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STRATEGIC ROLE OF LAND RIGHTS FOR BUSINESS WORLD BASED ON NATIONAL AGRARIAN LAW

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Abstract: *Land is one of the natural resources as a gift from God, and hence it should be used by the State for the welfare of the people to the utmost. Land rights may be granted to both individuals and private legal persons. The problem currently faced is how the balance of land titles between private sector (investors) and public or individual interests is kept and controllable. This is a constitutional mandate the implementation of which may be conducted by the State through State's control right of lands. By such State's control right, government may issue legal instruments to regulate the utilizations and uses of lands, to decide the control and ownership of land titles (rights), and to control their implementation in the field, so as to avoid inequality in land titles and ownerships. Provisions on land titles are contained in Article 2 paragraph 2 of UUPA (Agrarian Law).*

The method used in the present research was a juridical-normative method with statutory, historic, and legal politics approaches. From the results of analysis and discussion it could be concluded that a regulation of balanced land titles and ownerships should be conducted, in order to achieve the goal of creating prosperity for the whole people. In the meantime, land rights play a crucial role in business world, particularly in direct investment where lands for investment are fundamental and hence legal certainty of land right ownership is required. Moreover, the procedures of gaining a land right on seashore land depend largely on whether the seashore land has had a certificate in the name of individual or it belongs to an ulayat land (community land) or arisen land. If a land is owned by individual, the right of the land may be transferred by sale; if it is owned by a legal person then its transfer has to be made by a waiving agency; and if it belongs to an ulayat land then it may be transferred by proposing an application to the government for which the holders of ulayat right shall receive some compensation. Meanwhile, if a seashore land is an arisen land, the claimant may propose an application to State by paying some revenue to State. Any of the land rights can be granted if they are in conformity with the regency/municipality layout and in compliance with applicable legislations.

Keywords: *Strategic Role, Land Right, Private Sector*

INTRODUCTION

Soil and water and natural wealth contained therein shall be controlled by the State and used for the welfare of the people to the utmost, as stipulated in Article

1. Yudha Bhakti Ardhiwisastra, Immunity of State Sovereignty in Foreign Court Forum, Bandung, Alumni, 1999.

33 paragraph (3) of the Indonesia's 1945 Constitution. In the context of national agrarian law, this stipulation actually contains a spirit asserting that land as a natural resource which is a gift from the Only One God to Indonesia's people shall be used for the welfare of the people to the utmost. The fundamental position of land as the basic capital (asset) of development that has to be used for the welfare of the people to the utmost provides a philosophical and juridical basis to the State to control, regulate, and manage the uses of land in a bid to realize the welfare of the people to the utmost.

Grounded in the State's strategic role, State as the proprietor of national assets, including natural resources, particularly lands, should has a goodwill and capability to keep a balance of the uses of State's assets between public interests and business world. To the end, the government may create an instrument of legislations as well as supervise its implementation. However, in practice, the role has not been played optimally by the State, due to shortcomings in the policies and implementation of land affairs that have not cover comprehensively the whole important aspects of societal lives and business world. Based on the preceding condition, the writer presented here a topic on the importance of land rights (titles) in supporting the development of business world, including seashore land and its related problems.

In line with the description above, this paper would study the existence of land rights and the acquirement of seashore land for in private interests, in relation to national agrarian law. Therefore the research problems were identified as follows:

1. How the urgency of land rights in supporting business world in national agrarian law is?
2. What are the procedures for gaining rights of lands land and seashore lands according to national agrarian law?

LITERATURE REVIEW

Agrarian Law and Business World

Land Rights for Investors According to UUPA

In essence, Law No. 5 of 1960 (UUPA) is anti-foreign investment. Agrarian Minister Mr. Sadjarwo, in his address on September 14, 1960 when presenting the governmental reply on the General Opinion of DPR-GR memberships concerning Draft Basic Agrarian Law during a Plenary Session of DPR-GR, stated as follows:

> "*… This Bill, besides from demolishing the paramount peak of foreign capital that has for centuries been exploiting Indonesia's wealth and labor, would expectedly put to end*

those conflicts and disputes between the people against foreign entrepreneurs together with their officials who pit public officials and their own people, triggering bloody incidents and some sad actions of bulldozing."

He went on:

"…We simply want to add some issues we have not alluded to yet above, i.e., foreign capital issues. These issues have been clear in the concerned articles and their elucidation, that is, Articles 28 and 35, and related to transitional article 55, which principally stipulate that foreign capital should be temporary in nature, according to the needs of Planned General Development. They who have existed here have an afloopend character (just to complete their term, by 20 years in maximum)."[18]

In the last parliamentary session on the debate of UUPA in 1960, then Agrarian Minister Mr. Sadjarwo reasserted:

"*… by the birth of this Basic Agrarian Law, we eliminate foreign investment*…."

According to Law No. 5 of 1950, a land title (right) is 35 years in maximum and it may be extended for another 25 years. The term isn't sufficient for investors. In other countries, such as Malaysia, Singapore, Vietnam, and China, land titles for investors vary from 75 years to 90 years.

Indonesia's government under Soekarno regime (1959-1960) was inclined to be self-sufficient (*swasembada*) and rejected foreign aids (exempt from socialist countries like Soviet Union and China) and foreign investments. Indonesia then withdrew from UNO, IMF, and World Bank.

Indonesia Once Again Needs Foreign Investment

In the last days of his presidency, Soekarno was under pressure by a new regime under the leadership of Soeharto. President Soekarno signed Law No. 1 of 1967 on Foreign Investment. Indonesia resumed inviting foreign investors. Earlier, in 1996, the Government of Indonesia modified the provisions on land rights for investors by issuing Governmental Regulation No. 40 of 1996.

Article 11 of the Governmental Regulation No. 40 of 1996 stipulates:

(1) In the interest of investment, an application of extension or renewal of Right of to Cultivate (*Hak Guna Usaha/HGU*) as intended in Article 10 hereof may be made all together by paying some revenue specified for it in proposing for the first time a *HGU* application.

(2) In case the revenue has been paid all together as intended by paragraph (1) above, the extension or renewal of *HGU* is burdened with only an administrative fee the amount of which shall be decided by the Minister upon an approval from Minister of Finance.

