

Constitutionality of Simultaneous Extension and Renewal of Land Rights

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Abstract

One form of state control is to regulate the granting of land rights, including determining the subject of the right and the duration of a land right. The determination of the period of land rights must pay attention to equality of opportunity and access in acquiring and controlling land so as to create the greatest prosperity of the people as the goal of national agrarian law. This is normative research that focuses on examining the harmony between regulations, using a statute approach and a conceptual approach. Therefore, primary legal materials and secondary legal materials obtained based on literature research are used. The data obtained was then analyzed based on content analysis. In this research, it was found that there are overlapping regulations between the Basic Agrarian Law, Governmental Regulation No. 40 of 1996, Agrarian Minister Regulation No. 18 of 2021, and Government Regulation No. 12 of 2023 regarding the extension and renewal of land rights at the same time. This regulatory overlap is shown through the agrarian policies present in the capital city of the archipelago that are highly investment-oriented, override the objectives of the national agrarian law, and show a comparison with the policies in Thailand. In addition, in reality, the simultaneous extension and renewal of land rights causes several things, namely: (1) legal uncertainty due to overlapping regulations; (2) inequality and injustice for the community due to liberal-capitalist and investment-oriented policies; and (3) unconstitutionality because it basically violates the Constitutional Court's decision.

Keywords: *Constitutionality; Extension; Renewal; Land Rights; National Agrarian Law.*

1. INTRODUCTION

The concept of state/nation is always related to the aspect of territoriality because it is related to the control and use of natural resources in its territory. The concept of state as a concept that emerged in Westphalia was later developed in the Roman period.¹ Malcolm Shaw also strengthened the classical view by providing an understanding that land as one of the elements of a state's territory is an important existential requirement.² Soekarno, who criticized the views of

¹ John Agnew, "Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics," *Annals of the Association of American Geographers* 95, no. 2 (2005): 437–61, <https://doi.org/10.1111/j.1467-8306.2005.00468.x>.

² Malcolm N. Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008).

Renan and Bauer, also emphasized the same thing, namely that the nation/state is the unity of the nation and territory, not just the unity of people and forgetting the aspect of territory.³

In Soekarno perspective, the unity between man and territory named the homeland. This is what later became the basis for political and ideological legitimization of the Indonesian rights as nation to the earth, water, space and natural resources contained therein. The relationship between Indonesian and the land is an eternal means that as long as the Indonesian and natural resources still exist, the relationship will remain. The relationship between the Indonesian nation and its land is a private relationship or ownership relationship.⁴

In order to manage the land owned by the Indonesian people, an organ called the state was created. The state serves as the organization of all people. One important thing to be traced in this context is the meaning of the state. Gunnar Folke Schupper states that sovereignty and authority are integral parts of the state. The conception of the state in the Roman period, as stated by Burbank and Cooper, was a means to implement government and support social order.⁵ Therefore, the relationship between the state and land is a public relationship because public authorities are attached to it to manage land and other natural resources.

The constitutional foundation of state right to control is Article 33 paragraph (3) of Indonesia Constitution, which states that the Earth, Water and Natural Resources contained therein shall be controlled by the state and utilized for the greatest prosperity of the people. There are two important words that must be underlined in the substance of this article, namely the words controlled and utilized. The word controlled emphasizes the aspect of authority while the word utilized relates to the purpose of the authority.⁶

The substance of Article 33 paragraph (3) is then elaborated in Law No. 5 of 1960 on the Basic Agrarian Law (hereinafter referred to as BAL). Article 2 of BAL states that the right of state control in the agrarian sector includes regulating legal relationships and actions related to land. Based on this authority, the state has the right to determine the legal relationship between people and legal entities as subjects toward land as objects, both regarding the land that can be used and the legal status (type of land rights) attached to the land.

Based on Article 16 of BAL, land rights can be broadly divided into three: permanent, temporary and future land rights. The permanent land rights are the right of ownership, rights to cultivate, right to build, right to use, right to lease and the right of opening-up land. In this article, the author will focus on discussing the time period as well as the mechanism for extending and renewing right to cultivate, right to build and right to use that overlaps between the provisions contained in BAL and also regulations that are derivatives of the Job Creation Law in the land sector, namely Government Regulation No. 18 of 2021 (herein after cited as GR No. 18 of 2021), Government Regulation No. 40 of 1996 (herein after cited as GR No. 40 of 1996), Minister of Agrarian Regulation

3 Ananda Prima Yurista, "Implikasi Penafsiran Kembali Hak Menguasai Negara Terhadap Pengelolaan Wilayah Pesisir Dan Pulau-Pulau Kecil," *Rechtsvinding* 5, no. 3 (2016): 339–58.

4 Notonagoro, *Politik Hukum Dan Pembangunan Agraria Di Indonesia* (Jakarta: Bina Aksara, 1984).

5 Gunnar Folke Schuppert, "A Global History of Ideas in the Language of Law," in *State Authority* (Max Planck Institute for Legal History and Legal Theory, 2021), 54, <https://doi.org/10.1016/j.exis.2018.05.004>.

