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LEGALITY OF GUARANTEE BAN CLAUSE WITHIN BUILD OPERATE TRANSFER PROJECT BY LOCAL-OWNED ENTERPRISES

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ABSTRACT

In the process of implementing development, somehow a government has not sufficient fund to build infrastructures which have already been planned. During the process, the existence of private parties are required to be investors which are able to fund the government's infrastructure plan through BOT (Build, Operate, Transfer). It is an agreement conducted by government's policy with the private parties which create a public policy as the object of agreement. This study applied a normative research using statute approach and conceptual approach. The practical implication of this study is expected to be means of consideration to resolve the law-related problems of Build Operate Transfer (BOT), particularly concerning on the guarantee ban done by cooperation partner. BOT is a cooperative contracts between government and private party. The BOT contracts becomes one of the alternative contracts which could be applied by government for developing infrastructure whose development requires huge fund and the government has no capability to fund it. Nevertheless, the legality of clause pertaining to guarantee and agreement is the result of the establishment of BOT.

INTRODUCTION

The regulation of positive law in Indonesia states that the existence of principle of freedom of contracts in an agreement. Every person has the right to make agreements, whether the regulation has been made or not, as long as such agreement is not against the Constitution, public order, and morality. (Widodo & Soepriyadi, 2008) Through the principle of freedom of contracts, as it has been stated in the positive law in Indonesia, government has an authority to involve itself to any kinds of contracts (Wulandari, Putri, Kassim, & Sulung, 2016).

One of the examples is the contracts of Build Operate Transfer (BOT) as the means of running cooperative agreement which is conducted by the

government. The principle of freedom of contracts becomes the philosophical basis of contracts legal norms. The BOT contracts also becomes as one of the alternative contract which could be applied by the government in terms of infrastructure development. BOT is a cooperative contracts between the government and private party, where the private party in this contracts is as the investor. BGS has been regulated in [Government Regulation Number 27 of 2014](#) Article 1 Number 14 (Mouraviev & Kakabadse, 2016).

¹ In [Government Regulation Number 27 of 2014](#) Article 36 Number 7 stated that the implementation cost of BOT is expected as the responsibility of the concerned partner. Government has a different position with its partner when it comes to establish BOT contracts. This contracts could only be done when there is no available or insufficient funds in Local Government Budget (APBD) for the purpose of providing as well as project facilities which will be built (Xu, Jiang, & Moon, 2016).

One of the party in BOT contracts is government, where it is considered as the principal. The government is considered as a party who is fully responsible for granting concession and is the owner of such project or facility after the expiry of the term. On the other hand, another party is the cooperative partner, who is given a concession to build, operate, and transfer other facilities. The cooperative partner are required to be more proactive in anticipating various needs needed for such project (Harymawan & Nowland, 2016).

BOT contracts could be defined as a technique to develop infrastructure projects by using initiative and funding from private party. Various infrastructure projects have been built, for instance the most general is the construction of highway, mall construction, market renovation, terminal, and other buildings. According to Article 4 Section (1) [Presidential Regulation Number 13 of 2010](#) on Amandement of [Presidential Regulation Number 67 of 2005](#) on Government Cooperation with Business Entity (Rumata & Sastrosubroto, 2018).

The provision of highway construction funding does not merely come from the private party, but government also takes part in it. Consequently, when it is the process of the highway construction and management, the government could take part in such construction process, which has been regulated on [Presidential Regulation Number 18 of 2015](#) on [Government Cooperation with Business Entity in Infrastructure Provision](#) which later is considered as [Presidential Regulation Number 38 of 2015](#) (Purwono, Mubin, & Yasin, 2018).

²⁴ Regarding the background explicated previously, this study aims to analyze the legality of guarantee ban regulated in [Government Regulation Number 277 of 2014](#) on Management of State/Regional Property. The theoretical implication in this study is expected to provide law studies and thoughts for the development of law science which has the correlation with the Built Operate Transfer contracts. In addition, the practical implication which could be expected is that to be the means of consideration in resolving law problems of Built Operate Transfer contracts, particularly on the guarantee ban done by the cooperation party.