(3) The approval on granting a extension or renewal of *HGU* as intended in Article 9 hereof and the breakdown of the revenue as intended by the paragraph (2) above shall be contained in the decision of the granting of the *HGU*.

Furthermore, Article 28 stipulates:

(1) In the interest of investment, an application of extension and renewal of Right of Using Structures (*Hak Guna Bangunan—HGB*) as intended in Article 25 hereof may be made simultaneously by paying some revenue specified for it when presenting for the first time a *HGB* application.

(2) In case the revenue has been paid all together as intended by the paragraph (1) above, the extension or renewal of *HGB* is burdened with only an administrative fee the amount of which shall be decided by the Minister upon an approval from Minister of Finance.

(3) The approval on granting a extension or renewal of *HGB* as intended in Article 9 paragraph (1) hereof and the breakdown of the revenue as intended by the paragraph (2) shall be contained in the decision of the granting of the *HGB*.

Then, Article 48 stipulates:

(1) In the interest of investment, an application of extension and renewal of Right of Usage (*Hak Pakai—HP*) as intended in Article 47 hereof may be made simultaneously by paying some revenue specified for it when presenting for the first time a *HP* application.

(2) In case the revenue has been paid all together as intended by the paragraph (1) above, the extension or renewal of *HP* is only burdened with an administrative fee the amount of which shall be decided by the Minister upon an approval from Minister of Finance.

(3) The approval on granting a extension or renewal of *HP* as intended in Article 46 paragraph (1) hereof and the breakdown of the revenue as intended by the paragraph (2) above shall be contained in the decision of the granting of the *HP*.

Term "renewal of right"[19], not found in UUPA, doesn't contradict UUPA for two reasons. First, UUPA itself doesn't regulate what is the legal consequence of the expiry of HGU and HGB after their extension term. It only stipulates that HGU and HGB shall be terminated if their term has expired. The logic is that after the termination of HGU and HGB the lands, now having a legal status of State Lands, can be attached with land titles, including new HGU and or HGB, either to new applicant(s) or to former holders of the land rights. If the applicant is the former holder of the land right who is still qualified then a more appropriate term to use

is renewal of right, in that the HGU and or HGB is applied not for the first time but rather for renewing the HGU and or HGB, which should be made toward the end of the current term.

Second, the use of the term "renewal of right," which is certainly qualified to be extended if the requirements are met, fits the interpretative method (in this case extensive interpretation) on Articles 29 and 35 of UUPA as one of the methods of building laws by finding laws (*rechtsvinding*). Noteworthy, the granting of HGU and HGB all together with extension and their renewals doesn't mean changing UUPA provisions. What is granted is that a guarantee of extension and/or renewal. Before such extension and renewal is granted, it would be evaluated whether their specified requirements have been met. If the requirements have actually been met, the procedures of extension or renewal of a right is simplified, i.e., by simply registering the extension and renewal in a land book and a certificate of land right.

Reformation Era

The end of New Order era has been followed by a reformation era in Indonesia governance. The birth of reformation era was triggered by a monetary crisis which then turning into a multiple dimension crisis, leading to the loss of trust on the government. The government in the reformation era is demanded to pay attention to democratization, transparency, and restoration of people sovereignty and returning to democratic economy in all sectors of life and development. In revitalizing national economy, the government has to take some actions to replenish the reserves of foreign exchange by boosting exports and luring foreign investors.[20]

In a parliamentary debate on Law of Investment intended to replace Law No. 1 of 1967 on Foreign Investment and Law No. 5 of 1968 on Domestic Investment, in March 2007, Indonesia Government and Parliament (DPR) jointly agreed on the granting and extension of land rights (land titles) to investors simultaneously. After the terms of land rights have expired, they may, by an evaluation process, be renewed.

Article 2 of Law No. 25 of 2007 stipulates:

(1) Simplified services and/or permission of land titles as intended by Article 21 item *a* may be granted and extended all at once in advance, and is renewable at the investor's request for the following:

   a. Right to Cultivate may be granted for a period of 95 (ninety-five) years by being granted and extended all at once in advance for a period of 60 (sixty) years, and renewable for a period of 35 (thirty-five) years;

b. Right to Build may be granted for a period of 80 (eighty) years by being granted and extended all at once in advance for a period of 50 (fifty) years, and renewable for a period of 30 (thirty) years; and

c. Right to Use may be granted for a period of 70 (seventy) years by being granted and extended all at once in advance for a period of 45 (forty-five) years, and renewable for a period of 25 (twenty-five) years

(2) Land titles as intended by section (1) may be granted and extended all at once in advance for an investment, with the following investment activities, inter alia:

a. An investment that is made for a long term and linked to structured changes in the Indonesian economy aimed at improving competitiveness;

b. an investment with an investment risk level that requires a long-term return on capital based on the types of investment activities carried out

c. investments that need no large areas;

d. investments with the state land title; and

e. investments that do not undermine a sense of public justice and does not harm the public interest.

Based on a judicial review by Constitutional Supreme Court on the provisions of Law No. 22 of 2007 by Decision of MKRI No. 21-22/PPU-V/2007, the Article 22 is not binding, and thus the regulation of investment relating to the land titles currently prevailing should be returned to UUPA and Governmental Regulation No. 40 of 1996.[21]

Accordingly, to acquire certain land right (title) the prevailing procedures have to be complied with. In National Agrarian Law, land statuses are grouped into three broad categories, namely:

a. State Land, i.e., lands directly controlled by the State;

b. Land Rights (Titles), i.e., lands owned by individuals or legal persons, that is, there has been a concrete legal relationship between certain subjects and their lands;

c. *Ulayat* land, i.e., land under control by traditional community.

