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**THE DYNAMICS OF LAND CONTROL FOR BUSINESS USE  
RIGHTS BY PLANTATION LIMITED COMPANY****Djoko Susanto, Herowati Poesoko, Irawan Soerodjo & Aries Harianto**

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**Abstract**

*The dynamics of land control for Business Use Rights by Plantation Limited Company has been growing rapidly since Law no. 5 of 1960 concerning Basic Agrarian Principles was in force. This study aims to find out the nature, characteristics and certainty value of Business Use Rights by Plantation Limited Company. To fulfill this aim, such approaches as a statutory approach, a conceptual approach, a historical law approach, and a case approach were used to analyse the primary and secondary legal materials. The results reveals that Law no. 5 of 1960 concerning Basic Regulations of Agrarian Principles does not reflect the value of justice, because the regulations are still inconsistent, vagenorm, contrary to the principle of nationality and legal vacuum that regulates the maximum extent of the right to cultivate in particular Plantation Limited Company, so it is not in accordance with the value of justice as desired constitution. As a suggestion, it is necessary to add additional changes to the relevant regulations as well as the aforementioned regulations, especially regarding integrated supervision of institutions related to the acquisition of user rights.*

**Keywords:** Land Control, Business Use Rights, Plantation Limited Company

**Background**

Philosophically, the Indonesian word *tanah* tends to be defined as land and not soil, so that land is seen in a multidimensional vision.<sup>1</sup> Heru Nugroho said that land for the community has suc multidimensional meanings as a). From an economic perspective, land is a means of production that can bring prosperity; b). Politically, it can determine a person's position in decision making in society; c). As a culture land can determine the level of social status of its owner; d). Land has a sacred meaning because it deals with inheritance and transcendental problems.<sup>2</sup>

<sup>1</sup> Agum Gumelar, *Reformasi Pertanahan*, (Bandung: Mandar Maju, 2002), hlm. 3

<sup>2</sup> Heru Nugroho, *Reformasi Politik Agraria Mewujudkan Pemberdayaan Hak-hak atas Tanah*, (Bandung: Mandar Maju, 2002), Hlm. 99

Meanwhile, according to the view of life, awareness and ideals of the Indonesian nation's law based on Pancasila, land is a gift from God Almighty to all Indonesian people who must be grateful for its existence. As a form of gratitude, the land must be managed properly for the benefit of Indonesian human development as a whole in accordance with the development of Indonesian civilization and culture.<sup>3</sup> The form of land use can be managed in the form of agriculture, plantation, livestock, farming and / or even mining. However, land management must be based on legal arrangements that are able to unite the Indonesian nation, which consists of various cultural backgrounds and customs of the Indonesian nation which are *communal* and *religious* in nature. For this reason, land management arrangements must be in line with democratic values, including economic democracy, namely by accommodating the interests of all existing ethnic groups.<sup>4</sup> So, it is hoped that land as a source of capital and social resources can be used as a source of welfare and social justice for all Indonesian people.<sup>5</sup>

Regulations in the land sector must also support the realization of the national goals of the state as stated in the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, hereinafter referred to as the 1945 Constitution of the Republic of Indonesia. Regulations in the land sector must be oriented towards the interests of the nation in the framework of protecting the entire nation and all spilled Indonesian blood. Protection of the interests of the entire Indonesian nation in land is intended to promote general welfare, so that the life of the Indonesian nation becomes more just and prosperous.

Constitutionally, the 1945 Constitution of the Republic of Indonesia has laid the political foundation for national land law as part of the regulation of the earth, water and natural resources contained therein, which is confirmed in the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states "earth and water and The natural wealth contained therein shall be controlled by the state and used for the greatest prosperity of the people." Related to that, in order to realize the above philosophical ideals, Law no. 5 of 1960 concerning Basic Agrarian Principles, hereinafter refers to as UUPA (Basic Agrarian Law), as an implementing regulation of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which is embodied in the provisions of Article 2 paragraph (1) of the UUPA.<sup>6</sup> This provision implies that the control of the state over the earth, water and space is used to achieve the greatest prosperity of the people, in the sense of happiness, welfare and independence in society and the Indonesian constitutional state which is independent, sovereign, just and prosperous.<sup>7</sup> Even though the article contains not only control, but also regulates, administers the allocation, provision, determines, regulates legal relations, and legal actions of people regarding earth, water and space.

The meaning of control over land must be interpreted as a part of the implementation of the noble goals of the nation in order to achieve the welfare of the nation and the State. The meaning of control must also be properly formulated so that the right to control does not injure the foundations of justice in society in order to get the maximum benefit from the land. This is the authority of the state's right to control (Article 2 paragraph 1 UUPA) in the form of regulating and implementing the designation, use, supply and maintenance; determine and regulate legal relations between people; determine and regulate legal relationships between people and legal actions concerning earth, water and space.

Tenure rights over land according to the National Land Law are divided into two, among others: land rights as a legal institution and land rights as a concrete legal relationship. Tenure rights over land as a legal institution, if the land has not been linked to a certain person or legal entity as the holder of the right. For example,

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<sup>3</sup> Naskah akademik Rancangan Undang-Undang Pertanahan, hlm. 53

<sup>4</sup> *Ibid.*,

<sup>5</sup> *Ibid.*,

<sup>6</sup> Dalam ketentuan Pasal 2 ayat (1) Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria, "atas dasar ketentuan dalam Pasal 33 ayat (3) Undang-undang Dasar Negara Republik Indonesia Tahun 1945 dan hal-hal sebagai yang dimaksud dalam Pasal 1 Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria, bahwa bumi, air dan ruang angkasa, termasuk kekayaan alam yang terkandung di dalamnya itu pada tingkatan tertinggi dikuasai oleh Negara, sebagai organisasi kekuasaan seluruh rakyat."

<sup>7</sup> Lihat ketentuan Pasal 2 ayat (3) Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria.

ownership rights, business use rights, Building Use Rights, usage rights and rental rights for buildings.<sup>8</sup> Meanwhile, the right to control land as a concrete legal relationship, when certain land is the object and has been linked to a certain person or legal entity as the subject or holder of the right<sup>9</sup>, so that the acquisition of rights must be based or based on a process that is regulated by statutory regulations.

As for the rights resulting from the conversion of the UUPA, one of which is the right to cultivate originating from the Erfpacht Right, where the right to cultivate is the right to exploit land which is directly controlled by the state within a maximum period of 25 (twenty five) years or 35 (thirty five) years for a legal entity and may be extended for a maximum period of 25 (twenty five) years for the exploitation of agriculture, fisheries and livestock.

Furthermore, in the provisions of Article 28 paragraph (2) UUPA, the right to cultivate is granted to land with an area of less than 5 (five) hectares provided that if the area is 25 (twenty five) hectares or more, it must use proper capital investment and company techniques, which is good according to the times. Meanwhile, those who are entitled to have the right to cultivate are Indonesian citizens or legal entities established under Indonesian law and domiciled in Indonesia,<sup>10</sup> and when the land use rights end, then the land will be controlled by the state and its management and utilization will be regulated.

The granting of the Right to Control the State by the Indonesian people to the State is intended so that the control, ownership, use and utilization of land can bring prosperity to all Indonesian people. The reality shows that the duties assigned to the state have not fully provided prosperity to all Indonesian people equally.

This lack of success is shown by National Land Agency data, almost 80% (eighty percent) of land in Indonesia is controlled by no more than 2 (two percent) of the Indonesian population.<sup>11</sup> These data show that the structure of land ownership in Indonesia is very unfair. This has made it more difficult for the government to alleviate poverty. Injustice occurs everywhere, because most Indonesians do not own land while a small proportion of the population controls land without borders.