RESEARCH METHOD

This study applied normative research type, that law research is a process to find rules, regulations, as well as law doctrine in order to answer legal issues being confronted (Sukoco, Suprayogi, & Hidayati, 2018). The selected approach is statue approach, which was done by analyzing all Constitutions and regulations which have the relation with the legal issue being handled (Prihandono & Relig, 2019). Furthermore, conceptual approach was done when the researcher has not moved to the existing rule of law. It is conducted that way as there have not been any rules of law available to be used to handle the problem (Niyobuhungiro, 2019).

LITERATURE REVIEW

Provisions for Assuring Land Assets by Local-Owned Enterprises

Government plays a vital role in resolving the related issue in order to maintain a good relationship between government and the private party. As the private party is the investor, it also consider that there is a possibility to have investment in a big scale. One of many efforts could be done to maintain the relationship with the private party into legal relationship, is that government make a cooperation with the private party by having a agreement. The intended agreement is the agreement of build, operate, and transfer or commonly called as BOT contracts (Adnyana, Anwar, Soemitro, & Utomo, 2015).

Within the BOT contracts, government provides opportunity to private party to build a projects which have been promised. The private party will be given an exclusive right within a certain period of time, that is a concession to manage as well as economically benefit from the result of the project construction. It means that the result of the management is considered as the replacement funds of the former fundings which have been used to the project construction. When the period of time is over, the private party is obliged to return or hand back the land and or existing facilities in the projects to the land owner. (Feng, Zhang, & Gao, 2015).

Regarding Article 1 Number 14 Government Regulation Number 27 of 2014, BOT contracts is a utilization of state/regional properties in the form of land owned by other parties by establishing buildings and or supporting facilities, then is exploited by other parties in a certain agreed period of time which has been agreed, which later the land along with the buildings and the supporting facilities will be handed back after agreed period of time is over. The BOT contracts's longest period of time is 30 years since the agreement has been signed, as related with Article 36 Government Regulation Number 27 of 2014. Private party, as the investor, is required to pay retribution fees to the public account of the state/regional treasure in each year, as long as the process of managing done by the private party needs to maintain and make improvement toward the object of BOT contracts. Costs in BOT contracts is made after establishing the BOT partner and such costs will be the obligation of BOT partner to do payment (Feng et al., 2015).

The inheritance of ownership means that right of ownership to land and could

continue as long as the owner is still alive. However, if the land owner passes away, then the proprietary could be continued by the heirs as long as they qualify as the subject of proprietary to the concerned land. The proprietary over land has a stronger characteristic than that of other land rights. It has limitless period of time, is easy to defend from any interference by other parties, and are not easily removed. Proprietary whose characteristics are the strongest as well as the most complete, where the owner of the proprietary over land could act freely over it which is owned by him/her, such as selling it. As stated by Article 20 section (2), that proprietary could be transferred and transferred. What is meant by 'be transferred' is that the transfer of proprietary is because of legal event, such as death. On the other hand, 'transferred' means that the transfer of proprietary over land is because of legal actions, such as buying-selling, exchanging (Ezzi & Jarboui, 2016).

BOT over land of Right to Manage here in after is referred to as Land Management Right, the transfer of the use of Land Management Right land to investors could also be accompanied by granting new rights over land, either with Building Rights Title (HGB) or rights to use. In terms of granting, it doesn't require deed issued by Land Deed Official (PPAT), it only needs the signage of BOT agreement with principal agreements or recommendations from Land Management Right holder. According to Article 1 Number 2 Government Regulation Number 40 of 1996, Land Management Right is rights to control given by the state whose authority is partially delegated to the holder.

The subjects to BOT in Article 103 Minister of Finance Regulation Number 78/PMK.06/2014 are State-Owned Enterprises (BUMN), Local-Owned Enterprises (BUMD), private sectors except individuals, and other legal entities. Discussing Local-Owned Enterprises as one of the BOT subjects, according to Article 1 Number 1 Government Regulation Number 54 of 2017 on Local-Owned Enterprises, Local-Owned Enterprises is a legal entity whose capital is completely or mostly owned by the regional sectors. Local-Owned Enterprises could be as means of consideration for regional sectors to be made as a facility to provide service to the public. Local-Owned Enterprises could be established by local government according to Article 331 Number 1 and 2 Law 23 of 2014 (Xu et al., 2016).

