

## The transfer of land management rights (Public functions or private functions) in relation to the privatization of PT. Kereta Api Indonesia (Persero)

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**Abstract:** In the Dutch East Indies, there were two different kinds of railway companies: staats spoorwegen and verenigde spoorwegen. This is when the history of PT. Kereta Api Indonesia (Persero) started. The operational goals of PT. Kereta Api Indonesia (Persero) changed from being socially focused to profit-oriented in 1998 as a result of the business's status change from public corporation to state-owned enterprise (BUMN). The BUMN Law, which established the idea of privatization, brought about this shift. As a result, PT. Kereta Api Indonesia (Persero) is also bound by the standards of sound corporate governance and business judgment, which causes a number of problems. These concerns include the form of the transfer of civil rights in the management of state land, the relationship between the privatization of PT. Kereta Api Indonesia (Persero) and the transfer of civil rights in the management of state land, and the renewal of the privatization concept in compliance with the 1945 Constitution and Pancasila. Using legislative, conceptual, historical, and case techniques, the research is prescriptive and combines normative and empirical legal research. Primary and secondary data are among the sources and methods used for data gathering. Fieldwork and literature reviews are used to gather data, which is then qualitatively examined. The agreement that forms the foundation for the transfer of PT. Kereta Api Indonesia's civil rights as the owner of management powers over the state makes the link between privatization and the transfer of civil rights very clear. The 1945 Constitution and Pancasila's philosophical and constitutional underpinnings, which place the goal of transferring civil rights in the management rights over state land on the basis of social justice for the greatest welfare of the Indonesian people, serve as the basis for the revision and harmonization of the privatization concept related to the transfer of civil rights in the management rights of PT.KAI.

**Keywords:** Management rights, PT. Kereta Api Indonesia relation, The privatization, Transfer of land.

### 1. Introduction

Two different kinds of railway companies operated in Indonesia during the Dutch East Indies era: (1) the state railway company (staats spoorwegen, SS); and (2) the private railway company (Hartatik et al., 2024). In VS, verenigde spoorwegbedrijf. In accordance with Government Regulation Number 19, issued February 3, 1998, PERUMKA changed its name to PT. Kereta Api Indonesia (Persero) on June 1, 1999. The June 1, 1999, deed formed PT.Kereta Api Indonesia (Persero), which was later modified by the September 13, 1999, Number 14 deed. When the company's legal standing changed, the railway initially primarily provided land transportation services and was focused on turning a profit. Article 1, paragraph 1 of Law Number 19 of 2003 states that state-owned enterprises (BUMN) are businesses in which the state owns all or most of the capital through direct participation from state wealth that is distinct from the assets of state-owned enterprises. It also explains how privatization of state-owned enterprises has been implemented in Indonesia (Astami et al., 2010).

Land tenure relations in Indonesia were first governed by Dutch legal products and customary law prior to the country's independence (Riggs et al., 2016). The grand sultan's regulations and the application of the

domein verklaring in Dutch agrarian law, which was controlled by the Agrarisch Wet, were two examples (Setiawati, 2021). The dualism of law concerning Western agrarian law, and on the other hand, the application of customary agrarian law, prompted the Dutch government to issue a policy called the Agrarisch Wet, which was published in the staablad 1870 Number 55, in order to promote its agrarian political policy where the regulation does not designate the State as the land master, but rather as the landowner (staats domein).

The legal relationship between the state and the land inside Indonesia's borders underwent a paradigm shift following the country's independence (Eilenberg, 2012). In the Agrarisch Besluit 1870, the state is positioned as the landowner, and this results in Indonesia losing economic sovereignty, which should align with the national goals of Indonesia as outlined in the Preamble of the 1945 Indonesian Constitution. The Republic of Indonesia's 1945 Constitution states in Article 33, paragraph (3), that the state must regulate the sectors of production that provide a living for a large number of people and use them for the benefit of the populace. The meaning of the phrase "controlled by the state" follows. "Controlled by the state" does not imply that the state itself takes on the role of an entrepreneur or "ondernemer," according to Mohammad Hatta. It would be more realistic to say that the state's authority is found in enacting laws that ensure the economy runs smoothly and that forbid the wealthy from "exploiting" the weak. The word "controlled" is not intended to be taken as owned, as is the case in communist nations that do not recognize private property rights, according to Moh. Mafhud MD. In order to accomplish the objectives of the state, the right of state control refers to the authority to regulate the use of natural resources in conformity with the constitutional mandate.

