will cause social harm, then the nationalization of assets may be carried out by the state.

### CONCLUSION

In the perspective of Indonesian land law, the Republic of Indonesia is a legal subject. The state is a public organization which is the personification of the interests of the people. The state in the context of Indonesian land law is bound by the ties of nationality-territorial identity (nation state). While the subject of state land is the Islamic State (dar al-Islam) and a head of state is mandated to regulate the acquisition, designation and use of land. The terminology of the state is characterized by an ideological-religious identity.

The creation of state control rights over land in Indonesian land law when there is a concrete legal relationship between the state and land at the time of the founding of the Indonesian state. The creation of land rights when the Prophet in Medina and the Muslim community became a state. Control of land by the state through conversion as a consequence of military movements (futuhat) or because of a peace agreement or voluntary / peaceful surrender which has consequences for the control of territory by the state. The object of state land rights according to Indonesian land law is all land whose owners do not or have not known. Characteristics of state land are lands that concern the livelihood of many people (public utilities).

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<sup>65</sup> Yusuf Kamal, *Al-Islam wa al-Madhahib al-Iqtisadiyah*, 150.

<sup>66</sup> M. Ali Hasan, *Berbagai Macam Transaksi dalam Islam (Fiqh Muamalat)* (Jakarta: PT RajaGrafindo Persada, 2003), 62.

<sup>67</sup> Mahmud ibn Ibrahim al-Khatib defines the nationalization of al-ta'mim as follows: تحويل ملكية مال معين من الملكية الخاصة الي ملكية الامة . According to al-'Ibadi as quoted by al-Khatib, the law of al-ta'min was debated among scholars which gave birth to several legal possibilities depending on the object of the asset to be nationalized by the government. First, the nationalization of property obtained by illegal means, then nationalization is mandatory, then the confiscated assets are used for the benefit of the people. Second, the government may nationalize the assets of foreigners who are suspected of endangering the community. Third, the government may nationalize assets/assets which basically cannot be owned individually. Fourth, the state may nationalize assets needed for the public interest with emergency considerations by providing compensation by the state. For further details see Mahmud ibn Ibrahim al-Khatib, *Al-Nizam al-Iqtisadi*, 50-51.

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