6 Myrna A. Safitri, "Hak Menguasai Negara Di Kawasan Hutan : Beberapa Indikator Menilai Pelaksanaannya," *Jurnal Hukum Lingkungan*, no. 1 (2014): 1–21.

No 18 of 2021 (herein after cited as MAR No. 18 of 2021) as well as Governmental Regulation No. 12 of 2023 (herein after cited as GR No. 12 of 2023).

The analysis in this article is not only limited to the overlap between the substance of the UUPA and the regulations derived from Job Creation Law in the land sector but also analyzes the suitability of the mechanism and the period of extension and renewal of land rights with the Constitutional Court Decision and the objectives of national agrarian law, namely the greatest prosperity of the people.

One of the Constitutional Court Decisions regarding to prohibition of granting land rights and extensions simultaneously is Constitutional Court Decision No.21-22/PUU-V/2007. In this decision, the Constitutional Court explicitly stated that the granting and extension of rights at the same time for right to cultivate, right to build and right to use violates the Constitution, especially Article 33 paragraph (3) of the 1945 Constitution, which relates to the right to control the state.

The contradictions between the provision of various regulations is the first discussion in this article, which is then sharpened by analyzing the extension and granting of land rights simultaneously in light of the Constitutional Court's decision. Then, the analysis will become more comprehensive by assessing the extension and renewal of land rights in light of the state's right to control as one of the principles of national agrarian law management. At the end of this paper, a description of the steps that can be taken to overcome this problem will be presented.

This article differs from Holloway's in that it focuses on the coordination of programs to address losses from conflicts over agricultural land use and natural resources in the Americas.⁷ In addition, this research also differs from the writings of Hanan Jacoby, Guo Li and Scott Rozelle who discuss the dangers of land expropriation and investment in rural China and focus on the risks of land transfers that only produce minimal benefits for Chinese people.⁸ In contrast to these two studies, in this author's research, the focus is on the constitutionality of the policy of extending and renewing land rights by presenting a more sophisticated analysis of legal uncertainty, unconstitutionality, comparisons with Thai policies and injustices that occur.

This is normative research that conceptualizes law as norm with *statutory approach* which focuses on examining the substance of legislation and a *conceptual approach* by utilizing theories, principles and legal doctrines as well as *comparative approach* because it compares the substance of one legislation with other legislation. This research use secondary data. The data is collected through *literature research*. The next stage is to analyze the data through the following stages: *reducing data*, namely sorting data based on its relevance, *coding* or sorting data based on themes, interpreting data, namely analyzing data that has been sorted based on theories, concepts, doctrines and legal principles. At the end, a conclusion is made.⁹

⁷ James E. Holloway and Donald C. Guy, "Rethinking Local and State Agricultural Land Use and Natural Resource Policies : Coordinating Programs To Address The Interdependency And Combined Losses Of Farms , Soils , And Farmland," *Journal of Land Use & Environmental Law* 5, no. 2 (1990).

⁸ S. Jacoby, H. G., Li, G., & Rozelle, "Hazards of Expropriation : Tenure Insecurity and Investment in Rural China Author (s): Hanan G . Jacoby , Guo Li and Scott Rozelle Published by : American Economic Association Stable URL : <https://www.jstor.org/stable/3083257> Hazards of Expropriation ;," *American Economic Review* 92, no. 5 (2002): 1420-47.

⁹ Matthew B. Miles and A. Michael Huberman, *Qualitative Data Analysis* (London: SAGE Publication, 1994).

2. ANALYSIS AND DISCUSSION

2.1. Overlapping Regulations on the Extension and Renewal of Land Rights

2.1.1. Differences in Regulations Regarding the Extension and Renewal of Right to Cultivate

One of the land rights is the right to cultivate, defined as the right to cultivate state land for agricultural, fishery, and livestock businesses. The scope of activities has expanded with the inclusion of plantations in Government Regulation No. 40 of 1996 on the Right to Cultivate, Right to Build, and Land Title.

The draft of BAL submitted by Mr. Sadjarwo (Minister of Agrarian Affairs) on August 1, 1960, regulated the right to cultivate in Article 28, which stated that the right to cultivate was given for a maximum period of 30 years and for companies that needed longer time could obtain a right to cultivate for a period of 40 years. Based on the application of the holder of a rights to cultivate, an extension of 30 years can be granted.

In the discussion, this period was protested by Asmu, a member of parliament from the Golongan Karya Party, who stated that a period of 30 years was considered too long and should only be granted for a period of 25 years and for those requiring a longer period, changed from 40 years to 30 years. This shortening of the period can actually be linked to the explanation of Article 28 of the UUPA, which states that the granting of a 25-year or 35-year period with an extension of 25 years is considered long enough to carry out the exploitation of long-lived crops such as oil palm.