In favor of Contra The public typically questions privatization in terms of its justifications, what it really means to be "controlled by the state," and which production sectors are significant and affect the livelihoods of a large number of people (Santos, 2009). The privatization of state-owned enterprises (BUMN) was initially anticipated to be implemented without violating Article 33 paragraph (2) of the 1945 Constitution, which states that "controlled by the state" does not imply that the state itself takes on the role of an entrepreneur. There is still a role and intervention by the State through ministries and related agencies, and regulations continue to strengthen the State's position within the scope of civil relations between BUMN and third parties regarding the management of State land assets in the form of the transfer of civil rights, so Indonesian BUMN privatization does not completely turn BUMN into private legal entities. Since 1979, when Prime Minister Margaret Thatcher led the government, privatization has gained popularity in England.

Several nations are considering privatizing governmental assets as a result of England's successful privatization (Hodge, 2018). Ikenberry offers scientific justifications for the government's pursuit of privatization, spearheaded by the US and England, including addressing the budgetary crisis, boosting productivity, reviving government tools, forming alliances, and depoliticizing the economy and society.

The regulations that control state-owned companies (BUMN), including PT. Kereta Api Indonesia (Persero), which is classified as a public legal entity, are inconsistent when seen from the perspective of the regulatory framework that governs the position and scope of BUMN. According to Law Number 19 of 2003 about State-Owned Enterprises (BUMN), one of the criteria is unequivocally that the State owns 51% of the shares, indicating a division between the assets of the State and the enterprise. The majority of the assets under BUMN's administration are state property, as confirmed by Law Number 17 of 2003 about State Assets and Law Number 1 of 2004 concerning the State Treasury.

The affirmation that state-owned enterprise assets are included as state assets is found in the terms of Law Number 17 of 2003 about State Assets and Law Number 1 of 2004 concerning State Treasury. That's where it all started; the problem stems from the ambiguity and inconsistency in the rules governing state-owned enterprises' (BUMN) management of state land assets that are under the control of PT. Kereta Api Indonesia (Persero), the legal entity with management rights. Another issue is the absence of clear regulations pertaining to management rights and civil rights within those management rights. While privatization has made PT. Kereta Api Indonesia (Persero) a private legal entity, it cannot be compared to private legal entities generally.

Numerous interpretations and divergent opinions regarding PT. Kereta Api Indonesia's status as a public or private entity have emerged since its privatization, which is connected to the transfer of rights in

the management of state land, because it is not regulated in a clear and firm manner. Although civil rights in management rights are not governed by any norms, they are referred to as *privaatrechtelijk* in the Dutch legal lexicon (van Gerven, 2000). In legal science courses that deal with private law, this civil right is portrayed as a quality or attribute. One of the state-owned companies with management rights over state land is PT. Kereta Api Indonesia (Persero); however, ministerial-level regulations or government regulations ranging from PMA Number 9 of 1965 to Government Regulation Number 18 of 2021 continue to regulate management rights. The Civil Code mainly governs private law, which includes the control of the transfer of civil rights in the management rights over public land. This regulation is founded on the freedom of contract basis.

## 2. Method

This kind of research employs the typologies of statute approach, historical approach, and case approach in conjunction with normative juridical research and social juridical research (empiricism). This study employs a prescriptive-analytical approach, which is a technique used to analyze a variety of issues that need to be investigated in-depth, comprehensively, and methodically. It also identifies the root causes of current issues and offers recommendations or solutions, or it acts as a problem-solving technique for addressing those issues within the relevant field of study. A number of methodologies were used in the study process, including the legal approach to state-owned enterprises (BUMN), the historical approach to PT. KAI's founding, the conceptual approach to the organization's structure, and the case approach to PT. KAI. To find answers to the current issues, interviews with pertinent and authorized parties were undertaken.