In conformity with allocation, use, and requirements, the procedures of acquiring lands according to national agrarian law are as follows:

a. If the land needed is State land, an application and a granting of land title have to be proposed.

b. Transfer of right if:

1) The land needed is of a title land status;
2) The party that needs the land may acquire the existing right (title);
3) The owner is ready to deliver the land;

c. Waiver of right followed by an application and granting of a land title if:

1) The land needed if of a title status or an *ulayat* right of a traditional community;
2) The party that needs the land has not had a right title;
3) The owner is ready to deliver his or her land;

d. Revocation of a right followed by an application and granting of a land title if:

1) The land needed is of title land status;
2) The owner isn't ready to waive its right;
3) The land is allocated for the construction in a public interest.[22]

Here is described the various procedures of acquiring the aforementioned land titles.

a. Application of Right

If the status of land to acquire is State land, the only way of acquiring the land right is by an application of right. The rights that may be acquired for a land controlled by State are as follows:

Proprietary right, Right to Cultivate (Hak Guna Usaha/HGU), Right to Build (Hak Guna Bangunan/HGU), and Right to Use (Hak Pakai/HP). For specific cases, the government also issues Right to Manage (Hal Pengelolaan/HPL) granted to both public and private agencies according to its allocation and necessity.

Usually, to deal with applications, extensions, and renewals of Proprietary right, Right to Build, and Right to Use of State lands and Right to Manage, a committee of Land Examination is established, while for Right to Cultivate a committee of examination B is established. If an application of a new title above State land is granted, the receiver of the title (right) shall receive a Letter of Decision of Title Granting (SKPH). The requirements for or duties of the title receiver are, inter alia, as follows:

1) placing border marks at each corner of the land according to specific rules so as to show clearly the land area granted to the applicant;
2) paying a specified fee of acquiring the land title to Tax Office according to Law No. 21 of 1997;

3) registering the title at local Agrarian Office's Land Registration Section to gain a Land Book and Land Title Certificate as a receipt.

b. Transfer of Right

A transfer of right is a legal action of transferring a right of land by one party to another. A transfer of right shall be performed if the legal status of the right of land control meet the requirement as the holder of the available land, and the holder of the land right is ready to transfer his or its right. The types of transferable lands are HM, HGU, HGB, and HP as described above. A legal action of transferring a right of land may be done by sale, barter, grant, will, and revenue/*inreng*, where the legal action is based on Governmental Regulation No. 37 of 1998 on Land Deed Officers (PPAT) and made before a PPAT, and then registered at local Agrarian Office, as described above.

c. Clearance of Land

UUPA doesn't have a special chapter that contains provisions on land clearance. Instead, such provisions spread in several articles, namely Article 27, 34, and 40. The Articles stipulate that a land title is revoked if the land is waived voluntarily by the holder of the right.

Further elucidation of the Articles is provided for in Law No. 2 of 2012 on Land Acquirement in Public Interest.[23] The spirit of the Law No. 2 of 2012 is an amicable agreement for accomplishing justice and welfare of people. However, accomplishing them is no easy duty. The success of the implementation of any stipulations in the Law will depend on how it is practiced in the spirit and awareness of nationhood and statehood by both public officials and community.

d. Revocation of Right (Title)

By a revocation of right is meant as retaking by force a privately owned land by the government in public interest by granting some fair compensation to the land holder. A revocation shall be conducted if an amicable agreement cannot be achieved, while the land is urgently needed in a public interest and there is no alternative or substitute for the need. In this case, the governor presents a recommendation of revocation of land right to the Head of BPN (National Agrarian Agency) via Ministry of Home Affairs, Ministry of Justice, and the relevant Ministry that needs the land.

The requirements of such revocation of land right are: the land is really needed in a public interest, there is an urgent situation, there is fair compensation, and conducted in conformity with applicable legislations. Last but not the least, such revocation of land right should not be abused, or else the land may be then

returned to the former holder. Thus, this is a guarantee to the people that the allocation of the land is in the public interest and not to be used for personal or group interests. From the description above it can be inferred that there is an in-depth and broad meaning in relation to a revocation of land title. In principle, in a democratic, constitutional nation like Indonesia there is no place for exerting force against anyone, particularly against its own citizens. This principle must be upheld and aware of by this republic's entire public officials, from the highest to the lowest, so that people's rights can be steadily protected and assured, even though there is a reason for public interest. However, on the other side, good citizens should not rigidly stand for their right if their land is really needed to be used in public interest or state interest. Accordingly, there should be strong awareness and understanding that lands in Indonesia don't absolutely serve personal interests but rather they also have social functions.

Individual Right and Traditional Community on Land and Seashore Land used for Private Interests

Individual Right of Land

In Indonesia, individual right of land is philosophically and juridically strongly protected by the principle of "Just and Civilized Humanity", which is implemented by an abstract norm explicitly provided for in Article 28H of the 1945 Constitution, which reads: "Everyone shall be entitled to have personal proprietary right and the proprietary right may not be taken over arbitrarily by anyone." The juridical meaning that may be inferred from the content of the Article 28H of the 1945 Constitution is that proprietary right as a personal right has become integral to human rights. This acknowledgement is further confirmed in Article 36 of 1999 on Human Rights, which reads as follows:

(1) Everyone shall be entitled to have proprietary right, individually and jointly with others so as to develop themselves, nation, and society without violating laws.

(2) No one may be deprived from their property arbitrarily by violating laws.

(3) Proprietary right serves a social function.

Moreover, according to Muhammad Bakri:

> "Human rights are basic rights that are naturally attached to human beings, universal and permanent in nature. Therefore, they must be protected, respected, and kept, and should not be ignored, reduced, and seized by anyone. It means that everyone is in obligation to admit and respect other basic rights. This obligation also applies to the State and government, i.e., to respect, admit, protect, and defend the basic rights of their citizens indiscriminatively."[24]

Individual proprietary rights can traditionally be understood like a native where he or she may personally have a land and utilize it. In earlier times, personal proprietary right of land is a right to clear firstly a land. The cleared land is then transferred from one generation to another, called "*eidresume*" (hereditary personal proprietary right). The owner of a hereditary personal right (*erfelijk individueel grondbezit*) is a form of land control permanently and can be transferred to heirs.[25]

Apart from land clearance, heritance, grant, and will, Indonesian citizens may gain a proprietary right of land by a mixture of properties due o a marriage.[26]