Referring to the substance of BAL, the right to cultivate cannot be granted all at once but must be gradual, starting with the first grant for 25 years (35 years can be given for certain companies). Then, an extension can be given within 35 years if, based on the results of the evaluation, it meets the requirements to obtain an extension of rights. The conditions that must be met to obtain an extension of the right to cultivate are:

1. The right holder is still cultivating the land properly in accordance with the circumstances, nature and purpose of the granting of business use rights;
2. The right holder still fulfills the conditions for granting the right.

These conditions also apply if the holder of right to cultivate wishes to renew the right. The conditions and evaluations imposed when applying for extension and renewal of rights indicate that there is an evaluation mechanism to ensure that the right to cultivate is properly utilized.

The existence of such leasehold periods cannot be separated from the debates in the making of BAL, which was based on the spirit of nationalism but still aware of the reality that funding from large-scale companies was needed to support the economy of a newly independent country. However, this was only temporary until the country could become economically independent. It was this spirit of nationalism that led to the determination of the right to cultivate.

The intention to make large-scale investments as a temporary thing changed when the Job Creation Law was made. In this regulation, the flow of large-scale capital through investment is no longer seen as a temporary thing but becomes the main thing, as stated in the National Medium-Term Development Plan for 2019-2024. For

this reason, policies in the land sector are directed to support investment activities, including the acquisition, extension, and renewal of the right to cultivate:

Table 1. Comparison Table of Right to Cultivate Arrangement

Indicator	BAL	Government Regulation No. 40/1996	Permen ATR/BPN No. 18/2021
Time Period	25 years of first acquisition. For companies that require a longer period can be extended until 35 years is given. Renewed 25 years	Awarded 35 Years Extended 25 Years Renewed 35 Years Evaluation at the time of application for extension and at the time of application for renewal (application for extension and renewal cannot be done at the same time).	Awarded 35 Years Extended 25 Years Renewed 35 Years Applications for extension and renewal of right to cultivate can be submitted at the same time so that the total of application time is 60 years.
Cultivation Rights Extension and Renewal Application	Not regulated	Submitted no later than two years before the cultivation rights period ends	Right to cultivate renewal can be submitted no later than 2 (two) years after the completion of the Cultivation Rights period or its extension ends.
Soil Origin	State Land	State Land	State Land and Management Right

BAL states that the term of a rights to cultivate is 25 years and 35 years for companies that require a longer period. The holder of a rights to cultivate can obtain an extension of the right if, based on an evaluation, it is eligible for a maximum period of 25 years. If the holder of a rights to cultivate meets certain requirements, then at the latest two years before the expiration of the extension, he or she can apply for a renewal of the right as stipulated in Article 9 of GR No. 40/1996.

Article 72 paragraph (1) of MAR No. 18 of 2021 states that right to cultivate on management rights can be extended and renewed at the same time. In this case, the extension and renewal of right to cultivate on management rights are made in one decree.

Based on the description above, the substance of MAR No. 18 of 2021 is more favorable for investors in the fields of fisheries, animal husbandry, plantations because it is easier because the period of right to cultivate can be submitted at once, applications for extension and renewal of right to cultivate can be submitted two years after the period of granting and extension of right to cultivate expires and the origin of cultivation rights land which is increasingly broad in scope, namely state land and management rights land.

The granting of the right to cultivate extension and renewal at the same time for 60 years clearly benefits investors because they do not have to process two applications (extension and renewal separately) and no longer undergo the evaluation stage regarding

the fulfillment of the requirements for the right to cultivate renewal, both in terms of fulfilling the requirements and the conditions for the utilization of the land. Thus, as long as a cultivation rights holder only undergoes one evaluation stage, This is clearly different from the provisions of BAL and GR No. 40/1996, which require two stages of evaluation, one to obtain an extension of rights and the other to apply for a renewal.

2.1.2. Differences in Regulations Regarding Extension and Renewal of Right to Build

One of the land rights in BAL is the right to build. This right is granted to Indonesian citizens and legal entities established under Indonesian law. In this case, the right to build is intended to construct buildings on state land, freehold land, and management land. There are several differences in the regulation of the right to build in GR No. 40 of 1996 and MAR No. 18 of 2021.

Table 2. Comparison Table of Right to Build Arrangement

Indicator	BAL	GR No. 40/1996	MAR No. 18/2021
Time Period	Awarded 30 Years Extended 20 Years	Awarded 30 Years Extended 20 Years Renewable 30 Years	Awarded 30 Years Extended 20 Years Renewable 30 Years
		Evaluation at the time of application for extension at the time of application for renewal (application for extension and renewal cannot be done at the same time).	Applications for extension and renewal of right to build on management rights can be submitted at the same time so that the total application time is 50 years. Right to build on management right used for flats can be granted, extended and renewed at once so that the period of granting is 80 years.
Application for rights to build Extension and Renewal	Not regulated	Submitted no later than two years before the rights to build period ends	Right to build renewal can be submitted no later than 2 (two) years after the completion of the rights to build period or its extension ends.
Soil Origin	Freehold land and state land	Freehold and state land	State land, managed land and freehold land

Based on BAL and GR No. 40/1996, it is stated that the period of granting right to build is 30 years and if based on an evaluation of the right to build holder, it meets the requirements to obtain an extension for 20 years and based on an evaluation, the extension of the right to build, the right to build deserves to apply for a renewal of the right for 30 years.