## 3. Discussion

### 3.1. *The Relationship Between the Privatization of PT. Kereta Api Indonesia (Persero) and the Transfer of Civil Rights in the Management Rights over State Land*

Indonesia became a "patient" of the International Monetary Fund (IMF) during the 1998 crisis, which led to the privatization of state-owned businesses in that country. Pressure from the IMF following loan disbursement (Kim & Sumner, 2021). The IMF's desire that Indonesia be privatized is what is driving the push for privatization. With the adoption of Government Regulation No. 33/2005 on the procedures for the privatization of Limited Liability Companies (Persero), the government reinstated the state-owned enterprise (SOE) privatization policy on September 5, 2005. In order to execute Article 83 of Law No. 19 of 2003 on BUMN, which stipulates that a Government Regulation (PP) on the processes for the privatization of Limited Liability Companies (Persero) BUMN must be established, this policy is a derivative. Article 74 of the BUMN Law clearly states the goals of SOE privatization, which include: a. increasing public ownership; b. improving productivity and efficiency; c. developing a robust and competitive industrial structure; d. being globally oriented and competitive; and e. promoting a business climate, macroeconomics, and market capacity.

There is always a social purpose with PSO when privatization is implemented within state-owned businesses (BUMN), such as PT. Kereta Api Indonesia (Persero) ("Indonesian State-Owned Enterprises: The Challenge of Reform," 2008). As a legal result of PT. Kereta Api Indonesia's "persero" status, the company also uses its commercial role, which is profit-oriented. This demonstrates that BUMN must both serve as a source of state funding and deliver public services. Even though PT. Kereta Api Indonesia's shares are classified as a persero differently than those of other private firms, the Ministry of Law and Human Rights recognizes it as a legal entity with the "persero" status, just like other private limited corporations.

However, the State Finance Law (Law Number 17 of 2003) and the State Treasury Law, which clarify that the assets under PT.KAI's control remain State property and that only the HPL held by PT. Kereta Api Indonesia over State land is associated with the idea of privatization, restrict the ability of state-owned enterprises (BUMN) to freely compete with private businesses. It is implied that PT. Kereta Api Indonesia (Persero) has two opposing umbrellas or legs that conflict in nature and function, which prevents the exercise of its power from fostering harmony or establishing legal standing (a clear and distinct legal basis).

The privatization concept, which establishes PT. Kereta Api Indonesia (Persero) as a private legal entity, is implemented in the management of the limited liability business at PT.KAI. Two activities are included in a comprehensive understanding: carrying out ownership tasks, or control tasks, and carrying out management duties (*daden van beheeren*)/(Daden van Beschikking or Daden van Eigendom). It is further emphasized that the Limited Liability Company Law also binds BUMN's regulations. This is based on Articles 11 and 34 of the BUMN Law, which explain BUMN's position as a private legal entity and apply the principles of limited liability company law as if it were a private legal subject and other laws. Since privatization was put into place and the company's standing changed, this indirectly causes changes. The transfer of civil rights in HPL over state land is one of the legal activities that PT.KAI can carry out, just as other civil law matters (Sulyanati & Nasihuddin, 2023).

The policy of PT. Kereta Api Indonesia to prioritize profit orientation in the transfer of civil rights in HPL over state land, along with the optimization of the use of state land assets that benefit and boost revenue for PT. Kereta Api Indonesia, further supports this (Persero). The Second Amendment to the Minister of BUMN Regulation Number PER-03/MBU/08/2017 concerning BUMN Cooperation Guidelines, Minister of BUMN Regulation PER-07/MBU/04/2021 dated April 21, 2021, provides the foundation for the cooperation in the use of PT KAI's assets. The asset utilization agreement is typically drafted in a standard form and is governed by the Decree of the Board of Directors of PT Kereta Api Indonesia (Persero) Number KEP.U/KA.102/IV/1/KA-2016 dated April 27, 2016, concerning the Implementation Guidelines for the Utilization of the Company's Fixed Assets for a Period of Up to 5 (five) Years. The Minister of BUMN Regulation Number PER-13/MBU/09/2014 concerning BUMN Fixed Asset Utilization Guidelines governs the manner in which BUMN and private parties or other parties collaborate in the use of fixed assets. The following methods are available for using BUMN assets: Leases, operation cooperation (KSO), business cooperation (KSU), build-operate-transfer (BOT), and build-transfer-operate (BTO) are some examples. f. Use of the loan.