Personal rights of land are strongly protected in a state that constitutionally declares itself as a law based state (constitutional state), particularly related to one of the pillars of the rule of law (*rechtstaat*), that is, equality before the law. As a constitutional state,[27] Indonesia adopts equality of right among the citizens[28,] including on land rights (titles)[29]. Article 9 of UUPA provides an equal opportunity to all citizens, male and female, to gain land rights.[30] It is closely related to the existence of people with low economy who have been continuously driven out by those citizens with strong economy. It is necessary to make a provision or regulation that provides protection to low economy group, intended to prevent people from gaining excessive proprietary rights beyond their real needs.[31]

Based on the legal norm contained in Article 9 of UUPA above, AP. Parlindungan[32] commented as follows:

> "A nation that is still at a development stage and part of its citizens are still in very poor should protect its citizens from transferring their lands to non-Indonesians. Paragraph (2) of Article 9 adopts a principle that there is no difference between female and male. Both genders have equal opportunity to have land titles and even to have relations with soil, water, space and natural wealth contained therein."

Clearly, land titles held by anyone, male or female, don't depend on the adat law prevailing in their each region. This notion is one of the modifications of adat law of land as stipulated in Article 5 of UUPA,[33,] that reads:

> "Agrarian law that applies to soil, water, and space is adat law, as long as it is not in contradiction with national and state interests, on a basis of national unity, with Indonesia socialism, and with the provisions contained herein and with other legislations, by always complying with religious law elements."

The strongest and fullest personal right of land is proprietary right of land. Article 20 paragraph (1) of UUPA stipulates that: proprietary right is a hereditary, strongest, and fullest one may hold on land, by recalling the provision in Article 6." It means that even the proprietary right is the strongest and fullest but it should serve a social function. According to Gunaanegara:[34]

> "In principle, proprietary right is the strongest, fullest, and hereditary right and can therefore be owned by only Indonesia nationalities.[35] However, certain government-owned legal persons are, for certain interests, permitted to hold a proprietary right. Proprietary right may be assigned to a land that is not being tied to other land titles that are private in nature – it is possible that a proprietary right is derived from an *ulayat* land, but to be a proprietary right the *ulayat* land must be waived."

Being the strongest right, a proprietary right is free from any ties originated in a private (civil) right of others. According to Article 22 UUPA, a proprietary right may occur by adat law, by governmental decision, and by statutes. The occurrence of proprietary right by adat law is stipulated by the adat law. It is commonly tied to the intensity of its use and the duration of the control of the land. If it is of high intensity and for a relatively long time, there will be an increasingly stronger tie between the land and the owner. Eventually, the land will be subject to a proprietary right. A revocation or abolition of a proprietary right is due, among others, to voluntary waiver by the owner or acquired by the government for other allocation or interest or revoked for public interest.[36] Based on the preceding description, to be able to invest on a personal land, investors have to acquire the land by a selling-buying process.

The Right of Traditional Community on Land

Traditional community intended in this paper is those communities that still keep their customs actually in their daily lives based on the norms of adat law they hold and comply with. The living law in traditional communities internally is adat law as long as it is not in contradiction to human civilization and national interest in general. According to ter Haar, as quoted in Bushar Muhammad[37]:

> "… legal community (legal unit) is: (1) Orderly legal unit; (2) Settling in a certain area; (3) Has rulers; and (4) Has tangible and intangible wealth, where the members of the unit are living their own life in the community as something reasonable by nature and no one among the members has a thought or inclination to dismiss the developed tie or abandon it in a meaning that they will set free themselves from the tie forever."

According to Bushar Muhammad[38]: "a traditional law community (*adatrechtsgemenschap*) is a law community whose members feel tied to the community for they believe that they are all originated from the same descent (genealogical) or one settlement land (territorial)."

After the fall of President Soeharto in 1998, Indonesia entered into a "reformation Era." In the reformation era, a Regulation of Agrarian Minister/Head

of National Agrarian Agency No. 5 of 1999 was issued that seek to define traditional law community. The regulation defines traditional law community as a group of people tied by their adat law order as the common citizens of a legal association due to the sameness in settlement (residence) or on a basis of genealogy.[39]

Moreover, Law No. 41 of 1999 on Forest, Article 76, acknowledges traditional law community by stipulating that:

(1) A traditional law community is, as long as in reality still exists and its existence is acknowledged, entitled:
   a. to collect forest produces to meet the daily livelihood of the traditional community;
   b. to conduct forest cultivating activities based on applicable adat law and non in contradiction to applicable legislations; and
   c. to receive any empowerment in a bid to promote their prosperity.

(2) Confirmation of the existence and abolition of a traditional law community as intended by the paragraph (1) above shall be declared by Local Regulation (Statute).

(3) Further provisions as intended by the paragraphs (1) and (2) shall be stipulated by Governmental Regulation.

Moreover, Law No. 39 of 1999 on Human Rights, Article 6, stipulates:

(1) In a bid to uphold human rights, distinctiveness and needs in traditional law community shall be attended and protected by laws, people, and government.

(2) The cultural identity of traditional law community, including *ulayat* land title (right), shall be protected, in accordance with the up-to-date development.

Concerning the acknowledgement of Indonesia's positive (prevailing) laws on the rights of traditional community, it can be referred to Article 18B paragraph (2) of the 1945 Constitution that stipulates: "The State shall acknowledge and respect the traditional law community units and the traditional rights thereof as long as they still survive and comply with the community development and the principles of the Unitary State of the Republic of Indonesia, as stipulated by virtue of law. Furthermore, Article 28I paragraph (3) of the 1945 Constitution stipulates that: Cultural identity and traditional community right shall be respected in accordance with the up-to-date development and civilization."

The constitutional guarantee above can be traced in UUPA, particularly Article 5, stipulating that national agrarian law is based on adat law. It means that the

legal status of land rights for traditional law communities is strongly guaranteed by positive (applicable) laws in Indonesia.[40]

A research by National Law Commission (KHN) found out that a traditional community can be acknowledged and protected reasonably if they, as a group of individuals, meet the following requirements:

a. live together in certain area;
b. their existence as a group is deemed as reasonable, so that its members don't think of dismissing the tie they have built;
c. have mutual interests;
d. are self-ruling;
e. have authority to regulate soil, water, and natural wealth contained therein;
f. have the same origin of ancestors from generation to generation or the same ancestors.[41]

The clarity in what is meant by traditional law community is of high importance because it is related to the rights that the traditional community. This is because in some legislations the rights of traditional communities are acknowledged if it turns out that they are still existent. On the other hand, the decision on whether a traditional community exists or not is in the hands of the government. Thus, there is a "marginalization" of traditional communities.