Even though the state has regulated with the aim of providing prosperity to the Indonesian people, land cases that have surfaced so far have been dominated by the unbalanced factor of land tenure by legal entities (Plantation Ltd Coy). For example, the land case that occurred in Mesuji Lampung, the Kaltim Fertilizer land case in Bontang, East Kalimantan, the land case in Riau Province, Papua, and others. These land cases have resulted in a prolonged conflict. The community protested against the government for giving unrestricted land to a corporation (Plantation Ltd Coy), even though the land controlled by the corporation (Plantation Ltd Coy) not only did not provide benefits to the surrounding community but instead damaged the environment which in the end, the small community was disadvantaged.

In addition, the land controlled by the corporation (Plantation Ltd Coy) is not fully utilized, the land is only used for speculation, using the certificate for economic purposes, such as company guarantees at the bank, so that not a few of the state land is abandoned by entrepreneurs. Ironically, many of the people living around the land do not own any land, live in poverty and depend on the mercy of entrepreneurs (Plantation Ltd Coy).

In order to solve these problems, it can be seen that the development of the granting of land use rights must be in accordance with the nature of the rights to the land used and the nature and purpose of the granting, as well as the basic reasons for a legal subject to be granted a land use rights by the State to support.

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<sup>8</sup> Lihat Ketentuan Pasal 20 sampai dengan Pasal 45 Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria.

<sup>9</sup> Lihat ketentuan Pasal 28 dan Pasal 29 Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-pokok Agraria

<sup>10</sup> Lihat ketentuan Pasal 2 Peraturan Pemerintah Nomor 40 Tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah.

<sup>11</sup> Laporan Badan Pertanahan Nasional Republik Indonesia (BPN RI) dalam Rapat Dengar Pendapat (RDP) dengan Komisi II DPR RI, 2010. Dalam naskah akademik Rancangan Undang-Undang Pertanahan.

Based on this idea, the researcher will examine in depth and comprehensively the philosophy of land tenure rights to business use rights in national land law. Through this writing, the researcher wants to study and analyze by systematizing the history of legal principles, legal subjects, legal objects including permits, land area, and the period of their tenure over land use rights in Indonesia with the title “**The Dynamics of Land Control for Business Rights by Plantation Ltd Coy**”.

## Discussion

### A. The Essence of Land Use Rights Control by Plantation Ltd Coy

#### A1. History of Land Use Rights

In 1830 the Dutch government in Indonesia, led by Governor General Van den Bosch, began to popularize the concept of land tenure *Cultuurstelsel* or commonly known as the Cultivation System. According to Van den Bosch, this system of forced cultivation refers to the theory that land belongs to the government and therefore village heads are considered to be leasing to the government, and the village head then lends it to farmers. On this basis, the main content of the *cultuurstelsel* is that the land owner no longer has to pay *landrente* (2/5 of the yield), but 1/5 (one-fifth) of the land must be planted with certain plants that the government wants, such as indigo, coffee, tobacco, tea, sugar cane and so on, then the results of the agriculture must be submitted to the government (for export to Europe).<sup>12</sup>

Politically economically, it can be said that the main objective of the *domein's* statement was achieved, as evidenced by the proliferation of foreign capital to the Dutch East Indies, especially in the agribusiness sector, such as sugarcane plantations, coffee, cloves, tea, tobacco, pepper, and so on. large plantations in particular, and indigenous Indonesians in general as referred to in Article 1 paragraph (8) IS. After Indonesian independence, the provisions regarding land leasing were regulated in Articles 8a and 8b as well as Articles 15a and 15b of the Emergency Law Number 6 of 1951, which was later stipulated as Law Number 6 of 1952.

In addition, provisions regarding plantation land are also regulated in Law Number 28 of 1956 concerning Supervision of the Transfer of Rights to Plantation Lands, which applies specifically to *erfpacht*, *eigendom*, and other material rights. Subsequently, Government Regulation Number 35 of 1956 concerning Supervision of the Transfer of Rights to Concession Plantation Lands was also issued, which was later amended by Government Regulation Number 21 of 1959. According to this provision, every act in the form of transfer of rights and every handover for more than one year regarding *erfpacht*, *eigendom*, and other material rights over plantation land, as well as concession lands for plantations from the Dutch and the nation other foreign as well as legal entities can only be carried out with permission from the Minister of Justice (with Law Number 76 of 1957 from the Minister of Agrarian Affairs with the approval of the Minister of Agriculture).<sup>13</sup> The government is fully aware that the laws and regulations in the agrarian sector made by the colonial government, both the Dutch and the British, were very impartial to the Indonesian people. After 15 (fifteen) years of Indonesian independence, Law Number 5 of 1960 concerning Basic Agrarian Regulations was born (hereinafter referred to as UUPA 1960).

This provision aims to make it easier for the Government to supervise and ensure that the right recipient is able to operate the plantation company properly and does not make the plantation the object of speculation. There is great hope for plantation rights holders to be able to provide benefits to land rights in the form of land management in order to provide maximum benefit for the welfare of the community, so that the purpose of land management according to the National Agrarian Law is in accordance with the 1945 Constitution.

The birth of the UUPA, there was a big change in agrarian history in Indonesia, where the provision explicitly states that it is no longer accommodating, *Eigendom Rights*, *Verklaring Domains*, and *Erpacht Rights*. In

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<sup>12</sup> Wiradi, dalam Noer Fauzi dkk., *Prinsip-prinsip Reforma Agraria, Jalan Penghidupan dan Kemakmuran Rakyat*, LAPERA Pustaka Utama, Jakarta, 2001, hlm. 7

<sup>13</sup> *Ibid.*

addition, in the UUPA there are basic values of national agrarian law, namely Nationality; The right to control from the state; Recognition of customary rights; and social functions.<sup>14</sup> The national character of the UUPA clearly shows that in fact the so-called territory of Indonesia, as a unitary territory of the Republic of Indonesia is sovereign, homeland, nation, speak Indonesian, which is inseparable from the earth, water and natural resources contained therein.

One of the main objectives of Government policies in the context of granting Business Use Rights is to achieve the greatest possible prosperity for the people as mandated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia to the State. The granting of Business Utilization Rights over land which is directly controlled by the State only occurs with a Government decree. In this regard, it is necessary to explain in general that land rights as stated in Article 16 paragraph (1) of the UUPA can occur due to the following matters.

Based on the authority derived from the provisions of Article 2 paragraph (2) of the UUPA, the Government can grant rights to land to persons, legal entities or government agencies. The act of granting such rights in legal terms is referred to as a provision or decision. As formulated by several experts, the definition of a decision or decision is as follows.

1. **Prins** formulates a decision as a unilateral legal action in the field of review carried out by the overheid based on his special authority;
2. **Van Der Pot** and **Van Vollenhoven** imposes limits on the meaning of decisions as legal actions that are unilateral in the field of government, carried out by a government agency based on their extraordinary powers;
3. **Van Der W.** provide a formulation of stipulation as a one-sided public act carried out by government tools based on a special power, given the name *beschikking* or provision.

Agree with this matter, that the decision to grant rights to land is a limited legal action carried out based on the authority of the State as the holder of the highest rights to land throughout Indonesia. Meanwhile, granting rights to land according to the provisions of Article 1 point 8 of the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 3 of 1999 is a stipulation that gives a right to State land, extension of the period of rights, renewal of rights, change of rights, including granting rights over Management Rights.

Although the highest right to land is the right of the Indonesian people and in its implementation based on the provisions of Article 1 paragraph (1) of the UUPA it is carried out by the Government, the Government cannot act arbitrarily towards land in its territory, meaning that it cannot automatically determine a right to land above state land. Government determination in the land sector constitutes an extraordinary authority in determining the legal relationship between people and land. However, the freedom of the Government in determining land rights only applies to lands that are not attached to a previous land title. Therefore, the object of government determination above is limited to lands directly controlled by the State (State land).