Local-Owned Enterprises has a right to not implement such regulations, so on the contrary it could grant permission to the private sectors to guarantee it with certain conditions as Local-Owned Enterprises has separable assets. The BOT contracts undertaken by Local-Owned Enterprises in the form of Incorporated (PT) are more focused on the agreement of parties or consensus. If State-Owned Enterprises allows BOT partners to guarantee the BOT objects, then the guarantee agreement must be in the BOT contracts which has been made (Mouraviev & Kakabadse, 2016).

Limitations of Local-Owned Enterprises in Doing BOT Contracts

The BOT contract is actually a cooperation contract made between the government as the land owner and the private party to construct a building. There is a certainty towards the land which is used for project development will

return to the government with a maximum term of 30 years. Local-Owned Enterprises as one of the subjects which could do BOT contract have several regulations in it. Its assets are different from regional assets because Local-Owned Enterprises assets are separated, so may not comply with Government Regulation Number 27 of 2014.

BOT contract undertaken by Local-Owned Enterprises which uses Local Incorporated (Perseroda) will be more focused on the agreement of the parties. As Local-Owned Enterprises is the government's organ, so it should not only seek for profit solely in this contract. However, if the private party intentionally violates the rules that have been made to guarantee the object of the BOT contract, then there is a risk which will be given to the private party that guarantees it.

RESULT AND DISCUSSION

Rights and Obligations of BOT Contract Parties

Public Private Partnership (PPP) is an alternative financing in developing public service which is usually done by the country, especially the developed countries. By having an intertwined cooperation with the private party, it is expected that there will be positive impacts in terms of investment allocation and could be able to improve the quality of public service. Beside giving the benefits, the cooperation between government and private party also often causes problems because of the different interests between two parties. The government interests focus on social interests, while the private party has profit oriented interests (Adnyana et al., 2015).

Developing countries also apply cooperation system which bind private parties as the manager, that is Indonesia. The need of infrastructure access which continues to increase requires enormous investment. One of the cooperation concepts which is often used by the government and the private sector is the BOT contract, which involves service users who are the private sector. The BOT contract in Indonesia is considered as an important collaboration to realize the government's goal to develop national development to meet the needs of the livelihoods of Indonesian people (Hilmarsson, 2017).

The form of cooperations is considered as the most effective, as regarding the lack of funds owned by the government, the implementation of development keep continuing to run with the help of investors which are the private parties. However, within the BOT contract, the government will not lose its land assets. In the agreement between the government and private parties in BOT contract, after the specified period of time the land will be returned to the local government.

The form of cooperation using BOT contract generally requires a sufficiently long period of time, so the parties involved in this contract need to fully understand and master the procedures of making the BOT contract agreement. By perceiving from various factors, such as economic, political, social, and also culture of local community, it will obviously affects the sustainability of the process of implementing the partnership. In Surabaya, there are also binding

cooperations between government and private sectors, which are cooperation in the construction of the Darmo Trade Center (DTC), *Pasar Krampung*, *Taman Hiburan Rakyat* (THR) and many others (Sumaryana, Widianingsih, & Nurasa, 2017).

The government of Surabaya city collaborates with PT *Sasana Boga* to construct THR building and Surabaya Mall. This cooperation used BOT contract, whose period of time was reciprocally agreed that is 20 years. However, in 1989 the duration of the agreement was extended by 10 years, so it was in total 30 years from the same year. In this agreement, Surabaya suffered losses because the buildings which were supposed to be kept in proper condition were damaged before the time for the building to return. As after the return of the object was carried out to the government, it must fix the buildings which are inappropriate or feasible enough to be used again with a large cost.

Infrastructure development is considered very essential for the sake of supporting the people's welfare. BOT contract is considered as a brand new contract in Indonesia, there is no specific rules regulating on such BOT contract. Beside benefit which will be gained, there will be risks which need to embrace to the respective parties, either it is government or private party. Private sector and government have their own roles respectively (Chou & Leatemala, 2016).