Realizing this condition, some alliances of traditional law communities demand that their existence be acknowledged as well as the rights of their traditional community. The rights of traditional communities are included as basic rights generally in the world. Its applicability is universal, and thus issues of the protection of local people' rights may be based on a theory of "self-determination" in a framework of unitary state.[42] Total traditional law communities spreading throughout Indonesia achieve 20,000 (twenty thousands) units. Of the total, National Human Rights Commission has identified only 6,300 units in Aceh, 700 units in Sumatra, and 1,000 units in Bali.[43]According to the writer, the collection of data on the areas of ulayat lands should be made carefully and accurately, so as to avoid disputes of ulayat lands, such as the protracted Freeport case that is still unresolved until now. The data collection of ulayat lands is not intended to keep their existence or validity. The existence of ulayat lands will naturally be abolished as a consequence of constant development. This has occurred in Java Island where there is no longer ulayat land due to evenly spreading physical and nonphysical developments. Other positive impact of the data collection of ulayat lands in the future is that it will support a legal certainty for investors particularly in acquiring traditional community's lands.

Acquirement of Seashore Lands for Privates

Seashore is a border between land and sea and part that may be affected by the waters. Meanwhile, sea is the whole saline waters that inundate the earth surface. According to sea law, sea is the whole seawaters connected freely throughout the earth surface. Arisen lands may occur due to natural processes and to human activities. They may occur on seashores and riverbanks. They may be controlled by individual or communal. The handling of them is assigned to villages, where they may regulate it themselves as long as not in contradiction to National Agrarian Law. The problems in the fields are: what is the status of arisen lands, who have the land right, and how the process of acquiring the right of the lands, as well as land reclamation. There are no commonly accepted answers to the questions, due to differences in interpretations. According to the theory of State's controlling right, State has a right to control arisen lands and reclamation lands. If one who controls an arisen land wants to hold a right of the land, he or she has to file an application to local National Agrarian Agency, which may or may not be approved, depending on the existing layout of the district/municipality concerned. If approved, the applicant has to pay a specific amount of revenue to the State. A further question is, how if a proprietary land on seashore is missing from abrasion? According to UUPA, the land shall be deemed as missing, and the owner is untitled to claim compensation to the State.

In effort to regulate the legal status of arisen lands, State Minister of Agrarian/Head of National Agrarian Agency, by Decision No. 410-1293 dated of May 9, 1996, declares that:

1. Naturally missing lands, due to seashore abrasion, drown, or landslide, buried or earthquake, or removing to other places resulting from erosion, are declared as missing and their titles are null and void. Moreover, the holders of the rights (titles) have no right to file a claim if one day reclamation/pilling up and or draining (polder) are done on the site.
2. Reclamation lands are declared as lands that are controlled by State and their regulation shall be made by State Minister of Agrarian/Head of National Agrarian Agency. The party who performed reclamation shall be prioritized to propose an application of right of the reclamation land.
3. Naturally arisen lands such as delta, seashore land, lake coastline, riverbank alluvial, arisen island, and other naturally arisen lands are declared as directly controlled by the State. Moreover, control/ownership and utilization of the lands shall be regulated by State Minister of Agrarian/Head of National Agrarian Agency in accordance with applicable legislations.

4. In relation to the aforementioned, the heads of regional offices of Provincial National Agrarian Agency shall adjust the missing lands if they have had certificates. For those lands which will be reclaimed, their borders shall be marked firstly to determine the width of the reclaimed lands.
5. Furthermore, the applications for the arisen lands may be immediately processed according to the applicable procedures.

The next question is, how the application of a right of land which is completely an island or borders on seashore? On this question, State Minister of Agrarian/ Head of National Agrarian Agency issues a decision No.500-1197 dated of June 3, 1997:

1. In accordance with the provision of Governmental Regulation No. 40 of 1996 and its elucidation, the granting of HGU, HGB, or HP on a land area which is completely an island or borders on seashore shall be regulated separately by a Governmental Regulation.
2. Even though the Article 62 of Governmental Regulation No. 40 of 1996 stipulates that: as long as the regulation on the implementation of the Governmental Regulation has not been issued, the legislations on HGU, HGB, and HP remain in force as long as they aren't in contradiction to the provisions of the Governmental Regulation. However the elucidation of Article 60 stipulates expressively that any application of a right of land that is completely a land should not be approved until the issuance of Governmental Regulation that regulate it.
3. Accordingly, temporarily, any application of location on a land area that is an island completely or borders on coastline should not be approved, and if a location permit had ever been issued then the process of granting the right of the land shall be suspended till the promulgation of Governmental Regulation dealing with it.

Theoretical Framework

According to the modern concept of rule of law, the duties and functions of government are no longer as simply a night watcher (*nachwalkerstaats)*, but rather beyond it, in that the government is now delegated with some duties and responsibilities to realize the welfare of people (*bestuurzorg*).[3] The duties of the State in accomplishing people welfare and in realizing a just and prosperous society, materially and spiritually, are carried out by public services.[4] Public services are very wide, including in field of land (agrarian) affairs that involve land regulation, implementation of agrarian authority, and agrarian law enforcement.

Esping-Andersen, as quoted by Darmawan Triwibowo and Sugeng Bahgijo,[5] describe a strict scope of a welfare state as follows:

> "… not only a mechanism of intervening or correcting the existing discriminative structure but also a distinctive social stratification system. A welfare state is a dynamic power in restructuring social relations…"

Moreover, Sunaryati Hartono[6] maintains that a welfare state is a constitutional state (law-based state) in a material meaning, i.e., a constitutional state that is capable of bringing about justice in conformity with Pancasila values.