## ***A2. Aim of Plantation Ltd Coy to Get Land Use Rights***

Legal land use rights are obtained through a Government Decree. This is contained in the provisions of Article 31 of the UUPA which states that the Right to Use Business occurs because of the Government Decree. This provision indicates that Business Use Rights can occur only by Government Stipulation. Where according to the UUPA, the Right to Use Business is not a continuation of the *Erpacht* right, but the Right to Business is a new right.<sup>15</sup> The reform of agrarian law has a consequence that the old rights are converted into user rights stipulated by government regulations.

<sup>14</sup> Waskito dan Hadi Arnowo, *Pertanahan, Agraria, dan Tata Ruang*, Cetakan Pertama, (Jakarta: Balebat Dedikasi Prima, 2017), hlm. 79.

<sup>15</sup> Lihat dan baca Penjelasan Pasal 50 Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria.

The UUPA has decided that those who can have land use rights are Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia. The UUPA does not impose limits on legal entities that can have land use rights. The researchers understand that state-owned companies and private-owned companies can have land use rights. It's just that the UUPA provides a limitation as described in the Elucidation of the provisions of Article 30 of the UUPA that the right to cultivate business cannot be owned by foreigners.

Only legal entities with progressive national capital, either genuine or non-original, can have a legal entity that can hold a Business Use Rights. Legal entities with foreign capital are given the opportunity to have land use rights on the condition that it is required by the law which regulates the universal national development plan as regulated in the provisions of Article 55 of the UUPA. In addition, Business Use Rights are only granted for businesses in the fields of agriculture, plantation, fishery and / or livestock.<sup>16</sup>

Plantation in Indonesia has been known since the Dutch colonial era in Indonesia. Plantation as part of the history of the Indonesian nation cannot be forgotten. Given its huge role in the economy at that time, in 1830, the Dutch colonial government focused on plantations as the main area supporting the Dutch East Indies economy. During the Dutch colonial period, the prevailing plantation system was part of a commercial and capitalistic agricultural economic system.<sup>17</sup> During the Dutch East Indies era, the form of the plantation system was in the form of large-scale and complex agricultural enterprises, which were capital intensive, the land area was used so widely, large labor organizations, and so on. This system only benefited the colonial side. The system is known as the *culturstesels*.<sup>18</sup> This cultural system is capitalist which needs to be changed in order to rearrange the rights and obligations of PT. Plantation for the greatest prosperity of the people.

The year of 1960 with the birth of the UUPA gave new hope to the Indonesian people to end land colonialization, especially in the plantation sector. The UUPA which regulates land rights provides a breath of fresh air to domestic stakeholders. The entry of the plantation sector as one of the implementers of Business Use Rights shows that plantations have an important role to play in order to achieve the goal of land management for the greatest welfare of the people.

According to the provisions of Article 1 Number 1 of Law Number 39 of 2014 concerning Plantations, hereinafter referred to as the Plantation Law, it explains that all activities of managing natural resources, human resources, production facilities, tools and machines, cultivation, harvesting, management and related marketing Plantation crops. The provisions of Article 3 of the Plantation Law state that the operation of plantations aims to:

- a. Improve people's welfare and prosperity;
- b. Increase the source of foreign exchange;
- c. Provide employment and business opportunities;
- d. Increase production, productivity, quality, added value, competitiveness and market share;
- e. Increase and fulfill the needs of domestic industrial consumption and raw materials;
- f. Provide protection to Plantation Business Actors and the community;
- g. Manage and develop Plantation resources optimally, responsibly and sustainably; and
- h. Increase utilization of Plantation services.

The purpose of implementing plantations is to improve the welfare and prosperity of the people as stated in these provisions in accordance with the mandate of the constitution. This is also in line with the purpose of the UUPA which regulates land ownership and use, so that land throughout the territory of the Indonesian nation

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<sup>16</sup> Lihat dan baca Pasal 14 Ayat 1 Peraturan Pemerintah Republik Indonesia Nomor 40 Tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan, dan Hak Pakai Atas Tanah.

<sup>17</sup> Sartono Kartodirdjo dan Djoko Suryo, *Sejarah Perkebunan di Indonesia: Kajian Sosial Ekonomi*, (Yogyakarta: Aditya Media, 1991), hlm. 3.

<sup>18</sup> *Ibid*, hlm. 4.

is used for the greatest possible prosperity of the people, both individually and in mutual cooperation.<sup>19</sup> However, the nature of mutual cooperation is very difficult to implement because it has been regulated by laws and regulations that also base justice for the welfare of the people.

Indonesia's history cannot be separated from plantation activities. It was said by Sartono Kartodirjo and Djoko Suryo that during the Dutch East Indies era the existing plantation system was part of a commercial and capitalistic agricultural economic system.<sup>20</sup> It cannot be denied that plantations play an important role in national development.

Looking at the description of land use rights, it has been stated that plantations as a sub-sector of agriculture are one of the areas where land can be granted land use rights. The existence of an obligation for holders of Business Use Rights to carry out agricultural, plantation, fishery and/or livestock businesses as stated in the provisions of Article 12 Paragraph (1) of the UUPA shows that plantation is one of the areas chosen to be granted Business Use Rights. In addition, the provisions of Article 14 Paragraph (1) of the UUPA in substance state that the Holders of Business Use Rights have the right to control and use the land granted with Business Use Rights to carry out business in the fields of agriculture, plantation, fishery, and / or livestock. This provision emphasizes that the right to use business can be granted only for a number of business fields, one of which is plantation.

This is reaffirmed in the provisions of Article 11 Paragraph (1) of the Plantation Law which states that Plantation Business Actors can be granted rights to land for Plantation Business in accordance with the provisions of laws and regulations. In the provisions of the article in its explanation, it is explained that the land rights required for a plantation business can be in the form of ownership rights, land use rights, building use rights, and / or use rights in accordance with the provisions of laws and regulations.<sup>21</sup> This is because there is confusion in norms and even inconsistencies with the aim of Article 16 UUPA and Article 28 paragraph (1) UUPA.

The plantation Ltd Coy as the holder of Business Use Rights is obliged to cultivate plantation land at least 30% (thirty percent) of the total area. Second, the plantation company no later than 6 (six) years after granting the title of Business Use Rights, is obliged to cultivate the entire area of land rights that can technically be planted with Plantation Plants.

If the plantation land is not cultivated as described above, the land that has not been exploited is taken over by the state in accordance with the provisions of the laws and regulation. Plantation companies holding land use rights that do not implement this policy will be subject to administrative sanctions. These sanctions include fines, temporary suspension of business activities, and/or the government will revoke Plantation Business permits.

## **B. Characteristics of the Ownership of Business Use Rights by Plantation Ltd Coy**

### ***B1. Subject of the Ownership of Business Use Rights by Plantation Ltd Coy***

The right to cultivate as a form of right granted by the government through its determination as the holder of the right to control over land in Indonesia certainly has requirements that must be met in accordance with applicable laws and regulations both in terms of subject, object, period of time to the land area to be granted / stipulated on the holder of the right to cultivate in order to fulfill legal certainty in his control, as for the terms and conditions as in the provisions of the UUPA in conjunction with PP Number 40 of 1996 jo the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 Jo PP No. 7 of 2017).

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<sup>19</sup> Lihat dan baca Ketentuan Berpendapat huruf d Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Pokok-Pokok Agraria.