Despite generating a lot of discussion, the traditional distinction between public and private law is nevertheless applied today. Understanding the principle of the separation of public and private law is particularly helpful in defending whether the management of state-owned companies (BUMN) is under private or public law (Aharoni, 2000), despite the fact that it is a topic of great controversy. The separation of the fields of public and private law is based on a number of theories, such as the legal connection theory, the subject theory, and the theory of protected interests. The nature of the interests governed by public and private law serves as the benchmark, which is based on the notion of protected interests. Private law is concerned with managing the interests of particular entities, while public law deals with the general welfare. Therefore, the goal of civil law is to safeguard individual or personal interests, whereas the goal of public law is to safeguard the general interest (Woolley, 2015). In contrast, civil law regulations are typically supplemental, though some are mandatory, whereas public law regulations are mandatory.

The concept of creating State-Owned Enterprises is reflected in Article 33, paragraphs (2) and (3) of the Republic of Indonesia's 1945 Constitution, which states that the State controls vital industrial sectors that affect the lives of a large number of people. The State then controls the land, water, and natural resources found inside, and uses them to maximize the prosperity of the populace (Un Habitat, 2013). Therefore, the state's main responsibility when establishing businesses is to provide for all of society's requirements, even in cases where the private sector is still unable to do so. The State then converts these tasks into an endeavor that turns BUMN into development agents . One of the concrete examples of Article 33 of the 1945 Constitution is the establishment of BUMN, which are strategically positioned to enhance the welfare of the populace. But in practice, the effectiveness and performance of state-owned businesses (BUMN) themselves determine how much the state can use them as a weapon to enhance the welfare of the populace and the country. Since Law No. 19 of 2003 was passed and privatization was put into effect, BUMN is also bound by Law No. 40 of 2007 on Limited Liability Companies (Kartiadi et al., 2023), which governs BUMN as a private legal entity and applies the principles of good corporate governance and business judgment rules. But according to other laws, such as Law No. 17 of 2003 and Law No. 1 of 2004, which designate BUMN assets as state assets, BUMN continue to serve a public purpose. The Minister of Finance must

give his or her approval before state assets can be used through the transfer of civil rights in direct and indirect management. As a result, the rules controlling BUMN transfer of human rights and management powers over state land present a picture of disarray.

### 3.2. Forms of Civil Rights Transfer in State Management Rights

The islands of Java and Sumatra make up the 270.67 million m<sup>2</sup> total area of the land assets under PT KAI's management. Of this, 54% of the land, or 147.512 million m<sup>2</sup>, has received certification. 46% of the land, or 123.158 million m<sup>2</sup>, is still uncertified. One percent, or 1.618 million square meters, of the uncertified land assets are still undergoing certification. Of the land, 44.04 million m<sup>2</sup>, or 16%, is used but not paid for at the market rental rate, while 59.045 million m<sup>2</sup>, or 22%, is used by other parties without any agreements. Furthermore, KAI's land assets, which total 7.168 million square meters or 3% of the total, are occupied with new evidence. These include 600.072 square meters of land that are presently the subject of judicial proceedings, 9.96 million square meters of land that are in a natural dispute with government bodies, and 462.030 square meters that are still undergoing validation. The assets administered by PT. KAI (Persero) come from the Directorate General of Railways' Joint Operation (KSO) with the Ministry of Transportation, government capital involvement, and PT. KAI's asset acquisition. State land is one of the assets that PT KAI manages; these are things, issues, or entities that have current or potential worth for an organization (Surachman, 2024).