Government, in exercising it power in a welfare context, has authorities in managing natural resources for the welfare of the people to the utmost, among other a right of state to control lands. State's right of control is instrumental, the goal of which is to be used for the welfare of the people to the utmost. Therefore, the state is entitled to control soil, water and natural wealth contained therein, including space.

The state's right of control has received so many scientific legal analyses that a theory of state's right of control emerges. In some legal references there is an argument that the theory of state's right of control is a derivative of sovereignty theory[7]. According to Jean Bodin, sovereignty is an attribute or a characteristic and even becomes a principle for each sovereign entity or so called state. There is no other entity with a higher (superior) power that can restrict a state's power. Bodin says that sovereignty contains the following elements: (1) Original, that is, it is not derived from other higher power; (2) Supreme (highest), there is no other higher power that can restrict its power; (3) Permanent or eternal; (4) indivisible, being only one supreme power; and (5) cannot be transferred to other power.[8] It is by the sovereignty theory that the theory of state's right of control on the entire territory in the state sovereignty, including its contents, comes out. One of the elements of a state's territory of state is "land", and hence the theory is called a theory of state's right of land control.

The term of "to control" is an active verb, meaning it has a control on something, holding a power on something. The term "to control" is often corresponded with term "controlled", which actually is a passive verb. There is also a term of "controlling" as a noun, referring more to a process, method, or action of controlling or cultivating.[9] By comparing both terms of ' to control' and 'controlling', it can be discerned clearly that the meaning of "controlling" has a wider scope than term "to control". Thus, in this context, the state's right of land control means that the state has a power to control and cultivate the land with all the potentials existing in Indonesia's land jurisdiction. This definition is in line with phrase 'in the control of the state referred to the object of control as intended in Article 33 of the 1945 Constitution.

If the meaning of "control" is related to that of "right", then right of control is referred to the state as a legal subject (has rights and obligations). Therefore, the rules on the state's right of controlling soil, water and natural wealth contained therein, including space, is a part of constitutional norms provided for in the Article 33 of the 1945 Constitution.

The goal of the state's right of control is closely related to the concept of welfare state, which is, in Indonesia, formulated in phrases: "to develop public prosperity," "realize social justice," and "the welfare of the people to the utmost." Therefore, the goal of the state's right of land control is to delegate authority to the state as the holder of the right of control on agrarian resources.[10] The state's right of land control is an instrument, while the phrase "to be used for the welfare of the people to the utmost" is an objective.[11] It could be said that realizing welfare or prosperity for people is part of the state's responsibility as the holder of the right of control.

In relation to the balance between granting land rights to investors and individual rights of land, a prospective agrarian regulation with an intention to perform a societal reformation is required. Measures of societal reformation by a legal means is most appropriately accomplished by a Development Law Theory", a theory originally introduced by Mochtar Kusumaatmadja. The theory serves as a "guiding star" and it verifies the importance of a new paradigm of the development of National Agrarian Law. According to Mochtar,[12] "law isn't just the guardian of social order, but it also should serve as a sosial reengineering means."

In relation to Mochtar Kusumaatmadja's doctrine, Lili Rasyidi[13] points out that principally the development law theory features three Mochtar's thought essences, namely: (1) Legal concept; containing that it is not only norms but also social-cultural phenomena, where the creations of laws are made by two ways, top down and bottom up. (2) Law serves as social reengineering means. And (3) Law is either neutral or partial, depending largely on spiritual, faith, and belief elements.

The problem is, is it agrarian law a neutral law area? According to the writer, agrarian law has a character of less than neutral, or even can be said as partial (not neutral) at all, and thus caution is needed in making new provisions related to lands.[14] It can be argued that land issues are still related to the rights of traditional communities, such as *ulayat* (community) right. Therefore, it is not easy to perform a unification of law nationally. Likewise, the acquirements of lands for private business world would face complex constraints if the lands are *ulayat* lands.

Building law is indeed required and it is not a simple duty, because a good legislation has to meet the requirements of justice, legal certainty, and balanced benefits.

The same is true in enacting or reforming an agrarian law. It also should meet the requirements of justice, legal certainty, and balance. Meeting the requirements will contribute to people welfare, by among others protecting the assets and accesses of people (including the poor) to lands. As we know, one of the fundamental issues of the national agrarian law is community/people access to lands. Joyo Winoto (former Head of National Agrarian Agency) maintained that:[16]

> "People should have an access to liberate themselves, through developmental processes, from stupidity, underdevelopment, oppression, narrowly limited latitude, dependence, and fear. To the end, people should have manageable assets and access to utilize their assets. Farmers should have lands and accesses to capital, technology, market, management, etc."

The indication that Winoto suggested above is a strong reason for the importance of the national agrarian legal protection on people's assets and accesses to lands based on individual rights of land.

National agrarian legal protection on the individual rights of land intended is legal protection by legislations on the legal relations between individuals and lands that bring about individual rights of land.[17] On the other side, in a bid to promote the welfare of the people required in creating Indonesia's economic sovereignty, it needs to support the utilization of land and seashore land rights for the development of private sector as part of the carrying out of national economy without ignoring people interests in land.

Research Methodology

The research method used was a legal research, where the writer would study the strategic role of land rights in the development of business world (investment) in Indonesia, so that the State's objective of realizing the welfare of people can be achieved more rapidly as a result of the utilization of lands. One of the legal issues raised currently is the inequality in the control and ownership of land rights between investors and communities or individuals. An urgent homework of the government is to create a balance between land controls and ownerships nationally, but with economic growth steadily stable or even increasing without marginalizing people or individuals from land accesses and land rights. The present research began with verifying relevant legal norms based on legal theories and agrarian legal theories, particularly theories of State's right of land control, so as to obtain a solution on the balanced utilization of land rights between business world and public interests. And hopefully this paper may contribute to the development of national agrarian law, particularly in drafting the agrarian law that will be discussed by DPR-RI (Parliament).