<sup>20</sup> *Ibid.*

<sup>21</sup> Lihat dan baca Ketentuan Penjelasan Pasal 11 Ayat (1) Undang-Undang Nomor 39 Tahun 2014 tentang Perkebunan

As a form of land rights, land use rights, as a form of land control, certainly have a legal subject as the party controlling the land rights who are able to cultivate and defend these rights from other parties through registration of rights at the local land office. This subject is also a form of identity of ownership of the right to cultivate that has a legal attachment or relationship to the land so that it is able to maintain and cultivate for the purpose of the right to cultivate it. The subject of the right to cultivate as stipulated in Article 30 paragraph (1) UUPA *vis. Article 2 Government Regulation Number 40 Year 1996 and Article 17 the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 9 Year 1999 Jo Article Article 2 PP No. 7 of 2017*), that is:

- 1). Indonesian citizen;
- 2). A legal entity established under Indonesian law and domiciled in Indonesia

Basically, the theory of legal entities has developed rapidly in medieval Europe, which certainly requires a juridical, theoretical, and philosophical basis for the legitimacy of the authority, ownership and responsibility of the legal entity. The science of law recognizes the concession theory as the basis for the birth of a legal entity for a group of people created by certain authorities so that the legal entity is given the status of a legal entity by the state or government which can be granted based on law or implementing regulations cannot be separated from the state constitution.

The legal entities that are widely used throughout the world are business legal entities in the form of Limited Companies. There are several legal principles regarding legal entities, especially business legal entities, which have developed since the industrial revolution as follows.

1. Recognition to business associations as legal entities;
2. As a legal entity, the company is the holder of rights and obligations;
3. Separate responsibilities between individual company owners and their own company responsibilities;
4. The principle of free transferability of share / interest applies;
5. As a legal entity, the company has management as an accomplice to the company's activities;
6. As a legal entity, the company has management as an accomplice in organizing the company's activities;
7. The freedom of incorporation principle applies;
8. The company has the authority to make contracts and perform various other legal actions, except for legal acts that are not in accordance with the nature of the legal entity.

Legal acts such as marriage, childbearing, previously even criminal acts, cannot be carried out by a legal entity.<sup>22</sup>

A more in-depth discussion of this legal subject matter which is personal requires citizenship to be the main one, where foreigners are not allowed to have the right to cultivate. As for legal entities, it is determined that only legal entities that are subject to Indonesian law and domiciled in Indonesia may have rights.

This legal entity can be in the form of an ordinary legal entity, a legal entity in the form of a joint venture, namely a company that uses foreign investment, it can also be a legal entity that uses domestic capital. Legal entities with foreign capital can only be granted the right to cultivate if according to the law regulating universal national development planning is necessary, and this legal entity must be established according to applicable law in Indonesia and must have a domicile in Indonesia.

Furthermore, in Article 30 paragraph (2) UUPA it is stated that if the owner of the right to cultivate does not meet the requirements as referred to above, then within a period of 1 (one) year the right holder must relinquish his rights or transfer to another party who meets the requirements. Furthermore, if a person who has the right to cultivate loses his citizenship, in this case Indonesian citizenship, then that person cannot hold the right to cultivate anymore, as well as a legal entity, if the legal entity is transferred to another country, then the

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<sup>22</sup> Munir Fuady, *Teori-Teori Besar (Grand Theory) dalam Hukum*, hlm. 157.



right must be released. Meanwhile, if the right to cultivate in question is not released or transferred within that period of time, then the right is nullified by law, with provisions stipulated by government regulations.

Based on this provision there are sanctions for non-compliance with what is stipulated in Article 30 paragraph (2) of the UUPA, so that the right to cultivate will be nullified by law, if the right holder no longer meets the requirements and does not transfer to other parties who meet the requirements or release it in 1 (one) year. With the abolition of the said exploitation rights, the rights and other parties which are contained in the land concerned do not automatically abolish, the rights of these third parties are protected and respected. For example, the rights of a mortgage right holder who is burdened with the land that is nullified are still respected.

In addition, what deserves attention related to the legal subject of the right to cultivate, namely the type of legal entity that holds the right to cultivate it, this needs attention because the various types of legal entities in Indonesia and their management also need to be considered. So that it can minimize the smuggling of laws in control of land rights, in many cases, companies make Business Use Rights as a commodity owned without any restrictions through the form of large and affiliated legal entities, such as in holding companies, where there are parent and subsidiary companies inside it.

This should be a material for serious study considering that this legal subject greatly affects the area of land that can be legally controlled by a legal entity based on statutory regulations. So that it can be maintained and can be legally accounted for according to the applicable regulations even though if examined more deeply it is a form of neo-feudalism that torments the people and breaks justice in controlling land rights in Indonesia which should be used maximally for the welfare of the people as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia. Since the classification of legal subjects for legal entities is not clearly regulated, it is not impossible that neo-feudalism will be created or the right to cultivate is interpreted as just another name for erpacht rights in the colonial era.

Furthermore, the procedure for the formation of a Limited Company is established based on the Agreement. Therefore, to be able to establish a Limited Liability Company, there must be at least 2 (two) people who promise to each other. The Company Law does not limit the number of people (parties) to establish a Limited Company. Regarding the maximum number of people (parties) to be able to establish a Limited Company, it is entirely up to the parties making the agreement, what is stipulated in the Company Law is the minimum number of parties to establish a Limited Company, not the maximum number.<sup>23</sup> The provisions which require a Company to be established by 2 (two) or more persons do not apply to:

- a. Companies whose shares are wholly owned by the State;
- b. Companies that manage stock exchanges, clearing and guarantee institutions, depository and settlement institutions, and other institutions as regulated in the Capital Market Law;
- c. Public company.

After the Limited Company was established, the agreement theory was no longer valid. However, after the Limited Company was established, the "institutional" theory applies. According to this theory, shareholders are subject to Limited Companies as legal entities. The legal action at a Limited Company is carried out on behalf of the Limited Company and the one responsible is the Limited Company itself. Shareholders are not responsible for the actions of a Limited Company. This means that if the Limited Company goes bankrupt, in the event that there is no violation stipulated in the Company Law, the bankruptcy will not affect the shareholder's wealth.

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<sup>23</sup> lihat penjelasan Pasal 7 ayat (1) UUPT 2007

Limited Company is a legal entity that is a capital alliance, established based on an agreement, conducting business activities with an authorized capital wholly divided into shares and fulfilling the requirements stipulated by this Law and its implementing regulations. So the emphasis is on capital, which is why a Limited Company is called a pool of capital. So it can be concluded that capital is a material requirement in the establishment of a Limited Company. This means that if you want to establish a Limited Company, there must be capital. The minimum specified in the Company Law, as described below.

Apart from having rights because of share ownership, shareholders also have obligations. The main obligation of the shareholder is to pay up the shares that must be paid and as long as it has not been paid in full, he is not allowed to move to another hand without the approval of Limited Company. The general obligation of Limited Company holders is to manage individual assets, drive the company's businesses and represent Limited Company inside and outside the law.<sup>24</sup>

Article 36 paragraph (1) of the Company Law stipulates that the Limited Company "Company" is prohibited from issuing shares either to be owned by itself or to be owned by another Company, whose shares are directly or indirectly owned by the Company. In principle, implicitly, the issuance of shares is an effort to raise capital, so the obligation to pay up shares should be borne by the shareholders. For the sake of certainty, this provision stipulates that the Company may not issue shares to be owned by itself. This prohibition includes the prohibition of cross holding which occurs when the Company owns shares issued by another Company, either directly or indirectly. The definition of direct cross-ownership is if the first Company owns shares in the second Company without going through ownership in one or more "intermediate Companies" and vice versa the second Company owns shares in the First Company. Meanwhile, the meaning of indirect cross-ownership is the ownership of the first Company over shares in the second Company through ownership in one or more "intermediate Companies" and vice versa the second Company owns shares in the first Company.