This is different from the substance of Article 96 paragraph (1) letter a of MAR No. 18 of 2021 which stipulates that on state land, the application for extension of the right to build can be submitted at the same time as the renewal rights. In paragraph (2), it is stated that in the case of right to build on management right land, the application for extension and renewal of rights can be submitted at the same time as the application for granting rights after the building and/or its supporting facilities have been built and utilized at the same time.

There are differences in substance between various regulations regarding to the extension and renewal of land, even on the right to build on land under management rights can be granted at once, namely 80 years. In determining the substance of these regulations that should be applied, it is no longer based on conventional legal principles and tends to be positivist. In this case, the determination of applicability will be seen in accordance with the objectives of national agrarian law, namely the greatest prosperity of the people.¹⁰

There are significant differences between GR No. 40/1996 and MAR No. 18 of 2021 in terms of the time period, the mechanism for applying the extension and renewal of rights to build, and the origin of land. Among these three differences, the most prominent one relates to the duration of the land. There are two basic things: the granting of extensions and renewals of rights can be applied for at once, and the right to use land management for flats can be given at once for 80 years, as stipulated in Article 87, paragraph (2) of MAR No. 18 of 2021. Based on the analysis, this lump sum granting of land rights is even more extreme than Article 22 paragraph (1) letter b of Law No. 25 of 2007 on Capital Investment because this law only provides an opportunity to obtain the granting and extension of the right to build at once, namely 50 years, not 80 years like MAR. In Constitutional Court Decision No. 21-22/PUU-V/2007, the provision of a lump sum extension of the rights to build was declared contrary to the 1945 Constitution and said to have no binding legal force.

2.1.3. Differences in Regulations Regarding Extension and Renewal of Right to Use

One of the land rights that can also be extended and renewed simultaneously is the right to use. Based on the definition in Article 41 of BAL, this right to use can be used to construct buildings and be utilized for other purposes. The following table presents the differences in the regulation of the right to use stipulated under MAR No. 40 of 1996 and MAR No. 18 of 2021:

¹⁰ Imam Koeswahyono, "Hak Menguasai Negara, Perspektif Indonesia Sebagai Negara Hukum," *Jurnal Hukum & Pembangunan* 38, no. 1 (2008): 58, <https://doi.org/10.21143/jhp.vol38.no1.165>.

Table 3. Comparison in Regulations Regarding Extension and Renewal of Right to Use

Indicator	BAL	GR No. 40/1996	MAR No. 18/2021
Time Period	Not regulated	Awarded 25 Years Extended 20 Years Renewed 25 Years Evaluation when applying for extension and when applying for renewal (application for extension and renewal cannot be done at the same time)	Right to use period of time: Awarded 30 Years Extended 20 Years Renewable 30 Years Right to use as long as it is used (unlimited) Applications for the extension and renewal of time-limited right to use on management rights can be submitted at once so that the total application time is 50 years. The conditions for renewal and renewal of rights at once: <ol style="list-style-type: none"> 1. Agricultural land can be applied after it has been effectively utilized by the holder; 2. Non-agricultural land can be applied after the building and/or its supporting facilities have been constructed, used and effectively utilized.
Right to Use Extension and Renewal Application	Not regulated	Submitted at least two years before the end of the HP period	HP renewal can be submitted no later than 2 (two) years after the completion of the HP period or its extension expires.
Soil Origin	Freehold land and state land	Freehold land and state land	State land, managed land and freehold land

The table above illustrates the principal differences between the regulations governing the right to use in GR No. 40/1996 and MAR. The primary distinction is the disparity in the time period. The most significant distinction is the duration of the right of use. In GR No. 40 of 1996, the term of the right to use is 25 years, which can be extended for a further 20 years and renewed for a further 25 years, thus resulting in a total duration of 70 years. The provisions of MAR No. 18 of 2021 are given for 30 years, extended for 20 years, and renewed for 30 years, for a total of 80 years. Furthermore, this regulation allows for the extension and renewal to be granted simultaneously, namely for a period of 50 years. This provision is beneficial to right holders, including investors, who wish to use the land.

The extension and renewal of land rights occur simultaneously with the right to use, as stated in Article 123, paragraph (1), of MAR No. 18 of 2021. The article clearly stipulates that applications for extension and renewal of the right to use on management rights can be submitted simultaneously if they meet the requirements:

1. For agricultural land, extensions and renewals can be made after the right of use holder has effectively utilized the land; and
2. For non-agricultural land, after the construction of buildings and/or supporting facilities, the land is used and utilized immediately.

The aforementioned provisions indicate that the right to use can be renewed and extended simultaneously. Consequently, the rights to cultivate, build, and use can be extended and renewed concurrently.