In the stages of the present research were as follows: 1. Identified available legal facts; 2. Collected legal materials considered as relevant with the regulation of land control and ownership in private sector till now; 3. Conducted legal study of legal issues based on both legal theories and the theories of State's right of land control; 4. Drew conclusions and put forward recommendations, and provided a subscription or what should be done according to the argumentation that has been built in the conclusion. The approaches used were statutory, historical, and agrarian legal-politic approaches. The approaches of legislation and legal history in forms of legislations and regulations related to the issues of land controls and ownerships were provided for in Agrarian Law (UUPA) and Governmental Regulation No.40 of 1966 and their several derivatives, while the approach of legal politics is a constitutional mandate and implemented by UUPA and TAP MPR No. IX of 2001. The legal materials and the approaches applied were then followed by a juridical analysis and interpretation and also by a prescription on what should be the essence of land rights for business world, communities, and individuals.

CONCLUSION

Based on the description in the preceding discussion, the writer drew the conclusions as follows:

1. Right of land plays a crucial role in business world. It is an imperative particularly in direct investment, because land for investment is fundamental. Thus, legal certainty of land right ownership is needed.
2. To gain a land right, some applicable procedures should be followed. In National Agrarian Law, there are 3 broad categories of the legal status of land, namely:
    a. State lands, lands directly controlled by the State;
    b. Title lands, lands owned by individuals or legal persons. It means that there has been concrete legal relationships between certain subjects and their lands
    c. *Ulayat* lands, lands under control of a traditional law community.

    According to their allocation, use, and requirement, the procedure of obtaining an ulayat land according to National Agrarian Law is as follows:

    d. If the land needed is State land, an application and granting of the right of land should be made.
    e. A right transfer occurs if:
        i) The legal status of the land needed is of title land;

ii) The party who need the land is permitted to acquire the existing land;

iii) The owner is ready to deliver (transfer) the land;

f. A waiver of right followed by an application and granting of the right of the land shall be made if:

i) The legal status of land needed is a title land or ulayat land of a traditional law community;

ii) The party who needs the land cannot own any existing right;

iii) The owner is ready to deliver land;

g. Revocation of land right, followed by an application and granting of the same land right, shall be made if:

i) The legal status of the land is a title land;

ii) The owner is ready to deliver the land;

iii) The land is allocated for the implementation of development in public interests.[44]

Meanwhile, the procedures of gaining land titles of seashore lands depend largely on whether the seashore lands have had a certificate in the name of individual or it belongs to Ulayat title or arisen land. If a seashore lands is an individually owned land, a transfer of land by sale can be made, whereas if a seashore land is a land owned by a legal person then its transfer shall be made by a transfer of title by a in institution of right (title) transfers, and if a seashore land belongs to an ulayat right then an application to government shall be presented by giving some compensation to the holder of the ulayat right. If a seashore land is an arisen land, an applicant may propose an application to the State by paying a specified revenue to the State. All of the land rights may be approved in accordance with the layout of the district/municipality concerned and applicable legislations.

Recommendation

1. An improvement of legislations on land titles should immediately be carried out, or else a draft national agrarian law (currently being discussed in parliament) should be prepared that encompasses the whole aspects related to land titles for individual and business interests.
2. A governmental regulation on seashore lands, reclamation lands, and arisen lands on coastlines and rivers should immediately be enacted so as to cover their legal statuses and the procedures of valid title transfers. Supporting legal certainty on land title ownership is needed, so as to avoid multiple interpretations in the field.

Footnotes

1. This paper is submitted to be published in Journal of Applied Business and Economic Research.
2. Chairman of Postgraduate Study Program at Bandung Law College, *Lektor* (Associate Professor) and Lecturer of Agrarian Law.
3. SF. Marbun & Moh. Mahfud MD, *Fundamentals of Public Administration*, Yogyakarta, Liberty, 2004. p. 45.
4. Sjachran Basah, *Existence and Benchmark of Administrative Judicature Body in Indonesia,* Bandung, Alumni, 1985. p.11
5. Darmawan Triwibowo & Sugeng Bahgijo, Op. Cit. p.9 .
6. Sunaryati Hartono, *What is The Rule of Law?*, Bandung, Alumni, 1976. p.103.
7. Yudha Bhakti Ardhiwisastra, *Immunity of State Sovereignty in Foreign Court Forum*, Bandung, Alumni, 1999. p. 41.
8. *Ibid.* ps. 41-42.
9. Grand Dictionary of Indonesia Language, Jakarta, Republic of Indonesia Department of Education and Culture in Cooperation with *Balai Pustaka*, 1995. p.533.
10. According to Sediono MP. Tjondronegoro and Gunawa Wiradi: 'Types of agrarian resources are: (a) Soil or earth surface. The types of agrarian resources are a major natural asset in agricultural and husbandry activities. Farmers need soil as land for farm enterprises. Breeders need soil for savannah; (b) Waters. This type of agrarian resource is a major natural asset in fishing activities; both for river fishing and lake and sea fishing. Basically, waters are a fishing ground for fisher community; (c) Forest. The essence of the meaning of forest is a unity of flora and fauna living in an area (region) beyond the category of agricultural land. Historically, the type of agrarian resource is a major natural asset in forestry economic communities, making their livelihood from utilizing diverse forest produces according to local wisdom order; (d). Minerals. This type of agrarian resource include a varieties of minerals contained within earth body (underground and beneath sea), e.g.: oils, gasses, gold, iron ores, leads, diamond, precious stones, phosphate, sands, rocks, etc.; (e). Air. This type of agrarian resource refers to not only the space above earth but also to air materials themselves. The importance of air materials as a new agrarian source is increasingly felt currently, after the pollution by machine smokes or forest fires disturb human convenience, security, and health." *In* **Felix Sitorus**, *The Scope of Agrarian*, in: **Suhendar, et al., (Editor)**, *Toward Agrarian Justice, 70 Years Gunawan Wiradi,* Bandung, Akatiga, 2002. p.35.
11. Ilyas, *A Conception of Land Cultivation Right in Indonesia's Agrarian Law System in Relation to Welfare State Doctrine*, Bandung, A Dissertation in Postgraduate Study Program of Padjadjaran University, 2005. p. 116.

