

The Concept of Land Bank Agency: Between Public or Bussiness Functions?

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ABSTRACT

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The concept of a Land Bank entity in the Job Creation Act and its derivative regulations reflects the contradictory dualism of the functions of the Land Bank agency. On the one hand, the Land Bank agency was formed to carry out public functions, but on the other hand, the Land Bank could carry out business activities. The existence of this dualism results in ambiguity and imbalance in the functions of the Land Bank agency. This research aims to examine the concept of a Land Bank entity as contained in the Job Creation Law and its derivative rules and to provide an overview of the model of a Land Bank entity in the future that can balance the implementation of public and business functions. The research used normative legal research supported by the statutory approach and a conceptual approach. The results show that the concept of a Land Bank agency in the Job Creation Law and its derivative rules still reflects the dualism of contradictory functions of the Land Bank agency, namely as executor of public functions and as executor of business activities. It is necessary to revamp the concept of the Land Bank agency to avoid conflicts of interest between public and private scope, by dividing the Land Bank entity into two types, which is the Land Bank entity in the form of public legal entity and/or private legal entity.

1. INTRODUCTION

Land Bank Agency is a distinctive agency newly formed in Indonesia. The regulation regarding the Land Bank Agency itself is one of the notable points contained in Law Number 11 of 2020 concerning Job Creation (or hereinafter abbreviated as Job Creation Law). The significance of establishing a Land Bank agency is motivated by the emergence of various problems in the land sector, especially regarding the limited availability of land. The high intensity of the government's need for the availability of land is used to build various infrastructures to promote public welfare and support national development was the main point to establish the Land Bank Agency. The

problem of limited land availability is certainly an obstacle in the national development process. According to Prof. Maria SW Sumardjono notion, in general, the concept of the Land Bank Agency is intended as every government activity to ensure the availability of land whose use will be allocated in the future.¹The Land Bank Agency ensures the availability of land carries out several functions, namely the functions of planner, land acquisition, land acquisition, land management, land distribution, and land use.

The substance of land regulated in the Job Creation Law should be in line with the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (or hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) which means “the earth, water and natural resources contained therein are controlled by the state for the greatest prosperity of the people,” but the regulation regarding the Land Bank Agency as stipulated in the Job Creation Law has become a cluster that is quite controversial.² Professor Maria Sumardjono pointed out that the controversial issue regarding the Land Bank agency, namely the regulation of the Land Bank agency, was the result of the importation of a problematic defense bill which was simply plagiarized. The crucial points that caused the problem of the Land Bill (or hereinafter abbreviated as the Land Bill), so that it was canceled for ratification, namely, *First*, the substance of land conflicts with the provisions as contained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, because it’s biased and tends to aim at the interests of a small group of people. *Two*, the principles and construction of the Land Bank are contrary to Law Number 5 of 1960 concerning Basic Agrarian Regulations (or hereinafter abbreviated as Agrarian Law). The three philosophies of land substance do not reflect the values contained in MPR Decree IX/2001 on Agrarian Reform and Natural Resource Management.

In the Land Law, there are problematic substances and these provisions are simply copied into the Job Creation Act. This shows that indirectly the problems that have not been resolved by the Land Bill are transferred to the Job Creation Law. Regarding this fact, there is an opinion that doubts the applicability of the land provisions in the Job Creation Act because it includes "land law projects" in the Land Bill which is rejected by many experts because it is contrary to the Agrarian Law.

Land issues in Indonesia is not a new thing, but an issue that has long been a "interesting issue" and is the most complex to be resolved. A land is an object that plays a notable and strategic role in national development, so it is necessary to have a good and fair land management policy considering on the one hand population growth and increasing demand intensity and on the other hand the availability of land which tends to

¹ Maria SW Sumardjono, *Kebijakan Pertanahan-Antara Regulasi Dan Implementasi* (Jakarta: Buku Kompas, 2005).

² Nila Trisna and Ilka Sandela, “Eksistensi Bank Tanah Dalam Hukum Agraria Di Indonesia,” *Ius Civile: Refleksi Penegakan Hukum Dan Keadilan* 5, no. 1 (2021): 6, <https://doi.org/10.35308/jic.v5i1.3564>.

be fixed and limited. The political shift from the populist economy to a capitalist economy of neoliberalism is one factor that causes the land to become a commodity that triggers liberalization which in turn makes it difficult to get land.³ The Land Bank controversy does not only occur because of the Land Bank regulation in the Job Creation Law as the result of the importation of the problematic Land Bill but also the Land Bank agency regulated in Articles 125 to 135 of the Job Creation Law also reflects a dualism that causes bias in the functions of the Land Bank agency.