The mechanism for the extension and renewal of rights in BAL and GR No. 40 of 1996 necessitates an evaluation mechanism at each stage, thus preventing the submission of extension and renewal requests in a single instance. This differs from the substance of GR No. 18 of 2021 and MAR No. 18 of 2021, which permit the extension and renewal of rights simultaneously. Even the right to build on management rights may be granted, extended, and renewed simultaneously.

2.2. Simultaneous Extension and Renewal of Land Rights in Ibu Kota Nusantara

The issue of the extension and renewal of land rights became more complex following the enactment of GR No. 12 of 2023. The orientation of this regulation is to facilitate investment in Ibu Kota Nusantara (hereinafter cited as IKN).¹¹ This has led to adjustments in the period of land utilization. The ease of doing business is evident in the extension and renewal of rights to use, build, and cultivate, as shown in the following table:

Table 4. Extension and Renewal of Right to Cultivate, Right to Build and Right to Use

Indicator	Right to Cultivate	Right to Build	Right to Use
Time Period	Granting rights for a maximum of 35 years, can be extended for 25 years and renewed for maximum 35 years.	Maximum 30 years, extendable for 20 years and renewable for maximum of 30 years.	Maximum 30 years, extendable for 20 years and renewable for maximum of 30 years.
Extension and Renewal Mechanism	extension and renewal of rights may be granted in one lump sum after five years of land utilization.	renewal and extension of Rights may be granted in one lump sum after five years of use.	extension and renewal can be granted at once after five years of use/utilization.

The pattern of extension and renewal of land rights in this regulation is more ironic than in the previous regulation. In this regulation, the right holder can apply for

¹¹ Akhmad Safik and Mira Ewinda, "Pengelolaan Tanah Di Ibu Kota Negara IKN," *Jurnal Magister Ilmu Hukum* 8, no. 2 (2023): 50, <https://doi.org/10.36722/jmih.v8i2.2307>.

extension and renewal at the same time if they have utilized the land for five years. For example, if a holder has utilized the land for five years, they can apply for an extension and renewal at the same time, thus holding the land for 90 years.¹² This is problematic because it violates the purpose of the extension and renewal of the right, namely to evaluate the use of land by the right holder before the extension or renewal is granted. This is to ensure that the land does not become an object of accumulation and to ensure that the land remains productive. In the philosophy of national land law, land will be valuable/meaningful if it is actively used by the right holder. The issue becomes more complex when the holder is permitted to apply for rights for a second cycle within the ten-year period preceding the expiration of the rights.

This reality is clearly contrast to BAL, GR No. 18 of 2021, especially regarding the time period as described and finally it brings out legal uncertainty. According to Humberto Avila there are three forms of legal certainty, namely certainty in law, certainty because of law and certainty before the law. In this case, certainty in law which requires harmony between laws and regulations can't be attained. Legal certainty will occur if three conditions are met, namely:¹³

1. *Knowability*, the regulation will create certainty if it is known by the public and law officers because the regulation is addressed to both of those subjects. This named as dual aspect of law. The overlap of regulations will cause confusion for both subjects; if this happens, there is no definite reference for employees/officials in carrying out their duty and also public to obey the rules.
2. *Reliability*, regulation must be consistent so that there are no contradictions in it. Therefore, Lon L Fuller states that *non-contradiction is one of legality principle*.¹⁴ In this case, there is inconsistency regarding to period of land rights and mechanism for extension and renewal.
3. *Calculability, predictability* means that the consequences of fulfilling or violating regulations can be known. If there are two conflicting rules, it is clear that the consequences cannot be determined with certainty because fulfilling one provision will cause other provisions to be violated / not fulfilled so that the pattern becomes unclear and predictability will be difficult to realize.

The non-fulfillment of these three conditions clearly causes legal certainty can't be realized. Whereas legal certainty is one of the basic values that is very fundamental in law.

The non fulfillment is not only the value of legal certainty in terms of the extension and renewal of land rights but also the value of justice as the first and main value in law, which is referred to as the primacy of justice by Bur Rasuanto.¹⁵ John Rawls further provides an interpretation of justice as equality or *justice as fairness*.¹⁶ It can be

12 de Pria Dharsana, Indrasari Kresnadajaja, and I Gusti Agung Jordika Pramanditya, "The Legal Consequences of the Government's Policy of Attracting Foreign Investors Based on the Omnibus Law," *Journal of Public Administration, Finance and Law*, no. 26 (2022): 85–94, <https://doi.org/10.47743/jopaf1-2022-26-08>.

13 Humberto Ávila, *Certainty in Law*, vol. 114, Law and Philosophy Library (Cham: Springer International Publishing, 2016), <https://doi.org/10.1007/978-3-319-33407-3>.

14 Solomon Vinner, "Fuller's Concept of Law and Its Cosmopolitan Aims," *Law and Philosophy* 26, no. 1 (2007): 1–30, <https://doi.org/10.1007/s>.

15 Bur Rasuanto, *Keadilan Sosial : Pandangan Deontologis Rawls Dan Habermas (Dua Teori Filsafat Politik Modern)* (Jakarta: Gramedia Pustaka, 2005).