12. Mochtar Kusumaatmadja, *Op. Cit*. p.14.
13. Lili Rasyidi, *Using Theories/Concepts in Analysis in Legal Field*, in: Djuhaendah Hasan, *Business Law Development in A Framework of National Legal System (Commemorating 70 years of Prof. Dr. Djuhaendah Hasan, SH, Professor of Law Faculty, Padjadjaran University)*, Bandung, no publisher, 2007. p.231.
14. Darwin Ginting, *Legal Certainty of Land Right Ownership for Agribusiness Investment in Relation to State's Control Right in National Agrarian Law System*, p.29. Dissertation of Postgraduate Study Program of Padjadjaran University, Bandung, 2009. p.29.
15. Maria S. W. Sumardjono, Agrarian Policies … *Op. Cit.* p. 7.
16. Joyi Winoto, *Op. Cit.* p.7.
17. Muhammad Bakri, *Limitations of State's Land Controlling Right in Relation to Ulayat Right and Individual Right of Land*, Surabaya, A Dissertation of Postgraduate Study Program of Airlangga University, 2006. p.3.
18. Budi Harsono, *Indonesia's Agrarian Law, The History of Enacting Basic Agrarian Law, Content and its Implementation*, Jakarta, Jembatan, 2003. p.130.
19. Darwin Ginting, *Law of Land Right Ownership in Agribusiness,* Bogor, Ghalia Indonesia, 2010. p.88.
20. Darwin Ginting, Fundamentals of Agrarian Law, *Bandung, Unpad Press, 2012.* p.72.
21. Loc Cit., *Law of Land Right Ownership in Agribusiness,* Bogor, Ghalia Indonesia, 2010. p.258.
22. Arie S. Hutagalung, *Points of Thought Around Agrarian Law Issues*, Jakarta, LPHI, 2005. ps.174-175.
23. Darwin Ginting, at. Al**.**, *A Report of Research on Implementation of Land Acquirement for Development for Public Interests*, Research and Development Center of National Law System, National Law Guidance of Republic of Indonesia Ministry of Law and Human Rights, Jakarta, 2013. p.4.
24. Muhammad Bakri, *Limitations of State's Land Controlling Right in Relation to Ulayat Right and Individual Right of Land*, Surabaya, A Dissertation of Postgraduate Study Program of Airlangga University, 2006. p.46.
25. See: Aslan Noor, *Concept of Land Proprietary Right for Indonesian Nation as Viewed from Human Right Doctrine*, Bandung, Mandar Maju, 2006. p.174.
26. Cf. AP. Parlindungan, *Revocation and Clearance of Land Titles: A Comparative Study*, Bandung, Mandar Maju, 1993. ps.7-8.
27. Article 1 paragraph (3) of the 1945 Constitution: State of Indonesia is a constitutional state".
28. Article 27 paragraph (1) of the 1945 Constitution:" All nationals shall have equal position before the law and government and hold high the law and government, nothing excepted."

29. Article 28G of the 1945 Constitution: "Everyone shall be entitled to protect themselves, their family, honour, dignity, and assets under their control, and to the sense of security and protection from threat of fear to act or not to act anything being the rights."
30. Article 9 of UUPA: "(1) Only Indonesian citizens are eligible to own a full relationship with soil, water, and space, in the limitations of the provisions of Articles 1 and 2. (2) Every Indonesian citizen, be it male or female, shall have equal opportunities to acquire a land right and to obtain benefit s and yields thereof, either for himself/herself or for his/her family."
31. Cf. A. Basar Harahap, *Legal Status of Ulayat Land According to National Law*, Jakarta, Yayasan Surya Daksina, 2007. p.26.
32. AP. Parlindungan, Comment … *Op. Cit*. p.81.
33. *Ibid.*
34. Gunanegara, *People & State in Land Acquirement for Development (Philosophical Study, Science Theory, and Jurisprudence)*, Jakarta, Tatanusa, 2008. p.15.
35. Concerning the absoluteness of proprietary right for Indonesian citizens, Maria SW. Sumardjono maintains: "In national agrarian law order, legal relationships between individuals, both Indonesian citizens and foreigners and legal actions related to lands, have been regulated in Law No. 5 of 1960. One of the principles that the Law upholds is nationality principle. That is, only Indonesian citizens can anda full relationship with land as part of the soil in the phrase contained in Article 33 paragraph (3) of the 1945 Constitution. The ***intended relationship is the realization of proprietary right (hak milik—HM).*** On the other side, foreigners and foreign legal corporation that has representatives in Indonesia may be granter with a right to use (hak pakai)." Maria SW. Sumardjono, *Alternatives of Policies on the Regulation of Land and Building Right for Foreigners and Foreign Corporations*, Jakarta, Kompas Books Publisher, 2007. ps.1-2.
36. *Ibid*.
37. Bushar Muhammad, *Adat Law Principles: An Introduction*, Jakarta, Pradnya Paramita, 2006. ps.21-22.
38. *Ibid*. ps.23-24.
39. Article 1 paragraph 3 of Regulation of State Minister of Agrarian/Head of National Agrarian Agency (BPN) No. 5 of 1999 on Guidance of the Resolutions of Traditional Law Community's Ulayat Right Disputes.
40. Cf.: Arie S. Hutagalung, *Points of Thought Around Agrarian Law Issues*, Jakarta, Lembaga Pemberdayaan Hukum Indonesia (LPHI), 2005. p.120.
41. National Law Commission, "Protection and Acknowledgement of Traditional Law Community's Rights", A Research Report, 2004.
42. S. James Anaya, Indigenous Peoples International Law. (New York: Oxford University Press, 1994), p. 89.

43. "Empowering, *Ibid.*
44. Arie S. Hutagalung, *Points of Thought Around Agrarian Law Issues*, Jakarta, LPHI, 2005. ps.174-175.

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_____, *Law of Land Right Ownership in Agribusiness,* Bogor, Ghalia Indonesia, 2010.

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_____ at. al., *A Report of Research on Implementation of Land Acquirement for Development for Public Interests*, Research and Development Center of National Law System, National Law Guidance of Republic of Indonesia Ministry of Law and Human Rights, Jakarta, 2013.

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Sunaryati Hartono, *What is The Rule of Law?*, Bandung, Alumni, 1976.

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