The prosperity of the Indonesian people as a whole must undoubtedly continue to be the foundation for PT. Kereta Api Indonesia's (Persero) transfer of civil rights in HPL over state land. The party offering compensation, in this case the potential landowner, does not acquire the HPL land from the holder when the holder releases or transfers state land under Management Rights (HPL). The release or transfer of rights does not result in the extinguishment of HPL; rather, it is a transition of HPL in the form of civil rights originating from civil legal relationships. In actuality, the HPL holder and third parties have a variety of conditions of agreements. The Minister of Agrarian Affairs/Head of the National Land Agency Regulation Number 9 of 1999 declares the Minister of Home Affairs Regulation Number 1 of 1977 to be invalid. Article 4 paragraph (2) of Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 mentions the Land Use Agreement, specifically:

- 1) If the desired land is HPL land, the applicant must first get the HPL holder's designation in the form of a land use agreement.
- 2) A land use agreement establishes the legal relationship between the holder of HPL and third parties using HPL land, according to the terms of Article 4 paragraph (2) of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 9 of 1999. This clause does not need the land use agreement to be made via a private or notarial deed.

The process for transferring civil rights in HPL over state land owned by PT. Kereta Api Indonesia (Persero) must be based on the company's articles of association and the regulations that apply within the PT Kereta Api Indonesia (Persero) environment. These regulations include the following: Long-Term Fixed Asset Utilization, Utilization of Company Fixed Assets for a Period of Up to 5 (five) Years, Organizational Management within the PT Kereta Api Indonesia (Persero) environment, and the distribution of authority among the board of directors:

- a. Consists of the following in the near term: the regional asset management, asset security, and legal departments; the regional/division head; the asset management unit at the head office; and;
- b. In addition to the officials listed in point an above, the Asset Management Unit at the Head Office, the Legal Unit at the Head Office, the Risk Management Unit, the pertinent Directors, the Commissioners, and the General Meeting of Shareholders (RUPS) are all involved in the use of long-term assets.

The process of transferring civil rights in the HPL of PT. Kereta Api Indonesia (Persero) over state land that is not directly used for railway operations through a number of stages exemplifies the application of the principle of balance. Generally, the cooperation agreement is made based on the parties' agreement between PT Kereta Api Indonesia (Persero) and the Partner Party. A letter of

interest or offer from potential partners, along with additional documentation as specified in the Director's Regulation on the Standard of Procedure (SOP) for Cooperation, comes before both solicited and unsolicited initiatives (Gutterman, 2023).

The principles that must be observed in the implementation of fixed asset utilization cooperation in accordance with the Minister of BUMN Regulation No. PER-13/MBU/08/2017 are as follows: (1) Cooperation is carried out with attention to the principles of transparency, independence, accountability, responsibility, and fairness. (2) Cooperation is carried out with attention to the principle of utility. (3) Cooperation must be in accordance with its intended purpose based on statutory regulations. (4) Cooperation does not interfere with the main business activities of BUMN. (5) Cooperation is carried out for a specific period as stated in the agreement and the utilization of fixed assets without a time limit is not permitted. (6) Cooperation prioritizes synergy between BUMN and/or BUMN subsidiaries and/or BUMN-affiliated companies and the enhancement of national participation and business. (7) Collaborated fixed assets are prohibited from being used by Partners, unless otherwise regulated in the Minister of BUMN Regulation No. PER13/MBU/08/2017 dated August 21, 2017. (8) Other than the persero or perum organs, no party is allowed to interfere in the process and decision-making regarding the utilization of fixed assets while adhering to the prevailing laws and regulations. (9) The Board of Directors is responsible for the implementation of the utilization of fixed assets for the benefit of the company, and ensures it is free from pressure, coercion, and interference from other parties. (10) The Board of Directors is required to evaluate the agreements for the utilization of fixed assets that have not been implemented, if the Board of Directors believes that the agreements signed by the state-owned enterprises have not provided optimal benefits while still adhering to the laws and regulations.

### *3.3. The concept of privatization in Indonesia that aligns with the values of Pancasila and the 1945 Constitution of the Republic of Indonesia*

Pancasila as the foundation of the state is often referred to as the philosophical foundation (philosophische grondslag) of the state, the state ideology (staatsidee). In this context, Pancasila is used as the basis for governing the state, in other words, Pancasila is used as the foundation for organizing the administration of the state. Pancasila as the Foundation of the State (Maulida et al., 2023).