The Land Bank Agency was formed as a representation of the state to exercise management rights over land as part of the state's right to control. This is part of the public interest side that implies that the Land Bank can also carry out profit-oriented business activities. The existence of dualism that causes bias in the function of the Land Bank itself certainly causes various problems. The Land Bank, which was formed to ensure the availability of land for the public interest to realize a just economy, actually turned around and prioritized the availability of land for private interests. The contradictory dualism of the functions of the Land Bank agency can be seen in the derivative rules of the Land Bank agency, namely Government Regulation Number 64 of 2021 concerning Land Bank Agency (or hereinafter abbreviated as PP No. 64 of 2021) which on the one hand stipulates that literally, the Land Bank entity carry out public functions, but in the other hand, the regulation also provides space for the Land Bank agency allowed to do business activities.

Public functions of Land Bank in reality can be seen in the provisions of Article 2 paragraph (2) Government Regulation No. 64 of 2021 which states that "*in the context of realizing a just economy, the Land Bank guarantees the availability of land intended for social interests, public interests, economic equity to agrarian reform.*" Meanwhile, the provisions indicating that the Land Bank agency can carry out business activities are contained in the formulation of Article 3 paragraph (2) letter e Government Regulation No. 64 of 2021 that stated "*the Land Bank agency in carrying out its function in carrying out land use may enter into cooperation with other parties.*" The dualism of the contradictory functions of the Land Bank agency, in the end, raises the question of which functions is the priority for the Land Bank agency. The existence of contradictory functions of the Land Bank agency also results in the ambiguity of the functions carried out by the Land Bank agency.

To avoid conflicts of interest and create a just economy, it is necessary to renew the concept of the Land Bank after the Constitutional Court Decision Number 91/PUU-XVIII/2020 stated that the work copyright law is "conditionally unconstitutional." The meaning of the decision "conditionally unconstitutional" is that a law requested for judicial review becomes unconstitutional if the conditions set by the Constitutional Court

³ Hairani Mochtar, "Keberadaan Bank Tanah Dalam Pengadaan Tanah Untuk Pembangunan," *Jurnal Cakrawala Hukum* 18, no. 2 (2013): 129–30.

are not met.⁴ This provides room for improvements to the concept of the Land Bank agency. Based on the problems mentioned above, this research was conducted to examine the concept of the Land Bank agency as contained in the copyright law and its derivative rules and to provide a new scheme for the Land Bank agency concept in the future that can balance the implementation of public functions and business functions.

There has been previous research and studies that discuss the topic of land bank agency. Fatimah Al Zahra suggested the construction of the law setting the land bank as an attempt to realize the asset management within State land can be achieved by establishing rules concerning the level land bank legislation. The values of Justice, legal certainty and legal expediency in organizing land bank should be included in the basis and legal norms on the charge of draft legislation that will be compiled.⁵ Roma Tua Situngkir and Sri Untari Indah Artati analyze the similarities and differences between the Land Banks in Indonesia and the Netherlands as well as the factors of the similarities, namely the legal system and the needs and factors of differences, namely the concepts adopted by the countries of Indonesia and the Netherlands.⁶ Nila Trisna and Ilka Sandela conducted research that analyzes the philosophical and juridical foundations for the establishment of land bank institutions and the regulation of land banks according to Law Number 11 of 2020 concerning Job Creation, and the concept of implementing land bank institutions in Indonesia.⁷ While previous studies focus on the land bank agency's regulations on the Job Creation Law, this paper aims to examine the concept of the Land Bank agency as contained in the copyright law and its derivative rules and to provide a new scheme for the Land Bank agency concept in the future that can balance the implementation of public functions and business functions.

2. RESEARCH METHOD

The research is using normative legal research. Normative legal research is carried out by positioning legal norms as the object of research.⁸ This research also uses the statutory approach and the conceptual approach. The technique of collecting legal resources is using literature research by understanding and examining the content of the substance contained in each legal resource. The legal resources are primary including

⁴ Pusat penelitian dan Pengkajian Perkara, *Pengelolaan Teknologi Informasi Dan Komunikasi Mahkamah Konstitusi Republik Indonesia* (Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi, 2013).

⁵ Fatimah Al Zahra, "Konstruksi Hukum Pengaturan Bank Tanah Untuk Mewujudkan Pengelolaan Aset Tanah Negara Berkeadilan," *Arena Hukum* 10, no. 3 (2017): 357–84, <https://doi.org/10.21776/ub.arenahukum.2017.01003.2>.

⁶ Roma Tua Situngkir and Sri Untari Indah Artati, "Perbandingan Pengaturan Bank Tanah Di Negara Indonesia Dan Belanda," *Reformasi Hukum Trisakti* 4, no. 3 (2022): 501–10, <https://doi.org/10.25105/refor.v4i3.13821>.

⁷ Trisna and Sandela, Loc. cit.