The concept of land utilization agreement done by government with the private party is done by utilizing the existing land as a form of BOT contract cooperation pattern. It can be seen from the concept of land utilization agreement itself. It exists as the result of insufficient funds for the means of utilizing a land. With such insufficiency, it needs other source of fundings to support the project. It could come from private parties which are expected to be able to support the funding problem experienced by the government.

There have been numerous ways done by the government to determine the form of contracts, one of the is that a policy to engage private parties to cooperate in order to construct the infrastructure a certain region. The cooperation could result a legal consequences such as achievements which must be fulfilled by the parties. Rights and obligations are considered as important aspects within the cooperation. The parties have their respective rights and obligations which must be carried out in accordance with the governments and applicable rule, that is Government Regulation Number 27 of 2014. The rights and obligations binded to the agreement of the parties are applied into a BOT contract done by the city government of Padang when constructing *Sentral Pasar Raya Padang* (Pacheco, Schoneveld, Dermawan, Komarudin, & Djama, 2017).

The essence of the BOT contract is that the ownership of BOT objects in the form of land does not move to their parties, so during the process of cooperation the ownership is still owned by the government. On the contrary, private parties only do the management aspect. This BOT contract is a cooperation pattern conducted between the land owner with an investor as a commercial facility.

If it is looked from the aspect of agrarian law, the object of the contract is land. The BOT partners solely obtain physical control over the land. The facilities

and infrastructure existed as the result of BOT contract. According to Basic Agrarian Law Act (Undang-Undang Pokok Agraria/UUPA), the ownership system is differentiated into two categories, which are primary and secondary (Kaya et al., 2013). In primary form, it means that all rights are obtained by the state, whereas secondary form is that all rights obtained by the holders of other land rights based on collective agreements. The control over land as in Basic Agrarian Law Act (UUPA) is given in the forms of rights which consist of authority and are given by law to the holders of their rights to use land which is not belong to them, that is land of state or other people's land for a certain period of time and for certain purposes as well (Hilmarsson, 2017).

Rights over land which can be obtained is Freehold Title (*Hak Guna Usaha*/HGU). It could not be considered as BOT objects because the Freedom Title (HGU) is not granted a permission to construct the building. However, it does not give any permission, but only put efforts to undertake it. Freedom Title (HGU) is a special right to undertake the land which is not belong to the owner over the land directly controlled by the state for agricultural company, fisheries, and livestock whose surface area is minimum five hectare and maximum 25 hectare. Such surface area is according to Article 5 Section (1) and (2) Government Regulation Number 40 of 1996 on Freehold Title then later is called as Government Regulation Number 40 of 1996. Freehold Title (HGU) could be granted for maximum period of 25 years, except for companies which require a longer period of time can be given a maximum of 35 years. According to Article 8 section (1) UUPA, HGU is Menurut Pasal 28 ayat (1) UUPA, HGU is a right to cultivate land which is directly controlled by the state, within a certain period of time as stated in Article 29 for companies, agriculture, fisheries, and livestock.

HGU could occur because of Stipulation of Government, but HGU could also occur because a conversion (change of ownership) according to Article 31 UUPA. The transfer of HGU can occur because of the expired period of time, is terminated before the expired period of time because a condition is not fulfilled, is revoked for public interest, is abandoned, the destruction of land, the provisions in Article 30 section (2) UUPA (Xu et al., 2016).

Beside HGU, there are proprietary which is about a right to enjoy the benefit of an object with the intention to be free towards something with complete sovereignty and does not conflict with the existing rules. According to Article 20 section (1) UUPA, proprietary is a hereditary, strongest, and the most fully owned rights of people over their land, as in the provisions of Article 6. Furthermore, proprietary can be transferred and transferred to other parties (Lucas, 2015).

Proprietary may only be owned by the Indonesian citizens, whereas for legal entities may not own land with the status of ownership right, except those who are designated under Government Regulation. The legal entities which can own the land, as regulated in Article 21 section (2) Government Regulation Number 38 of 1963 are banks established by the state, the association of agricultural cooperatives according to Law Number 79 of 1958, religion institution appointed by Minister of Home Affairs (Prakoso & Setyaningati, 2018). The

proprietary can be removed because the land falls to the state which is caused by the revocation of rights, voluntary transfer from the owner, the land is abandoned, the subject does not meet the requirements, because it is not old enough, under control, unhealthy, or the land is destroyed (Susan & Budirahayu, 2018).