The provisions on prohibition of share ownership as referred to above, do not apply to ownership of shares obtained based on a transfer due to law, a grant or a will as stipulated in Article 36 paragraph (2) of the Company Law. In accordance with the explanation of this Article, it is said that because there is no issuance of shares requiring a deposit of funds from other parties, this does not violate the provisions on the prohibition of issuing shares as referred to in Article 36 paragraph (1) of the Company Law. Then, shares acquired by law, grants and wills based on the provisions of Article 36 paragraph (2) of the Company Law, within a period of 1 (one) year after the date of acquisition must be transferred to other parties who are not prohibited from owning shares in the Company. If the other company is a securities company, the provisions of the capital market laws and regulations shall apply.

The definition of Cross Holding is regulated in Law No. 40 of 2007 concerning Limited Companies, Article 36 paragraph (1) and its explanation, which explains that cross holding is:

"Cross holding that occurs when a company owns shares issued by another company that owns the company's shares, either directly or indirectly"

The definition of direct cross-ownership is if the first company owns shares in the second company without going through ownership in one or more "intermediate companies" and vice versa, the second company owns shares in the first company. The meaning of indirect cross-ownership is the ownership of the first company of shares in the second company through ownership in one or more "intermediate companies" and vice versa, the second company owns shares in the first company.

Article 36 of Company Law No. 40 Year 2007, states that the Company is prohibited from issuing shares to own or to be owned by other Companies whose shares are directly or indirectly owned by the Company. The

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<sup>24</sup> Farida Hasyim, *Hukum Dagang* (Jakarta: Sinar Grafika, 2009), hlm. 155

Company Law explicitly prohibits cross share ownership. The prohibition on cross-ownership of shares as regulated in Article 36 of the Company Law is the failure to achieve additional capital in the issuance of company shares, as well as the absence of legal protection for minority shareholders and also the absence of independence due to a mix of interests between the management of the Company and the shareholders in the Company, so that business actors who carry out the practice of cross-share ownership are able to run the company at a relatively low cost.

In the reform era, plantations as an agricultural sub-sector were one of the areas given special rights related to control over land, namely the control of land rights with land use rights. It has been explained previously that Business Use Rights can be granted to legal entities. The UUPA does not limit whether private legal entities or state-owned legal entities (State-Owned Company) can have land use rights. Not regulating this matter means that the UUPA provides an opportunity for State Legal Entities to have Business Use Rights.

One of the State-Owned Company that has Business Use Rights, namely Nusantara Plantation Ltd Coy is a State-Owned Company in the form of a legal entity. Nusantara Plantation Ltd Coy is also the name of fourteen state-owned companies operating in the plantation sector throughout Indonesia. Even though Nusantara Plantation Ltd Coy is the State-Owned Company, it should not receive special treatment in granting Business Use Rights. PT. Perkebunan Nusantara has the same rights and obligations as other legal subjects who can have land use rights.

Nusantara Plantation Ltd Coy in order to obtain Business Use Rights must register. The provisions of Article 7 Paragraph (1) of the Government Regulation of Business Use Rights, Building Use Rights, and Use Rights on Land state that the Granting of Business Use Rights as referred to in Article 6 Paragraph (1) must be registered in the land book at the Land Office. Furthermore, in Article 7 paragraph (2) Government Regulation of Business Use Rights, Building Use Rights, and Use Rights on Land Use Rights for Business occurs since being registered by the Land Office in the land book in accordance with the provisions of the legislation. This provision provides an understanding that in addition to the existence of a Business Use Right, registration must also be carried out. According to Article 19 Paragraph (1) UUPA, land registration aims to guarantee legal certainty by the Government.

According to Maria S.W. Sumardjono, systemic land registration is not only to provide legal certainty for land rights, but also to reveal the control of *Guntai* or *absentee land*.<sup>25, 26</sup> Land registration which will produce proof of land rights in the form of a certificate is a realization of one of the objectives of the Company Law. The obligation is to carry out land registration by Plantation Ltd Coy. In principle, this Nusantara Plantation Ltd Coy is borne by the government. The obligations imposed on Nusantara Plantation Ltd Coy as holders of Business Use Rights are obliged to:<sup>27</sup>

- a. Pay state revenue;
- b. Carry out agricultural, plantation, agricultural and / or livestock businesses according to the designation and requirements as stipulated in the decision to grant their rights;
- c. Cultivate land use rights for business properly in accordance with business feasibility based on the criteria stipulated by the technical agency;
- d. Build and maintain environmental infrastructure and land facilities in the area of land use rights;
- e. Maintain soil fertility, preventing damage to natural resources and preserving the environmental capacity in accordance with the prevailing laws and regulations;

<sup>25</sup> Tanah guntai atau tanah absentee adalah tanah yang letaknya diluar daerah tempat tinggal yang mempunyai tanah tersebut. Dimana sejak disahkannya Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria pemilikan tanah dengan guntai atau tanah absentee dilarang. Larangan ini dapat dijumpai pada Ketentuan Pasal 10 Ayat (1) Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok agraria yang menyatakan bahwa setiap orang dan badan hukum yang mempunyai sesuatu hak atas tanah pertanian pada dasarnya diwajibkan mengerjakan atau mengusahakannya sendiri secara aktif, dengan mencegah cara-cara pemerasan.

<sup>26</sup> Maria S.W. Sumardjono, Kebijakan Pertanahan Antara Regulasi dan Implementasi, (Jakarta: Kompas, 2001), hlm. 181.

<sup>27</sup> Lihat dan baca Pasal 12 Ayat (1) Peraturan Pemerintah Nomor 40 Tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan, dan Hak Pakai Atas Tanah.

- f. Submit a written report at the end of each year regarding the use of Business Use Rights;
- g. Submit the land granted with the Right to Cultivate to the State after the Right to Cultivate is abolished;
- h. Submit the revoked Business Utilization Right certificate to the Head of the Land Office.

The obligations as described above must be carried out by private Limited Companies or Those established using foreign investment. The Nusantara Plantation Ltd Coy as holders of land use rights are prohibited from transferring exploitation of land use rights to other parties, except in cases that are permitted according to the prevailing laws and regulations.<sup>28</sup> In addition, if the land use rights for business due to geographical or environmental conditions or other reasons are located in such a way that it limits or closes the yard or other plot of land from public traffic or waterways, Nusantara Plantation Ltd Coy, as the holder of Business Use Rights, is obliged to provide a way to the outside or a waterway or other facilities for the confined estates or parcels of land.<sup>29</sup> Therefore, the control of Business Use Rights is obliged to organize, maintain its designation so that the geographical conditions remain well organized in a healthy environment for the community or the plants.

### **B2. Object of the Ownership of Business Use Rights**

Based on the concept of Article 33 of the 1945 Constitution of the Republic of Indonesia as a roadmap, national development and as a basis for agrarian politics, it has been co-opted with various sectoral laws and regulations. The UUPA calls for granting the right to cultivate in the agrarian sector as a basis for joint efforts, a joint form, aimed at the greatest prosperity of the people, allowing for cooperation between the State and regional states and domestic and foreign private sectors. In connection with the provisions of Article 14 Government Regulation of Business Use Right, Buiding Use Rights, and the Right to Use on Land, which in substance is that the holder of a Business Use Right has the right to control and use the land granted with a Business Use Right to carry out business in the fields of agriculture, plantation, fishery and / or livestock; Control and use of water sources and other natural resources on land granted with Business Use Rights by holders of Business Use Rights can only be carried out to support the business as referred to in paragraph (1) by taking into account the provisions of the prevailing laws and regulations and the interests of the surrounding community.