⁸ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum*, 2016.

statutory regulations that have a binding and coercive nature such as Job Creation Law and Government Regulation No. 64 of 2021 concerning the Land Bank Agency and the secondary consist of books, legal journals, and other relevant legal papers. The analytical techniques used in building the construction of legal arguments are comparative, argumentative, and prescriptive techniques.

3. RESULTS AND DISCUSSION

3.1. The Concept of The Legal Bank Agency in The Job Creation Act and Its Derivatives in Performing Public and Business Function

In this age, access of land is not only needed for public facilities, but also by the private sector which is intended as land for business and investment. Faced with two subjects with an interest, between the state and the private sector, which require the availability of land, of course, this is very influential in formulating policies in the land sector by the government. Job Creation Law as the juridical basis for the establishment of the Land Bank agency requires the realization of a just economy carried out by ensuring the availability of land which will be used ultimately for the public interest, social interests, national development, agrarian reform, economic equity, and land consolidation. The conception of the Land Bank agency as a legal entity as well as stipulated in Government Regulation No. 64 of 2021 indicated that is *sui generis*, “*which is given the authority to manage land as a form of embodiment of the right to control the state has the authority to acquire abandoned lands, manage and distribute land for the benefit of the people's livelihood or in other words activities carried out by the Land Bank agency is intended to carry out the function of public services.*”

The public function of the Land Bank agency certainly means that the activities carried out by the Land Bank are not profit-oriented (*non-profit*) as has been confirmed in Article 4 Government Regulation No. 64 of 2021 which is a derivative rule of Job Creation Law. In the Job Creation Law, several provisions provide legality to the Land Bank agency to carry out business activities that exactly are profit-oriented. The regulation of the Land Bank agency as contained in the Job Creation Law and its derivative regulations reflects the dualism of the contradictory functions of the Land Bank agency, namely as executor of public functions and as executor of business activities.

The implementation of the contradictory functions of the Land Bank agency can be seen in the provisions of Article 2 paragraph (2) Government Regulation No. 64 of 2021 stating that “*in the context of realizing a just economy, the Land Bank guarantees the availability of land intended for social interests, public interests, economic equity to agrarian reform.*” Meanwhile, the provisions indicating that the Land Bank agency can carry out business activities are stipulated in the provision of Article 3 paragraph (2) letter e Government Regulation No. 64 of 2021 stating that “*the Land Bank agency in carrying out its function in carrying out land use may enter into cooperation with other parties.*”

The function of implementing business activities carried out by the Land Bank is reflected in the provisions of Article 27 letter b of Government Regulation No. 64 of 2021 which states that the Land Bank has a source of wealth that can come from its income. In addition, the function of implementing business activities carried out by the Land Bank agency is strengthened by the formulation of Article 30 paragraph (2) letter j Government Regulation No. 64 of 2021 stating the Land Bank's income can be in the form of business results. This provision is sufficient to explain that the Land Bank agency can carry out activities that have a business element which is of course profit-oriented. The function of the Land Bank in carrying out business activities is reflected in Article 23 letter b of Government Regulation No. 64 of 2021 stipulates that the Land Bank has the authority to provide ease of business licensing to support investment activities. This provision likes a fast track for investment activities, which are mostly carried out by capitalists. One of the reasons for the lack of clarity regarding the functions of the Land Bank agency is the lack of firmness regarding the legal entity form of the Land Bank itself, whether the Land Bank is a Public Service Agency (BLU), State-Owned Enterprise (BUMN), or other forms.⁹

The regulation that becomes a crucial issue regarding the Land Bank in the Job Creation Law is the provision for Management Rights (MR). In essence, MR is a form of implementation of the "Right to Control the State" carried out by the state as a powerful organization,¹⁰ however, in the provisions concerning the Land Bank, the MR can be granted to a third party. The Constitutional Court through its decision Number 002/PUU-I/2003 has interpreted that "*the right to control the country itself as a conception of public law which is carried out as a form of state representation in carrying out the principle of people's sovereignty in which the people are the holders of the highest power in the state.*"¹¹ According to that, the state as a powerful organization has the authority to control the earth and all the wealth contained therein which is used as much as possible for the prosperity of the people without sacrificing and harming the interests of the people as stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia 1945.

The MR conception in the Job Creation Law not only contains a public element but also a private element in the MR, but also the Land Bank's MR is intended to create

⁹ Nizam Zakka Arrizal and Siti Wulandari, "Kajian Kritis Terhadap Eksistensi Bank Tanah Dalam Undang-Undang No. 11 Tahun 2020 Tentang Cipta Kerja Critical Assessment of the Existence of Land Banks in Law Number 11 of 2020 Concerning Job Creation," *Keadilan* 18, no. 2 (2020): 99–110, hlm 103.