The BOT contract over the land proprietary is a land which has a proprietary status and will be handed over to BOT partners for the purposes of constructing buildings on a proprietary land. The BOT partners will be given Building Rights Title (*Hak Guna Bangunan/HGB*) or right of usage¹. HGB is one of rights over land which is based on Article 35 UUPA. It is a right to build and own the buildings over land which are not their own, with a maximum term of 30 years. As the request of the right-holder and the needs as well as the condition of the buildings, the period of time mentioned in section 1 is extended with maximum of 20 years. HGB can be transferred and transferred to other parties.

What is meant by HGB in UUPA is a right over land given¹ someone to build and own a building on such land with the period of time of 30 years and can be extended into 20 years. Those who can own the HGB is the Indonesian citizens and legal entities which are established according to Indonesian law and live in Indonesia according to Article 36 section (1) UUPA. The abolition of HGB is regulated in Article 40 UUPA, terminated before the period of time is expired because of an unfulfilled condition, revoked for the public interest, abandoned, and the land is destroyed (Adnyana et al., 2015).

On the other hand⁹, the right of usage is regulated in Article 41 section (1) UUPA, that is a right to use or collect the results of land which are directly controlled by the state or the land is owned by someone else. Both of these rights over the lands are originated from lands controlled by other parties. For this reason, the BOT partners cannot guarantee, shift, or transfer the managed object to other parties as the BOT partners does not have the right over the land they control.

Share Subscription of Central/Local Government is a transfer of ownership of state/regional assets which were originally assets that are not separated into the separated one for the purpose of calculating the state/regional capital in BUMN, Local-Owned Enterprises, other legal entities owned by the state according to Article 1 Number 19 Government Regulation Number 6 of 2006 on Management of State/Regional Property which then is referred to as Government Regulation Number 6 of 2006. Local-Owned Enterprises has articles of association with financial statements to be accountable to the Local Government (Fianto, Gan, Hu, & Roudaki, 2018).

The purpose of establishing Local-Owned Enterprises is to provide benefits for the development of the regional economy in general, to conduct public benefits in the form of providing quality goods and services for the fulfillment of people's livelihoods, and to obtain profits and or profits for the region², based on Article 331 Number 4 Law Number 23 of 2014. According to Article 331 Number 3 Law Number 23 of 2014, Local-Owned Enterprises is divided into two types, which are Regional General Corporation (*Perusahaan Umum*

Daerah or namely as *Perumda*) and Regional Company (*Perusahaan Perseroan Daerah* or namely as *Perseroda*) (Pramudya, Hospes, & Termeer, 2017).

The assets of Local-Owned Enterprises need to be utilized properly and correctly because it will be an additional new revenue which can be obtained from the service sector of Local-Owned Enterprises. Rules relating to the establishment rights over land are intended to protect the state assets because later they will be given Land Management Right (*Hak Pengelolaan Lahan/HPL*). The utilization of Land Management Right can be cooperated with third parties, namely private sector as long as it supports its duties and functions. Within the BOT contract, later Local-Owned Enterprises will establish land with the status of Land Management Right, as in Article 3 Regulation of Minister of Home Affairs Number 5 of 1974. Land Management Right consists of authorities to plan the designation of target and the use of related land, to use the land for business purposes, and hand the parts of the land to the third parties according to the conditions specified by the company which is the right-holder.

The management of regional companies is responsibility of the management of the regional company which needs to be responsible to the head of the region. The responsibility of the regional head is as the owner and manager. On the other hand, in Local-Owned Enterprises whose one of it is in the form of Local Corporation (*Perseroan Daerah/Perseroda*) is referred to Law Number 40 of 2007 on Corporation, where there is profit-oriented motive and a clear responsibility towards shareholders, commissioner, management of PT. Local-Owned Enterprises assets is originated from Provincial or District Government Budget (APBD). It is a share subscription of local government determined by Local Government Regulation (Perda) and it is the wealth of separated areas. The management of a certain corporation does not merely become the responsibility of the district head, as in local corporation.