In order to achieve the mandate of Article 33 of the 1945 Constitution, it must be understood in an integral manner so that it is interpreted as a whole and related to one another. Based on the foregoing, to interpret the right to use as a joint venture, this form of business must have the face of a cooperative, which is a legal entity as required to obtain the right to cultivate in Article 30 paragraph 1 UUPA. The various types of land rights in Indonesia as stipulated in the provisions of Article 16 of the UUPA, of course, have consequences for the types of land to which each type of land rights can be attached.

Business Use Rights are the rights to exploit land that is directly controlled by the state for agriculture, fishery or livestock businesses, so that the main object of a Business Use Right is land, however what land is meant to be classified for legal certainty in its control, therefore become objects of Business Use Rights, as regulated in the provisions of Article 5 Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Establishing Business Use Rights, which states that: "Acquisition of land use rights as referred to in Article 4 paragraph (1) may come from: a. State Land; b. Land Rights; c. Ulayat Land; d. State Forest Area; and e. Transmigration Management Rights, "which is in line with the previous arrangement, where the acquisition of right to cultivate can come from:

1. State land as stipulated in the provisions of Article 28 UUPA jo. Article 4 paragraph (1) Government Regulation Number 4 of 1996;

<sup>28</sup> Lihat dan baca Pasal 12 Ayat (2) Peraturan Pemerintah Nomor 40 Tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan, Hak Pakai Atas Tanah.

<sup>29</sup> Lihat dan baca Pasal 12 Ayat (2) Peraturan Pemerintah Nomor 40 Tahun 1996 tentang Hak Guna Usaha, Hak Guna Bangunan, Hak Pakai Atas Tanah.

2. If the land to be used as the object of cultivation rights is a forest area that can be converted, it is necessary to request the release of the forest area from the Minister of Forestry as regulated in the provisions of Article 4 paragraph (2) Government Regulation Number 40 of 1996;
3. If the land to be used as the object of the right to cultivate is land that already has rights, then the right must be released first, as stipulated in Article 4 paragraph (3) of Government Regulation Number 40 of 1996;
4. In the case of the land being requested there are plants and / or buildings owned by other people whose existence is based on legal rights grounds, then the owner of the plant or building must receive compensation from the new rights holder, as stipulated in Article 4 paragraph (4) Government Regulation Number 40 Year 1996;
5. If the land being requested is communal land, the applicant for the right to cultivate must enter into an agreement with the customary law community as the customary rights holder to recognize the transfer of use of the communal land in question for a certain period of time, so that if that period expires, or the land is no longer used. Again or neglected, the right to cultivate is abolished, and subsequent land use must obtain new approval from the local customary community, this is regulated in the Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 5 of 1999.

Meanwhile, in Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Determining Business Use Rights, Land acquisition activities carried out based on a Location Permit prior to the enactment of this Ministerial Regulation, are still valid and can be granted Business Use Rights. Regarding the maximum area limitation, based on the Instruction of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 5 of 1998 jo. Regulation of the State Minister for Agrarian Affairs/ Head of the National Land Agency Number 2 of 1999, the maximum extent of land control that can be granted a location permit for Business Use Rights in the plantation sector for all commodities except sugarcane, the maximum limit for one province is 20,000 (twenty thousand) hectares, while for sugarcane covers an area of 60,000 (sixty thousand) hectares, while for the right to cultivate the area of ponds, the maximum area in one province in the island of Java is 100 (one hundred) hectares and outside Java is 200 (two hundred) hectares. The maximum area for large-scale land tenure covers the entire territory of Indonesia for all commodities except sugarcane, the maximum area limit is 100,000 (one hundred thousand) hectares and for sugar cane commodity 150,000 (one hundred and fifty thousand) hectares. Whereas the area that can be granted a Business Utilization Right is at least 5 (five) hectares, and the maximum area that can be granted a Business Utilization Right to an individual is 25 (twenty five) hectares, while the maximum area that can be granted to a legal entity is determined by the Minister with considerations from the competent authority in the field of business concerned, bearing in mind the area required for the implementation of the most efficient business unit in the field concerned (Article 5 PP 40/96). Meanwhile, in Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Determining Business Use Rights are not re-regulated regarding the maximum area so that they still refer to the previous regulations.

The absence of definite boundaries related to the area of land that can be controlled by legal entities, of course, will open up the widest gap in land tenure which is unlimited, whereas if we look at the facts, the land used or allotment of agriculture is very unequal between ownership by cultivators and legal entities. The existence of inequality like this will easily lead to conflict because the sense of justice related to land ownership is very unbalanced, on the other hand farmers have difficulty obtaining arable land to meet their daily needs, on the other hand, legal entities or corporations have unlimited land which is used as commodities and tools, guarantees in order to obtain banking capital without being properly utilized and not bringing welfare benefits to the surrounding community.

In 2014 Nusantara Plantation Ltd Coy III has officially become a holding company for state-owned plantations. The area owned by Nusantara Plantation Ltd Coy III (Persero) Plantation Holding is 1,181,751.03

ha (one million one hundred eighty one thousand seven hundred fifty one point three hectares).<sup>30</sup> Another example of the land area owned by Nusantara Plantation Ltd Coy with Business Use Rights, namely Nusantara Plantation Ltd Coy II, where the total area under management is 109,409.61 Ha (one hundred nine thousand four hundred nine point sixty one hectare). The planted area is 52,118.06 hectares (fifty-two thousand one hundred eighteen point six hectares). Nusantara Plantation Ltd Coy owns 13 (thirteen) plantation companies and each company has land use rights. This shows that Nusantara Plantation Ltd Coy is a legal entity that is the priority of the ruler of land use rights.

### **B3. Location Permit for Objects**

In addition, issues related to land are location permits, where based on the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 2 of 1993, applications must be submitted through the Head of the local Regency Land Office and signed by the Head of the Land Office, which is then based on a Decree. President Number 34 of 2003 is amended the application for a location permit is submitted through the local District Head, whose data will be processed based on data from the Land Office and the Decree will be signed by the Regent based on the Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 2 of 1999.

According to the provisions of Article 28 Paragraph (2) of the UUPA, it is stated that the Right to Use Business is granted over land with an area of at least 5 (five) hectares provided that if the area is 25 (twenty five) hectares or more, it must use appropriate capital investment and company techniques, both according to the times. Further provisions regarding the area of land that can be granted with a Business Utilization Right are regulated in Article 5 of the Government Regulation on Business Use Rights, Building Use Rights, and Land Use Rights, which states that the maximum area of land that can be granted with a Business Use Rights to legal entities is determined by The Minister by considering the competent official in the field of business concerned, taking into account the area required for the implementation of the most efficient business unit in the field concerned.

Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency Number 7 of 2017 concerning Arrangements and Procedures for Establishing Business Use Rights does not regulate the maximum area of land granted with Business Use Rights. The Regulation of the Minister of Agrarian and Spatial Planning/National Land Agency concerning Regulations and Procedures for Establishing Business Use Rights only regulates Officials authorized to grant, extend and renew Business Use Rights. This is as evident in the provisions of Article 59 Paragraph (1) of the Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency concerning the Regulations and Procedures for Establishing Business Use Rights which state that the authority to grant, extend or renew Business Use Rights in this Ministerial Regulation is carried out in accordance with the following provisions.

- a. Head of Land Office with a land area of up to 25 Ha (twenty five hectares);
- b. Head of National Land Agency Regional Office with a land area of more than 25 Ha (twenty five hectares);  
and
- c. Minister of Agrarian Affairs and Administration / Head of the National Land Agency with a land area of more than 250 Ha (two hundred and fifty hectares).