¹⁰ Devy K. G. Pasandaran, Jerome Bryanto; Cornelius, Tangkere; Sondakh, "Kajian Hukum Terhadap Hak Pengelolaan Dalam Hukum Pertanahan Indonesia," *Lex Administratum* 9, no. 5 (2021): 17–25.

¹¹ Kuntana Magnar, Inna Junaenah, and Giri Ahmad Taufik, "Tafsir MK Atas Pasal 33 UUD 1945: Studi Atas Putusan MK Mengenai Judicial Review Terhadap UU No. 7/2004, UU No. 22/2001, Dan UU No. 20/2002," *Jurnal Konstitusi* 7, no. 1 (2016): 111–180, <https://doi.org/10.31078/jk717>.

a just economy, but also, on the other hand, the Land Bank's MR is intended to support investment activities. Land Bank is carrying out its public function to realize a just economy by guaranteeing a minimum of 30% (thirty percent) of land availability for agrarian reform. However, the provisions of the Job Creation Law that provide space for the Land Bank agency to carry out business functions that cause disruption and even the elimination of the implementation of public functions by the Land Bank agency can be seen in Article 136 of the Job Creation Law concerning strengthening management rights which stipulate that the implementation of some Management Rights (MR) which is the right to control the state is delegated to the right holder. This provision eliminates the philosophy of the right to manage itself, in which the right of management is a form of the right to control the state which is attached to the public element whose purpose at realize prosperity and provide justice for all Indonesian people.

Moreover, Article 137 paragraph (2) of the Job Creation Law regulated the powers granted to management rights holders reflects that management rights are no longer public in nature but also have civil elements attached to them.¹² The authority of the holder of management rights is stipulated in the provisions of Article 137 paragraph (2) letter b and letter c of the Job Creation Law. That provision re-explains that there are elements of profit-oriented business activities that can be carried out including through cooperative relationships established with third parties to take advantage of and use either part or all of the management rights which are state control rights. Not only that, the right holder has the authority to determine tariffs and receive compensation/income based on the agreement that has been made by the right holder in exercising management rights.

Pursuant above mentioned, it is undeniable that various questions regarding the Land Bank have arisen, one of which is asking which interests are the priorities for the Land Bank in the future. Does the Land Bank prioritize the fulfillment of the public interest or is it more oriented towards the implementation of business functions? Although basically investment plays a notable role in improving the country's economy, it's commonly paid attention that the investment activities do not make people miserable and only provide benefits for some parties. The existence of dualism in the functions of the Land Bank agency that contradicts each other are feared that will result in the neglect of the public function which is a concept rather than the Land Bank agency.

3.2. The Concept of a Land Bank Agency in the Future That Can Maintain a balance of Public and Business Function

¹² Dwi Kusumo Wardhani, "DISHARMONI ANTARA RUU CIPTA KERJA BAB PERTANAHAN DENGAN PRINSIP-PRINSIP UU NOMOR 5 TAHUN 1960 TENTANG PERATURAN DASAR POKOK-POKOK AGRARIA (UUPA)," *Urnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha* 6, no. 2 (2020): 440–55.

As previously explained, there are concerns about the dualism of the functions of the Land Bank, which results in neglect of public functions, and is more oriented towards business functions. Moreover, there is a verdict of the Constitutional Court Number 91/PUU-XVII/2020 that stated “*the Job Creation Law is unconstitutional for two years and suspends all strategic and broad-impact actions or policies.*” According to this, it is very notable to find a future concept for the Land Bank agency that can balance public and private elements.

In finding a future concept for a Land Bank agency that can balance public and private elements, even though the Land Bank agency is a new thing to be regulated in Indonesia since the 20th decade, several western countries have recognized the Land Bank agency instrument. This situation is because the state has known the Land Bank agency instrument for a long time. So, Indonesia can compare several states about the concept of the Land Bank agency with some adjustments such as the urgency of the importance of establishing a Land Bank, and adapting to Indonesia's social, economic, and ideological conditions. For example, compared two developed countries, namely the Netherlands and the United States, which have been familiar with Land Banks for a long time, to understand the general concept of Land Banks.

3.3. Land Bank in the Netherlands

Institutionally, the Land Bank of the Netherlands is carried out by establishing a separate special institution (a separate state institution) or utilizing pre-existing government institutions which are generally within the ministry¹³ such as *Domeinen/ State Domains Service*, which is under the auspices of the Ministry of Finance (*Ministry of Finance*) or the *Bureau for Land Management*, which is under the auspices of the Ministry of Agriculture (*Ministry of Agriculture*).¹⁴ Land Banks in the Netherlands are regulated by some regulations, namely the Land Consolidation Act, 1954, The rural area development Act, 1985, and - the Act on the spatial structuring of the rural areas, 2005. Land Bank institutions in the Netherlands are specific and are national institutions consisting of several ministries or agencies, this institution is non-profit or not intended for profit.¹⁵

The practice of the Land Bank instrument in the Netherlands is carried out in conjunction with land consolidation and *land readjustment*.¹⁶ To streamline the land

¹³ Sungkana, “Mengenai Bank Tanah/Land Banking Sebagai Alternatif,” *Manajemen Pertanahan; Artikel DJKN*, 2015.