With the transfer of the state/regional assets which were formerly an asset which is not separated, later it turned into assets which are separated to be counted as a state/regional capital in Local-Owned Enterprises. As a result, Local-Owned Enterprises does not have to comply with Government Regulation Number 27 of 2014 on Management of State/Regional Property because it has rights in BOT contract, and relating to the relationship with the private sectors. For example, Local-Owned Enterprises has a right to apply or not apply the Article 36 of Government Regulation Number 27 of 2014 on Management of State/Regional Property, where the BOT partners are prohibited from guaranteeing BGS objects/ (Ahmad & Thahir, 2017).

Landowner's Approval in Guarantee of the BOT Contract Object

The BOT contract which involve Local-Owned Enterprises with cooperation partners have objects within the contract. Object is something that is useful and can be controlled by legal subjects.¹⁸ Something which is promised in the agreement can be in the form of clear things or goods, which relate to the BOT contract whose object of agreement is an asset in the form of land or land rights (Xu et al., 2016).

The object of BOT contract, land, has regulations which prohibit the cooperation partners whose one of them is guaranteeing such object of the BOT contract, according to Article 36 Government Regulation Number 27 of 2014. On the other hand, Local-Owned Enterprises as one of the subjects in the BOT contract has exclusive right which could allow or not allow cooperation partners to guarantee the related object of the BOT contract, in other words Local-Owned Enterprises is allowed to not follow the regulation stated in Article 36 Government Regulation Number 27 of 2014 (Hilmarsson, 2017).

Considering the BOT contracts as the utilization of State/Regional assets in the form of land based on Government Regulation Number 27 of 2014, the land used as the object of the BOT contract does not belong to the cooperation partners. As there is exclusive rights owned by Local-Owned Enterprises, the cooperation partners could guarantee lands which are not owned by them (Pacheco et al., 2017).

The object of BOT as it is owned by the government, Local-Owned Enterprises acts only as a party who undertakes cooperation with the cooperation partners. As Local-Owned Enterprises assets are separated from government, then lands owned by the government which becomes the BOT objects are not owned by Local-Owned Enterprises. As a result, the guarantee assets over the lands in the BOT contract done by the partners need to have the government's approval as the land owner. BOT is over Land Management Right, the handover of the use of Land Management Right land to the cooperation partners can be accompanied by granting a new right over land, HGB. The concerned cooperation partners will be granted right over land in the form of HGB and must ask permission firstly before guaranteeing the object of the BOT contract to the government as the owner of land right in the form of Land Management Right which is intended to be guaranteed (Adnyana et al., 2015).

CONCLUSION

To answer the statement of problem pertaining to legality of guarantee ban clause within BOT contract, there is a regulation which prohibits cooperation partner to guarantee the object of BOT contract as it has been regulated on Government Regulation Number 27 of 2014. The regulation needs to be followed by the related subjects, including Local-Owned Enterprises. However, it has the right to be able to allow or not allow cooperation partners to guarantee the object of the BOT contract because it has separated assets from the government assets. In order to be able to guarantee the object of the BOT contract, the cooperation partners need to ask permission firstly to the land owner as the owner of the object of the BOT contract, which is the government.

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ETHICAL CLEARANCE

This research does not involve any participants, rather it is descriptive study. This research was carried out in accordance with the research principles. This study implemented the basic principle ethics of respect, beneficence, nonmaleficence, and justice.

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It's my pleasure to inform you that, after the peer review, your paper, **"LEGALITY OF GUARANTEE BAN CLAUSE WITHIN BUILD OPERATE TRANSFER PROJECT BY LOCAL-OWNED ENTERPRISES"** has been ACCEPTED to publish with PalArch's Journal of Archaeology of Egypt/Egyptology, ISSN 1567-214X. It will be Publish in December 2020 Issue.

I believe that our collaboration will help to accelerate the global knowledge creation and sharing one step further. Please do not hesitate to contact me if you have any further questions.

Sincerely,



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