The lack of clarity regarding the maximum limit of land tenure rights for business use has resulted in the mandate of Article 33 Paragraph (3) of the 1945 Constitution that will never be achieved, that is where the laws and regulations governing the Right to Use Business as the main door to achieve justice and to achieve the greatest prosperity of the people throw policies at each other.

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<sup>30</sup> Diolah dari sumber Internet <https://www.holding-perkebunan.com/tentang> diakses pada tanggal 11 Maret 2020 Pukul 08.34 WIB.

The land area of Nusantara Plantation Ltd Coy that is so extensive, with the existence of policies regarding the current timeframe, are far from the expectations of agrarian reform. If this is allowed to continue, what happens is control over land by one person or a certain group. Meanwhile, UUPA hopes that the granting of land rights can achieve the greatest prosperity of the people.

In addition, the policy for an unlimited period of land use rights may result in the centralization of land use rights holders in the hands of Nusantara Plantations Ltd Coy for decades or even hundreds of years or more. This will certainly injure the sense of justice in society. Where equal distribution of land rights will not be achieved, considering that the amount of land will not increase, while the need for land continues to increase. Therefore it is necessary to have a legal remedy that explicitly supports the spirit of equal distribution of land rights, so that the right to use business is not only controlled by one particular group.

### **C. The Reflection of the Value of Legal Certainty in Business Use Rights Control of Plantation Ltd Coy** **CI. Inconsistency towards Business Use Rights Subject by Plantation Ltd Coy**

Changes in the direction of politics in a very dynamic manner during 1962 to 1965 which was then followed by a change in the Old Order political regime by the New Order regime in turn destroyed the entire populist policy building in the field of land law. Since the beginning, a kind of consensus was built among supporters of the New Order government to prioritize stabilization, rehabilitation and development of a capitalistic economy. According to Fauzie in Bachriadi Dianto, et al, stated that the dynamics of Indonesia's post-colonial land policy which marked the beginning of the New Order's rule was the term "Destruction of Populism and Development of Capitalism."<sup>31</sup>

Basically, the periodization of land policies during the New Order period in line with the change in focus of macroeconomic policies can be divided into 3 (three) sub-periods, namely the "Exploitation of Natural Resources" Policy in the 1967-1973 period; Policy "Pursuing Productivity Without Structuring" in the period 1974-1983; and the "Land Deregulation" Policy in the period 1984-1997.<sup>32</sup>

The complexity of the legal problem in the defense sector is influenced by the nature of the land which is an integral part of human life and as a primary need that has high economic value, various interests will always accompany any changes made in order to realize the ideal of an effective, efficient national development, and can accommodate all the aspirations of both investors and affected communities.

According to Sahala Bistok Silalahi, chaotic land problems occur because of sectoral egos from ministries / agencies related to land to make sectoral laws that castrate UUPA and Sectoral Laws, which should be based on UUPA as basic regulations on agrarian principles.<sup>33</sup>

It has been previously described in sub-chapter 2.2 point A regarding the subject of control over Business Use Rights by Plantation Ltd Coy is stated that as a form of land rights, land use rights as a form of land control certainly have a legal subject as the party controlling the land rights who are able to cultivate and defend these rights from other parties through registration of rights at the local land office. This subject is also a form of identity of ownership of the right to cultivate that has a legal attachment or relationship to the land so that it is able to maintain and cultivate for the purpose of the right to cultivate it. The subject of the right to cultivate as stipulated in Article 30 paragraph (1) UUPA jts. Article 2 Government Regulation Number 40 Year 1996 and Article 17 Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 9 Year 1999 Jo Article Article 2 PP No. 7 of 2017), that is:

1). Indonesian citizens;

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<sup>31</sup> Bachriadi Dianto, dkk, *Reformasi Agraria: Perubahan Politik, Sengketa dan Agenda Pembaruan Agraria di Indonesia*, (KPA-FE-UI, Jakarta), hlm. 67-69

<sup>32</sup> *Ibid.*, hlm. 64-65

<sup>33</sup> Karut Marut Masalah Pertanahan karena Banyak UU Sektoral, <http://hukum.kompasiana.com/2012/06/01/karut-marut-masalah-pertanahan-karena-banyak-uu-sektoral-461468.html>, diakses pada tanggal 3 Januari 2019.

2). A legal entity established under Indonesian law and domiciled in Indonesia.

If connected with article 19 letter E Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 concerning Procedures for Granting and Cancellation of Rights to State Land and Management Rights which states "Approval for Domestic Investment or Foreign Investment or a letter of approval from the President for certain foreign investment or a letter of approval in principle from the technical department for non-domestic investment or foreign investment."

Furthermore, based on the Presidential Regulation of the Republic of Indonesia Number 44 of 2016 concerning List of Business Fields Closed and Business Fields Opened with Requirements in the Field of Investment Article 1 point 5, it states "Investment is all forms of investment activities, both by domestic and domestic investors. Foreign capital to do business in the territory of the Republic of Indonesia", while the business sector in investment activities consists of:

- a. Open business fields;
- b. Closed business fields; and
- c. Business fields open with conditions.

It is necessary to pay attention to the business fields that are open with certain requirements, namely:

- 1) Limitation of foreign capital ownership;
- 2) Specific location;
- 3) Special license;
- 4) 100% domestic capital (one hundred percent); and / or
- 5) Limitation of capital ownership in the framework of the Association of Southeast cooperation.

Furthermore, if you look at the List of Attachments to the Presidential Regulation of the Republic of Indonesia Number 44 of 2016 concerning List of Closed Business Fields and Business Fields Opened with Requirements in the Investment Sector, in attachment III of the List of Business Fields Opened with certain requirements in the agricultural sector in the plantation business sector with an area of 25 hectares or more to a certain area without a processing unit, including oil palm plantation business field code KBLI 01262, with a maximum foreign investment requirement of 95%, and an obligation for plasma plantations of 20%. This regulation is classified as vague regulations and contradicts the principle of nationality as the basis for regulating land law in Indonesia.

## ***C2. Inconsistency towards the Objects of Business Use Rights by Plantation Ltd Coy***

Based on the Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Establishing Business Use Rights, the Object of Business Use Rights by Plantation Ltd Coy is based on location permits. As for the maximum area limitation, based on the Instruction of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 5 of 1998 jo. Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 2 of 1999, the maximum extent of land tenure that can be granted a location permit for Business Use Rights in the plantation sector for all commodities except sugarcane, the maximum limit for one province is 20,000 (twenty thousand) hectares. Meanwhile, in the Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Determining Business Use Rights, Land acquisition activities carried out based on a Location Permit prior to the enactment of this Ministerial Regulation, remain valid and can be granted Business Use Rights, as in Article 59 that:

1. The authority to grant extension or renew Business Use Rights in this Ministerial Regulation is implemented in accordance with the following provisions:
  - a. Head of Land Office with a land area of up to 25 Ha (twenty five hectares);
  - b. Head of National Land Agency Regional Office with a land area of more than 25 Ha (twenty five hectares) to 250 Ha (two hundred and fifty hectares); and



- c. Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency with a land area of more than 250 Ha (two hundred and fifty hectares);
2. In the event that the authority to grant, extend, or renew Business Use Rights is delegated to the Head of the Land Office:
- a. application documents can be submitted directly to the Land Office by taking into account the provisions referred to in Article 22 and Article 23;
  - b. the formation of committee B is determined by the Head of the Land Office with the membership composition coming from the scope of the Land Office and the local Regency/City Government with due observance to the membership structure formed by the Head of the Regional Office of the National Land Agency as referred to in Article 22; and
  - c. determination of rights is carried out by the Head of the Regional Office of National Land Agency as referred to in Article 26 *mutatis mutandis* with the determination of rights carried out by the Head of the Land Office.