¹⁴ Al Zahra, “Konstruksi Hukum Pengaturan Bank Tanah Untuk Mewujudkan Pengelolaan Aset Tanah Negara Berkeadilan.”

¹⁵ Ranitya Ganindha, “Urgensi Pembentukan Kelembagaan Bank Tanah Sebagai Alternatif Penyediaan Tanah Bagi Masyarakat Untuk Kepentingan Umum,” *Arena Hukum* 9, no. 3 (2016): 442–62, <https://doi.org/10.21776/ub.arenahukum.2016.00903.8>.

¹⁶ Celline Gabriella Tampi, “Pembentukan Bank Tanah Berdasarkan Undang-Undang No 11 Tahun 2020 Dalam Rangka Menjamin Kesejahteraan Masyarakat,” *Jurnal Lex Crimen* 1, no. 1 (2021): 174–200.

acquisition process, the Land Bank practice is needed in terms of policies to rearrange the control, ownership, use and utilization of land and space according to the spatial plan as well as efforts to provide land for the public interest to improve environmental quality and maintain natural resources. The core task of the Land Bank agency is to acquire, temporarily manage and dispose of real estate (land and buildings) to realize the government's policy objectives in rural areas, particularly those related to nature, agriculture, recreation, water and landscape management. The accumulation of land pools is used to compensate smallholders for land taken from production for the implementation of publicly initiated projects, for example, related to nature restoration, or used directly for public purposes, such as the construction of public infrastructure. Allotment of use is improvement of agricultural land performance, river restoration, and replacement of damaged environment (greening).¹⁷

The mechanism for implementing the Dutch State Land Bank is implemented as a means of land management, carried out in 3 stages. Herein are “*Exchange land banking ; where the Land Bank will buy land for collection which will later be released back to third parties; financial instrument is carried out through the Land Bank buying land to be rented out to farmers to be managed for a long period (generally 26 years); Land bank as developer is generally carried out by the private sector by purchasing land in large quantities with the hope that in the future there will be changes in the function of the location of the land (speculation) such as turning into residential areas, recreation, economic activities so that it will increase the value of the land.*”

Dutch Land Banks usually, divest through direct sale, but in some cases, a long-term lease is preferred. Land Bank is more intended for the public interest because it is implemented with a communitarian ideology. The Land Bank operates with a communitarian ideology, where resources are public ownership which is well understood by the Dutch government and society, this shows the difference between American liberalism and individualism.¹⁸ According to abovementioned, it could be inferred that the existence of 2 Dutch Land Banks is a Public Land Bank.

3.4. American Land Bank

In the United States, the aims to develop the Land Bank concept to solve the problem of vacant urban land and buildings, resulting from population migration to suburban areas due to industrial development in the United States and the Midwest.¹⁹ Land Bank St. Louis, Cleveland, Louisville, and Atlanta were the first-generation Land Bank programs in the United States, precisely in the 20th century. Then followed by

¹⁷ Morten Hartvigsen et al., “European Good Practices on Land Banking and Its Application in Eastern Europe and Central Asia,” no. June 2021 (2021): 21–25.

¹⁸ Sungkana, *Loc. cit.*

¹⁹ Erwin Van Der Krabben, Piyush Tiwari, and Jyoti Shukla, *Land Use Management Strategies for Equitable Infrastructure and Urban Development: Overview of Strategies and Tools*, 2020.

Michigan, Ohio, Pennsylvania, Georgia and also the city of New York.²⁰ Overall the main objectives of establishing a Land Bank in the United States are dealing with abandoned properties, returning property on the tax register, rejuvenating abandoned properties, developing green open spaces, collecting and combining abandoned lands into a single, consolidated site that can be developed, as well as facilitating the revitalization of the *brownfield*.²¹

As a federation, Land Bank Regulations in the United States are under the jurisdiction of each state government. Each state in the United States uses the Land Bank concept differently because the Land Bank applied is adapted to the different structures of each state.²² Although the regulation of Land Banks in the United States is the authority of each state, the central government still provides general Land Bank regulations as a legal umbrella for Land Bank regulations implemented in the states, namely the Housing and Economic Recovery Act (HERA), which later some of its substance was changed in the new regulation, namely the American Recovery and Reinvestment Act (ARRA). With this regulation, several states in the United States have the freedom to make their own Land Bank regulations. For example, Michigan Comp. Laws Laws 124.751-124.774 (The Michigan Land Bank Fast Track Authority statute), 2003 and the Ohio Land Banking Legislation of 2008 and 2010.