16 John Rawls, *A Theory of Justice, The Belknap Press of Harvard University Press*, Revised, vol. 1 (Cambridge: Harvard University Press, 1999), <https://doi.org/10.29339/pha.1.1.15>.

interpreted that the current agrarian policy wants to create equality between entities, including the community and investors in IKN. The process of extension and renewal of rights for investors is much easier for business actors who invest in IKN because the extension and renewal of rights can be given at once after five years of land utilization, while for the community in general, renewal of rights can be submitted no later than 2 (two) years after the completion of the right period or extension expires.

2.3. Simultaneous Extension of Land Rights Violates Constitutional Court Decision

Efforts to provide a longer period of time will undoubtedly confer benefits to the rights holders. Article 1 of Law No. 25/2007 stipulates that rights to cultivate can be granted for a period of 95 years. Furthermore, these rights can be granted and extended simultaneously for a period of 60 years, and subsequently renewed for a further 35 years. In addition, the right to cultivate can be granted for a total period of 80 years by initially granting and extending it for 50 years as a lump sum, and subsequently granting and extending it for 30 years as a lump sum. The right to use can be granted for a total period of 70 years by initially granting and extending it for 45 years as a lump sum, and subsequently granting and extending it for 25 years as a lump sum.

In essence, the granting and extension of the period at once in this investment law is the same as the substance of the MAR No. 18 of 2021 and GR 12/2023, which also provides a period of extension and renewal of rights at once. This is beneficial for right holders because it allows them to obtain a long period of time without going through an evaluation mechanism which requires several administrative processes and fulfills certain conditions.

The granting and extension of land rights at once without going through an evaluation stage was declared to have no binding force in Constitutional Court Decision No. 21-22/PUU-V/2007. The decision posited that the simultaneous conferral and renewal of land rights is at odds with Article 33, paragraph (3), of the Constitution, as it diminishes, impairs, and in certain instances, extinguishes the state's prerogative to regulate.¹⁷ Consequently, *mutatis mutandis*, this Constitutional Court Decision can also be the starting point for the proposition that the simultaneous granting of extensions and renewals of rights in MAR No. 18 of 2021 and GR No. 12/2023 is contrary to the Constitution.

Constitutional Court Decision 021-022/PUU-I/2003 stated that there are five forms of state control rights, namely:

1. Establish policies (*beleid*);
2. Performing management actions (*bestuursdaad*);
3. Making rules (*regelendaad*);
4. Performing management (*beheersdaad*) and
5. Carry out supervision (*toezichthoudensdaad*).

Of the five forms of state control rights, there is a reduction in state control rights due to the extension and renewal of rights at once, even for right to build on management rights used to build flats can be the object of granting, extending and renewing rights

¹⁷ Ida Ayu Putu Sri Astiti Padmawati dan Ida Bagus Sudarma Putra, "Konstruksi Hukum Pembentukan Badan Bank Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum Yang Berkeadilan," *Vyavahara Duta* 27, no. 2 (2023): 58–66. China, was caused by a novel betacoronavirus, the 2019 novel coronavirus (2019-nCoV

at once, namely 80 years. The two forms of state control rights that are reduced are the state's right to carry out supervisory actions (*toezichthoudensdaad*) and also management actions (*beheersdaad*).

The state's right to conduct supervision is related to monitoring, evaluation, auditing, control and law enforcement.¹⁸ In this case, supervision is a logical consequence of granting land rights. This is to ensure the implementation and use of land rights are in line with the provisions (*geldelijke controle*) and according with the purpose namely create the greatest prosperity of the people (*doelmatigheid controle*).¹⁹

Based on the Constitutional Court Decision No. 21-22/PUU-V/2007, there are several reasons that can be put forward to state that the extension of land rights at once as stipulated in the MAR No. 18 of 2021 violates the constitution because:

1. This will hinder state to stop or cancel the extension and renewal. In this case, right holder can question the validity of the state's action. This condition weakens the state's position in exercising its right to control as stipulated in Article 33 paragraph (3) of the Constitution.
2. This hampers the state in providing equal access and opportunities for the entire community to own and control land. Because the holder owns access and exclusivity. Access means that land rights holders have the authority to control and use/utilize the land to meet their needs.²⁰ Exclusivity means that land rights holders are authorized to exclude or exclude other people from using the land.²¹

The extension and renewal of land rights at the same time causes land rights holders to control the land for longer periods of time and exclude other people from controlling the land. This condition clearly contradicts the state's obligation to provide equal opportunities and access for all. Moreover, equitable distribution of land rights is one of the indicators to achieve the greatest prosperity of the people in addition to the benefits of natural resources for the people, the level of participation of the people in determining the benefits of natural resources and respect for the rights of the community to utilize natural resources. This means that the state must provide access to land for all people.