According to the Preamble of the 1945 Constitution, Indonesia is a rule of law state that views the law as the supreme authority when it comes to the use of power to further its national objectives (Indrastuti et al., 2024). Realizing social justice for all Indonesians is one of the country's objectives (De Royer et al., 2018). According to Pancasila philosophy, which argues that the control over state assets is meant to be used and distributed for the welfare of all Indonesians, fairness is relevant when examining the meaning of Article 33, paragraph 3 of the 1945 Constitution. All state assets, including land, water, and natural resources, must be managed by the state, which has the authority to do so, and must use and distribute them as much as possible for the benefit of the populace. The transfer of civil rights within HPL and the foundation for the HPL holder's power to act as a private or public legal subject are both indirectly impacted by the inconsistency in the regulations pertaining to HPL. When PT. Kereta Api Indonesia (Persero), one of the HPL holders over state land, transfers civil rights in HPL over state land, there is a propensity for state-owned businesses (BUMN) to exhibit both public and private characteristics.

Based on the idea that land has a social function under the UUPA, this becomes hazy when HPL land shifts its purpose to the wellbeing of the populace rather than societal interests. As a result, a solid and unambiguous legal basis that is applied in accordance with the principles of the Pancasila philosophy must be established. "Our pride as a nation lies in our noble character, morality, familial nature, togetherness, and similar qualities," said Satjipto Rahardjo. It does not, however, permeate our legal culture. In actuality, that culture leans more toward individuality. Our social capital (SC) has not yet been transformed into morality. The aforementioned claim demonstrates that morality is a social capital in society's legal culture (QUIBRIA, 2003). Under support of this view, Sidharta went on to say that under a legally controlled state, culture is given top priority, or "the culture primacy." The culture being discussed is the culture of happiness. Since Pancasila justice is a moral principle and a value of justice that serves as the cornerstone of law, it is important to comprehend the distinction between it

and legal justice (Wijaya et al., 2024). The principles of law are applied to society as legal regulations and serve as recommendations while laws are being formulated (Nonet & Selznick, 2017).

The concepts of justice found in Pancasila serve as the cornerstone or basis for the creation of laws, which fundamentally seek to establish justice. These are the features of Pancasila justice (Rachmawaty et al., 2024). One way the legal system manifests itself is through laws, which are an attempt to achieve that justice. From the standpoint of legal philosophy, the foundation or base of law is comprised of several ideals. The transfer of civil rights in the management rights over state land as a form of power of state-owned enterprises (BUMN) as a result of privatization is therefore not immediately applicable to the notion of privatization adopted from nations with a common law legal system. A statutory body, which is a private legal entity granted special authority, is one way that State-Owned Enterprises (BUMN) have manifested their position as legal entities since the implementation of privatization regulated by Law Number 19 of 2003 concerning BUMN. This means that not all of the 1945 Constitution's legal provisions that govern BUMN as state organs apply to BUMN as statutory bodies. Consequently, the state's finances are not always the same as those of BUMN Pesero. As a result, the losses sustained by State-Owned Enterprises (BUMN) and the losses sustained by the State are separate (Apriansyah, 2024).

State-owned businesses (Persero) that are not allowed to be privatized include those whose operations, according to regulations, can only be handled by state-owned businesses (BUMN); those involved in national security and defense; those functioning in specific public interest sectors; and those involved in natural resource sectors that are expressly forbidden from being privatized. It is impossible to compare PT.KAI (Persero)'s status as a private legal entity to that of a legal person in general.

#### 4. Conclusion

Since PT. Kereta Api Indonesia (Persero) underwent privatization, the company's status has shifted to that of a Limited Liability Company, which is a private legal entity. Law No. 19 of 2003 pertaining to State-Owned Enterprises (BUMN) supports this. The United Kingdom, which follows the common law system and has distinct legal features from Indonesia, is the legal outcome of privatization. The transfer of civil rights in the management rights over state land is impacted by PT. Kereta Api Indonesia's (Persero) privatization. The rules governing the position and scope of state-owned enterprises (BUMN), especially PT. KAI, in the transfer of civil rights in management rights are incongruous because of the two functions that are inherent in the company, namely the public function and the private function. These regulations should be based primarily on Pancasila and the 1945 Constitution as their philosophical and constitutional foundations.

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