In practice, there are two types of land banks in the United States: public land banks and mixed land banks. Public Land Bank is a Land Bank institution consisting of government elements, both independently and in collaboration with other departments. A mixed Land Bank is a Land Bank institution that is the result of cooperation between the government and the private sector. This type of mixed land bank is considered to be able to trigger economic growth, so it is often used, as has been practiced by the Cleveland Land Bank or the Atlanta Land Bank, both of which work together with Community Development Corporations (CDCs) in purchasing properties acquired and then managed by Cleveland Land Bank of Atlanta Land Bank.²³

In the United States, the implementation mechanism at the Land Bank consists of 3 stages, namely the collection stage, the management stage, and the reuse stage²⁴ various properties were abandoned or subject to tax confiscation. The mechanisms used in practice are:

²⁰ Dragana Milićević, "Review of Existing Land Funds in European Countries," *Geonauka* 02, no. 01 (2014): 31–42, <https://doi.org/10.14438/gn.2014.05>.

²¹ Frank S Alexander, *Land Banks and Land Banking*, (2015): 19.

²² Julie A. Tappendorf and Brent O. Denzin, "Turning Vacant Properties into Community Assets through Land Banking," *Urban Lawyer* 43, no. 3 (2011): 801–12.

²³ Al Zahra, "Konstruksi Hukum Pengaturan Bank Tanah Untuk Mewujudkan Pengelolaan Aset Tanah Negara Berkeadilan."

²⁴ Widyarini Indriasti Wardani, "Harmonisasi Lembaga Bank Tanah Dengan Pengaturan Pengadaan Hak Atas Tanah Bagi Pembangunan Untuk Kepentingan Umum," *Spektrum Hukum* 18, no. 2 (2021), <https://doi.org/10.35973/sh.v18i2.2476>.

- a. The collection/acquisition stage, this stage begins with identifying the land, followed by the confiscation of the tax object or the voluntary gift of property by the landlord.
- b. The management stage is in the form of financing for property maintenance activities ranging from sales, rentals, collection of tax fees, cleaning up to the destruction of abandoned properties or property subject to tax confiscation. This financing can be obtained from the relevant government departments, also facilitated by the granting of authority to the private sector such as the United States Department of Housing and Urban Development (US HUD). Through the sale of these assets, the private sector can then receive a commission on the sale. Meanwhile, the government will receive funds equal to the property's market price. The practice of land banks in certain states is relaxed through tax waivers by the private sector as an incentive to acquire property. Once managed, it is used to determine according to government programs.
- c. In the reuse stage, selling property through public auctions or selling directly is a way between the Land Bank institution and the private sector or private sector to distribute property. Distribution recipients are selected very strictly because this is strictly regulated in a special policy.²⁵

The Land Bank agency concept can be found in several parts of the country that has its differences. The existence of these differences in concepts is due to the different factors behind the formation of the Land Bank agency itself. The concept of a Land Bank agency in Indonesia is based on the provisions contained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which essentially constitutes the basis of the State's Right Owned.²⁶ Marulak Pardede stated that *“the State's Right Owned stipulated in the Agrarian Law is essentially rooted in the philosophy of customary law on land which places the state as the land ruler who has the authority to regulate and manage land and not as the landlord.”*²⁷ In another argument, Tri Hayati stated that *“the right to own the state is a public legal conception that is shown as a representation of the form of people's sovereignty in which the people are the holders of the highest power in the state so that the right to control the state is aimed at the greatest prosperity of the people in the context of realizing social justice.”*²⁸ The interpretation of the meaning of “the right to own by the state” that deviates from the spirit, philosophy, and principles of Article 33 of the 1945 Constitution of the Republic of Indonesia and Law Number 5 of

²⁵ Al Zahra, “Konstruksi Hukum Pengaturan Bank Tanah Untuk Mewujudkan Pengelolaan Aset Tanah Negara Berkeadilan.”

²⁶ Kurniati, “Hak Menguasai Negara Terhadap Tanah Menurut Undang-Undang No. 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria,” *Varia Hukum* 30, no. 39 (2018): 1667–1668.

²⁷ Marulak Pardede, “Hak Menguasai Negara Dalam Jaminan Kepastian Hukum Kepemilikan Hak Atas Tanah Dan Peruntukannya,” *Jurnal Penelitian Hukum De Jure* 19, no. 4 (2019): 405, <https://doi.org/10.30641/dejure.2019.v19.405-420>.