### ***C3. Period of Time to Obtain Business Use Rights (the Unclear Regulation)***

Based on Article 29 paragraph (1) UUPA (Basic Agrarian Law) it is stated that "the right to cultivate is granted for a maximum of 25 (twenty five) years." This is due to the fact that business use rights are usually granted for large agricultural purposes, it takes a long period of time for long-lived plants to produce results, given the large capital investment, entrepreneur will only dare to invest their capital. If there is certainty about the duration of the effort. Meanwhile, in Article 29 paragraph (2) UUPA, it is stated that "for companies requiring a longer time can be granted Business Use Rights for a maximum of 35 (thirty five) years." Furthermore, in Article 29 paragraph (3) UUPA it is stated "at the request of the right holder and considering the condition of the company, the period referred to in paragraphs (1) and (2) of this Article can be extended by a maximum period of 25 (twenty five) years."

The possibility to extend this right is expressly determined, if the period of 25 (twenty five) years or 35 (thirty five) years is deemed insufficient, an extension may be held for a maximum period of 25 (twenty five) years. To get this extension, the right holder must apply for an extension of his right. And in this extension, the condition of the company will be taken into consideration whether the said application for extension can be granted or not. Then in its implementation based on Article 8 of Government Regulation No. 40 of 1996 it is stated that "after the period of the right to cultivate and its extension ends, then the right holder can be given renewal of the right to cultivate on the same land".

The new regulation is related to this time period, which had generated a wave of protests in the community as stipulated in the provisions of Article 3 paragraph 1 Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency No. 7 of 2017 concerning Regulations and Procedures for Establishing Business Use Rights, which explicitly states that Business Use Rights can be granted for a maximum period of 35 (thirty five) years, and can be extended for a maximum period of 25 (twenty five) year. In this provision there is no longer a distinction between the types of plants cultivated as in the LoGA, all the stipulated rights are given a maximum period of 35 (thirty five) years. And the extension is a maximum of 25 (twenty five) years, so that the total period of time given is at most 60 (sixty) years at the beginning, and is not a short time for the exploitation of agriculture, livestock and fisheries.

In addition, in the following provisions in Article 3 paragraph 2, it states that "After the period of the Cultivation Right and its extension as referred to in paragraph (1) ends, the right holder can be given renewal of the Right to Cultivate on the same land for a period of at most 35 (thirty five) years" So that the total time given is up to 95 (ninety five) years. Of course this is not a short time so that the control of this right to cultivate can be carried out from generation to generation with a period of nearly a century which is not impossible, this is a form of legalized neo-feudalism so that there is no change in exploitation and / or

ownership of right to cultivate to the parties, other thereby breaking the balance and opportunities of other citizens to exploit the same land rights before the law.

With the length of time given this also makes Business Use Rights like ownership rights, besides being a strong form of land tenure that can be defended before the law, it is also a right that can be controlled from generation to generation so as to create welfare not for the community but only for a handful of parties as holders of Business Use Rights.

Based on the provisions of Law Number 5 of 1960 jo. Government Regulation No. 40 of 1996, Right to Use Business can be granted for a period of 35 (thirty five) years and thereafter can be extended for a maximum of 25 (twenty five) years. After the expiration of the period including its extension, the Cultivation Right can be renewed once. In order to guarantee its exploitation, this right to cultivate, grant, extend and renew it can be granted at once. Moreover, in this provision, it is increasingly apparent that this right to cultivate is like a new model of erpacht rights which continues to eat away at inch by inch of land in this beloved country.

The procedure for granting rights to State land, as well as granting Business Use Rights, is regulated in Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 jo. Regulation of the Head of the National Land Agency Number 1 of 2011, whereby Business Use Rights are granted for a period of 35 (thirty five) years and can be extended for a maximum period of 25 (twenty five) years. Then for the purpose of investment, based on the provisions of Article 11 Government Regulation No. 40 of 1996, the extension of the period and renewal of rights can be granted at once. Thus, the Right to Use Business can be granted at once for a period of 95 (ninety five) years.

Nevertheless, highlighting the provision of this time period, according to Maria S.W. Sumardjono,<sup>34</sup> giving automatically or all at once will make supervision difficult. Therefore, in order to grant extension and renewal of rights so that certainty of doing business is more secure, applications are submitted earlier or after the Business Use Right less than half of their timeframe, so that periodic supervision is maintained. In addition, agree with the matter, given a period of time at the same time for the period of control of the Business Use Right will cause the vulnerability of neglect and abuse of Business Use Rights granted so that it is not in accordance with the purpose of granting the right to cultivate and / or does not even bring the slightest benefit to national development and community welfare.

## Conclusion

- a). The essence of Business Use Rights control by Plantation Ltd Coy basically provide the greatest possible benefit of prosperity and welfare for the people of Indonesia in accordance with the constitution. The objectives include: (a). Increase: people's welfare and prosperity, source of foreign exchange, production, productivity, quality, added value, competitiveness and market share, to meet consumption needs and raw materials for domestic industry; (b). Provide: employment and business opportunities; (c). Managing and developing: plantation resources optimally, responsibly and sustainably; (d). Providing legal protection to: plantation business actors and the community;
- b). Characteristics of Business Use Rights control by Plantation Ltd Coy is: (a). The birth of the Business Use Rights based on a stipulation from the government; (b). Business Use Rights Subject: Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia. Plantation Ltd Coy is a legal entity in the form of a Limited Company. However, with the presence of foreign investment, up to 95% of the shares were given to him. Logically, shareholders benefit greatly compared to Indonesian citizens themselves, so that it does not reflect justice for the Indonesian people; (c). The area of the object in the granting of Business Use Rights is increasing, originally the Business Use Rights was given to individuals 5 Ha (five hectares) and entrepreneurs 25 Ha (twenty five hectares). But now the area given is

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<sup>34</sup> Maria S.W. Sumardjono, *Kebijakan Pertanahan: antara Regulasi dan Implementasi*, Kompas Media Nusantara, Jakarta.2005, hlm. 95

less than 250 Ha (two hundred and fifty hectares); (d). Permits to obtain Business Use Rights are: 1). The authority of the head of the land office with a land area of up to 25 Ha (twenty five hectares); 2). The authority of the head of the National Land Agency at regional office with a land area of 25 Ha (twenty five hectares) to 250 Ha (two hundred and fifty hectares); 3). The authority of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency with a land area of more than 250 Ha (two hundred and fifty hectares). Therefore, the unclear regulations regarding the maximum extent of Business Use Rights limits will never achieve justice for the greatest prosperity of the people;

- c). Business Use Rights control by Plantation Ltd Coy do not reflect the value of legal certainty because: (a). Foreign investment for Plantation Ltd Coy with a maximum stipulation of 95% contradicts the principle of social function of land rights; (b). There is a regulatory vacuum regarding the maximum limit of Business Use Rights acquisition; (c). Supervision of the acquisition and control of Business Use Rights objects, as well as the qualifications of Plantation Ltd Coy that have subsidiaries can exceed the acquisition of the Business Use Rights area without a maximum limit, which creates a sense of injustice for the Indonesian people.

### Recommendations

- a). It is necessary to have in-depth thinking about the laws and regulations relating to the acquisition of Business Use Rights including legal subjects in the form of a Limited Company, especially Plantation Ltd Coy, the area, duration and permits to control the Business Use Rights without a maximum land area limit and integrated supervision; and
- b). It is necessary to have a law regulating Business Use Rights so that it is in accordance with the objectives of the constitution for the welfare of the Indonesian people in general.
- c). There is a need for harmonization based on the legal system so that there is no inconsistency between the laws and regulations relating to the mechanism for obtaining Business Use Rights.

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