Notonagoro posited that one of the tenets of national agrarian development is that the state must ensure that land is not allocated to small communities but rather to all people.²² Notonagoro's view should be a guide for the government in realizing a welfare state.²³ Furthermore, Satjipto Rahardjo underscores the prioritization of bringing happiness to the people.²⁴

In the author's view, the extension and renewal of land rights limits the access of the people in general. This is also contrary to the spirit of the People's Consultative Assembly Decree No. IX/MPR/2001 which is oriented to justice in land tenure and ownership in Indonesia. In addition, it also contradicts the spirit of the framers of the

18 Jimly Asshiddiqie, *The Economic Constitution* (Jakarta: Kompas Gramedia, 2010).

19 Yance Arizona, *Konstitusionalisme Agraria* (Yogyakarta: STPN Press, 2014).

20 Robert Mayhew, "Aristotle on Property," *The Review of Metaphysics* 46, no. 4 (1993): 803-31.

21 Howard Williams, "Kant's Concept of Theory," *The Philosophical Quarterly* 27, no. 106 (1977): 32-40.

22 Notonagoro, *Politik Hukum Dan Pembangunan Agraria Di Indonesia*.

23 Yuswanto, "Peran Negara Hukum Indonesia Melindungi Rakyatnya Dalam Menyambut Masyarakat Ekonomi Asean (Mea) 2015," *FIAT JUSTISIA: Jurnal Ilmu Hukum* 8, no. 4 (2015): 571-83, <https://doi.org/10.25041/fiatjustisia.v8no4.280>.

24 Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban* (UKI Press, 2006).

BAL who want to limit land tenure of particular party so long that it create unequal access.

2.4. Comparison of Renewal of Right to Builds and Right to Use between Thailand and Indonesia

Basically, there are differences between the extension and renewal of right to build and right to use in Thailand and Indonesia. This can be illustrated in the following table:

Table 5. Comparison of Right to Builds and Right to Use between Thailand and Indonesia

Indicator	Thailand	Indonesia
Granting and Extending Rights	Right to Build and Right to Use in Thailand are granted for a period of 30 years and can be renewed for 30 years.	Right to Builds and Use Rights are granted for a period of 30 years, renewable for 20 years.
Renewal of Rights	Does not recognize renewal of rights Renewal of rights can be applied for after the initial grant period (30 years) has been completed.	Right to Build and Right to use can be renewed for a period of 30 years. Renewal and extension of rights can be applied for at the same time. In the IKN Law, extension and renewal can be granted at once after five years of use/utilization.
Total Period of Land Concession	60 years old	80 years old

Source: Processed by the author from various sources

The table above shows that there are significant differences in the context of granting, extending and renewing land rights between Indonesia and Thailand. Under *Sections 540 and 1403* of the Thai Civil and Commercial Code, Right to Build and Right to use can be granted for thirty years and can be extended for 30 years at the end of the first term so that the total term of Right to Build and Right to use is 60 years. The application for extension at the end of this term is necessary to evaluate the use of the land in accordance with the purpose for which it was granted and to prevent misuse of the land. This is contrast to Indonesia, which can grant up to a total of 80 years of right to use and Right to Build with the ease of simultaneous extension and renewal. This would eliminate the land use evaluation mechanism in the extension and renewal of rights which is not in line with the value of justice and the Constitutional Court Decision. This condition is unfair because it is clear that the orientation of granting building use rights and longer use rights is to facilitate land acquisition by investors, including foreigners, and not in favor of the people who currently have very little control over land.

The table above also illustrates that Thailand's land policy is more protective than Indonesia's, with an evaluation mechanism in place for the extension and renewal of land rights. Thailand's land policy is particularly stringent in the agricultural sector, where foreign investment is prohibited and leasing land for agricultural activities is limited to a period of six years. This contrasts with the land policy in Indonesia, which is more pro-investment. As a result, the period of land use rights is longer and the process of extension and renewal is easier. One sector included in the scope of business use rights is the agricultural sector, which is of particular importance given that it is related to people's livelihoods and that the majority of Indonesians work in this sector.

2.5. The Accordance of Simultaneous Extension and Renewal of Land Rights with Justice

An investor in IKN may apply for extensions and changes at once after five years of using the land. In contrast, a member of the public in common must pass an evaluation process before being permitted to submit an application. This discrepancy in access to the basic right to use land for civil society and investors in IKN demonstrates a lack of equality. Consequently, this policy also undermines the community's ability to utilize land and weakens the spirit of agrarian reform. The simultaneous extension and renewal of leases further exacerbates the existing inequalities in land control and ownership, as the land is effectively under the control of investors for an extended period.

This condition is contrast to the concept of justice initiated by the founding fathers of the nation. Soekarno stated that meaning of justice is:²⁵ (1) Social welfare as a condition where there is no poverty in an independent Indonesia; (2) Justice as a condition of society or the nature of a society characterized by justice and prosperity, a happy situation for everyone; and (3) Marhaenism is concept of common people whose traditional means of production. These three interpretations of justice are not according with the extension and renewal of land rights at the same time. This is because current policy is very indicative of a liberal-capitalist agrarian policy instead of adjusting to Soekarno's social-marhaen spirit which strongly favors the weak.