²⁸ Tri Hayati, “HAK PENGUASAAN NEGARA TERHADAP SUMBER DAYA ALAM DAN IMPLIKASINYA TERHADAP BENTUK PENGUSAHAAN PERTAMBANGAN” 49, no. 3 (2019): 768–787.

1960 concerning Basic Regulations on Agrarian Principles will certainly have implications for the emergence of disputes and even agrarian conflicts.

Right to control by the state has been interpreted by the Constitutional Court through Decision Number 50/PUU-X/2012 which outlines “the right to control by the state” as the state's authority in managing natural wealth through policy formation (*beleid*), management (*beheersdaad*), organize (*bestursdaad*), regulation (*regelendaad*), and supervision (*toezichthoudensdaad*) in their implementation to realize the greatest prosperity of the people. It should be underlined that the right to control the state to administer is not interpreted as a civil right context but is interpreted as a state obligation carried out in a public context.²⁹ The Constitutional Court not only interprets those matters, but also through Decision Number 3/PUU-VIII/2010 the Constitutional Court outlines the meaning of the phrase “the greatest prosperity of the people” as stipulated in the Article 33 of the 1945 Constitution of the Republic of Indonesia which is measured through several parameters, namely First, the usefulness of natural resource wealth is intended for the people. Second, the enjoyment of the benefits of natural resources for the people in an equitable and just manner. Third, the role of the people to participate in determining the benefits of natural wealth. Fourth, the use of natural resources by upholding and respecting the rights of the people from generation to generation. The meaning of the phrase “as much as possible for the prosperity of the people” as interpreted by the Constitutional Court, in its practice will provide a sense of justice, especially for the little people.

Land Bank Agency in addition to carrying out public functions to realize a just economy, it is also possible to carry out business activities with the aim of improving the national economy. A just economy implies that economic development is based on the truth, namely taking sides with people in vulnerable positions. Justice in a just economy is corrective justice or discriminatory justice. Such discrimination can be exercised as long as it benefits the least advantaged members of society.³⁰ Legality for bank entities to carry out business activities has basically been contained in several provisions in the Job Creation Law. However, to avoid ambiguity in the function of the Land Bank agency and to avoid conflicts of interest between the public and private, it is important to carry out reforms related to the construction of the Land Bank agency concept. In the future should be balance the implementation of public functions and business activities. There are several forms that can be an option to be implemented in the future as a form of Land Bank agency concepts, namely:

²⁹ King Faisal Sulaiman, “Polemik Fungsi Sosial Tanah Dan Hak Menguasai Negara Pasca UU Nomor 12 Tahun 2012 Dan Putusan Mahkamah Konstitusi Nomor 50/PUU-X/2012,” *Jurnal Konstitusi* 18, no. 1 (2021): 091–111, <https://doi.org/10.31078/jk1815>.

³⁰ Maria S.W Sumardjono, “Dalam Webinar Bank Tanah Dan Ekonomi Berkeadilan, Kanal Pengetahuan FH UGM, Tanggal 21 Oktober 2021,” (2021).

- a. The function of the public land bank is carried out by the state, while the function of the private land bank is carried out by the private sector

The implementation of the functions of the Land Bank agency should have clarity so that there is no conflict of interest between the public and the private sector. The concept of a Land Bank agency which is the first option is that the Land Bank entity is classified into two types, namely the Land Bank entity in the form of a public legal entity and the Land Bank entity in the form of a private legal entity. *First*, in the Land Bank agency in the form of a public legal entity, the implementation is carried out by the state considering that the public function of the Land Bank is carried out in the context of fulfilling the public interest and realizing a just economy. where the people are the holders of the highest power in the state. Based on this, the state as a power organization has the authority to control the earth and all the wealth contained therein which is used as much as possible for the prosperity of the people without sacrificing and harming the interests of the people as stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The implementation of the public function of the Land Bank agency which is fully implemented by the state will certainly provide a sense of justice, especially to the poor, considering that the public function is carried out purely for the public interest without being motivated by the existence of an element of seeking profit so that the state's goal in promoting general welfare and realizing a just economy will be realized. *Second*, the Land Bank Agency in the form of a private legal entity that carries out business activities that are *profit-oriented*, the implementation is carried out by the private sector provided that the private sector is not allowed to act in the public scope or violate the provisions of the legislation. Therefore, it is necessary to have a policy that regulates and contains substance regarding the limits of actions that can be taken by the private sector.

- b. Public Land Bank Functions Organized by The State and The State Can Form a Private Land Bank

The concept of the Land Bank agency follows the BUMN model as regulated in Law Number 19 of 2003 concerning State-Owned Enterprises. The BUMN is divided into 2 (two) forms, namely Perum and Persero. The implementation of the public benefit function by BUMN is carried out by Perum as a public legal entity, while the function of profit-oriented business activities is carried out by the Company as a private legal entity. The implementation of the two different functions carried out by SOEs is, of course, prone to conflicts of interest. To avoid this conflict, harmonization of the implementation of BUMN functions is carried out through the establishment of a cooperative relationship between Perum and Persero which is motivated by the consideration that with the implementation of business functions by the Persero which is a private legal entity of BUMN that is oriented to seek profit in the end it will form economic capacity, where the profits obtained by the Persero are used as a source of

funding for Perum to carry out the function of public benefit.³¹ The concept of BUMN as abovementioned can be used as an option for the concept of a Land Bank agency in the future while still being based on clear parameters in separating the implementation of public functions and the functions of business activities so that the concept of a Land Bank entity is divided into two forms. *First* the Land Bank entity which follows the Perum concept, namely the Land Bank entity as a public legal entity whose share ownership is fully owned by the state or in other words the state as the sole shareholder. Second, the Land Bank agency in the form of a private legal entity that follows the Persero concept by positioning the state or the Public Land Bank entity as a shareholder in the private Land Bank agency.

The next Land Bank entity concept as one of the options is to make a Land Bank entity in the form of a public legal entity as the majority shareholder in a Land Bank entity as the private legal entity. This concept is a form of implementation of the group company concept. According to Raajimakers, group companies are defined as a collection of companies that have one economic unit but are still legally independent.³² Group companies are led by a holding company as the *holding company*, which acts to control its subsidiaries.³³ A company that acts as a *holding company* is basically a company that holds a majority share. The concept of a Land Bank agency if it adopts the concept of a group company, the Land Bank entity in the form of a public legal entity has the position as the central leader of the group company which has the authority to control and supervise the activities carried out by its subsidiaries or which in this case is a Land Bank entity in the form of a private law entity.

- c. The function of a public land bank is carried out by the state, while the function of a private land bank is established in cooperation between the state and the private sector

The implementation of the functions of the Land Bank agency where in this concept, there are 2 types of Land Bank entities, namely the public Land Bank agency and the private Land Bank agency. Ownership of the public Land Bank agency remains with the state, however, the difference between this concept and 2 other concepts is ownership of the private Land Bank entity. The concept of establishing a Land Bank agency provides an opportunity for the state as well as the private sector to be able to cooperate in the formation of a Land Bank agency. This concept positions the private Land Bank agency as private and state ownership either directly from the state or under

³¹ A.A. Gede Duwira Hadi Santosa, "Korporatisasi BUMN Dalam Bentuk Persero (Transformasi Kerta Masa Sebagai Konsep BUMN Ke Depan)" (Universitas Gadjah Mada, 2019).

³² Emmy Pangaribuan, "*Perusahaan Kelompok (Group Company/Concern)*." (Yogyakarta: Seksi Hukum Dagang Fakultas Hukum UGM, 1994).

³³ K. Hardjono Dhaniswara, *Monograf Kedudukan Hukum Perusahaan Induk*, Uki Press (Jakarta, 2021); 26.

the public Land Bank agency. In establishing a private land bank, both state and private, each owns shares regardless of the amount of share ownership. Even though in this concept there is private intervention in the Land Bank, it still puts the public interest first, because the form of a private Land Bank entity whose ownership is a form of cooperation between the state and the private sector, with private interests being *profit oriented* or only concerned with large profits without paying attention to the impact is balanced by the government's more social interests.

4. CONCLUSION

The concept of a Land Bank entity in the Job Creation Act and its derivative regulations still reflects the dualism of the contradictory functions of the Land Bank agency, namely as executor of public functions and as executor of business activities. The implementation of public functions by the Land Bank is reflected in the provisions of Article 2 paragraph (2) PP No. 64 of 2021 while the provisions that provide space for the Land Bank agency to carry out business activities are contained in the provisions of Article 3 paragraph (2) letter e PP No. 64 of 2021. The contradictory dualism of the functions of the Land Bank agency ultimately raises questions regarding which function is the priority for the Land Bank agency and in the end, it is feared that it will result in the neglect of public functions which are concepts rather than the Land Bank agency itself. To avoid the dualism of the functions of the Land Bank agency, it is necessary to reform the concept of the Land Bank agency which has clear parameters in separating the implementation of public functions and the functions of business activities so that in its implementation the Land Bank agency can balance the implementation of public functions and the functions of business activities.

The concept of a Land Bank agency that can carry out its functions following the fifth principle of Pancasila and article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which can maintain the balance of Public Functions and Business Functions, it is necessary to establish a Land Bank with concepts that can be offered as follows: 1. Functions Public Land Banks are Organized by the State While the Functions of Private Land Banks are Performed by Privates; 2. The function of a public land bank is carried out by the state and the state may establish a private land bank; 3. The function of the public land bank is carried out by the state, while the function of the private land bank is established in cooperation between the state and the private sector.

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