The current agrarian policy is demonstrably at odds with the social-marhaenism values that are pro to disadvantaged communities. A review of USAID records from 2019 reveals that the GINI ratio of land ownership inequality in Indonesia reached 0.57, indicating that 57% of land in the country is owned by 1% of the population.²⁶ However, in 2022 There was an increase in the GINI ratio of land ownership inequality, reaching 0.68. This indicates a growing injustice in the context of land ownership.²⁷ Such inequality has a negative impact on the socio-economic rights of the surrounding civil society. The community may be affected by the narrowing of the area of agricultural land controlled

²⁵ Rindiana Larasati et al., "Construct Integrated Agrarian Reforms Based On Justice," *International Journal of Innovation, Creativity and Change* 14, no. 2 (2020): 909–28.

²⁶ Matt Sommerville, Christopher Bennett, Muhammad Ridwansyah and Mia Siscawati, "Indonesia Land tenure and Property Rights Assessment: Integrated Land and Resource Governance Task Order Under the Strengthening Tenure and Resource Rights II" (Burlington, 2019). Page 60

²⁷ Felishella Earlene and Benny Djaja, "Implikasi Kebijakan Reforma Agraria Terhadap Ketidaksetaraan Kepemilikan Tanah Melalui Lensa Hak Asasi Manusia," *Tunas Agraria* 6, no. 2 (2023): 152–70, <https://doi.org/10.31292/jta.v6i2.223>.

by farmers, which will reduce their income. This explanation also demonstrates the contrast between two classes of people: entrepreneurs who have strong capital and will more easily control land with various facilities from the government.²⁸

Furthermore, Ronald Dworkin provides his view on justice that is relevant to justice in the agrarian context. Dworkin views that justice is needed in the face of social facts regarding the inequalities that are present. Dworkin believes that justice must be present by involving public participation in constructing justice, respecting diversity in each community and paying attention to *disadvantaged people*.²⁹ Dworkin's view is also reinforced by the views of John Rawls³⁰ and Amartya Sen³¹, all three of whom view that justice is in favor of the weaker party. In this case, the weaker party is civil society in general, not business actors who have stronger economic power, so special treatment that creates inequality and degrades the rights of civil society should not be prioritized and given to entrepreneurs.

The Concepts of affirmative action³² and positive discrimination are necessary in understanding and viewing injustice in these issues by emphasizing the favor of the weak rather than the strong.³³ This can be achieved when the understanding of social justice is maximized as a whole, includes by bringing policy for the weak to correct injustice.³⁴ Accessing justice is important for marginalized farmers and potential to deepen structural poverty. Wojciech Sadurski views that social justice is created when an individual/group does not fall below the poverty line and is unable to gain access to resources/land.³⁵ Cristopher Peters views that the agrarian policy should be realized to protect these rights is a policy based on the basic principle of justice, namely equality, which distributes goods and services to everyone based on their basic needs.³⁶

The aforementioned views indicate that the extension and renewal of land rights may impinge upon the socio-economic rights of the community, particularly those of farmers. This of course negatively distances the state from its basic goal of realizing a just and prosperous society. Therefore, a reassessment of the policy is needed solely to realize the values of equality and equity as the basic modality of social justice for all Indonesian people.

28 Muh. Afif Mahfud, Ani Purwanti, and Dyah Wijaningsih, "A Critical Appraisal of Agricultural Land Conversion for Land Procurement for the Public Interest and National Strategic Projects," *Proceedings of the 1st International Workshop on Law, Economics and Governance* 1, no. 1 (2023), <https://doi.org/10.4108/eai.27-7-2022.2326266>. Page 2

29 Muh. Afif Mahfud, "The Relevance of Ronald Dworkin's Theory for Creating Agrarian Justice in Indonesia," *Yustisia Journal of Law* 8, no. 3 (2020): 389, <https://doi.org/10.20961/yustisia.v8i3.27386>. Page 396

30 Thomas Nagel, "John Rawls and Affirmative Action," *The Journal of Blacks in Higher Education* 39, no. 39 (2003): 82, <https://doi.org/10.2307/3134387>.

31 Amartya Sen, "What Do We Want from a Theory of Justice?," *The Journal of Philosophy* 103, no. 5 (2006): 215-38.

32 Deepak Nayyar, "Discrimination and justice: Beyond affirmative action," *Economic and Political Weekly* 46, no. 42 (2011): 52-59.

33 Mike Noon, "The shackled runner: Time to rethink positive discrimination?" *Work, Employment and Society* 24, no. 4 (2010): 728-39, <https://doi.org/10.1177/0950017010380648>.

34 Laurent Dobuzinskis, "Non-welfarism avant la lettre: Alfred fouillée's political economy of justice," *European Journal of the History of Economic Thought* 17, no. 4 (2010): 837-64, <https://doi.org/10.1080/09672567.2010.482998>.

35 Wojciech Sadurski, "Commutative, Distributive and Procedural Justice - What Does It Mean, What Does It Matter?," *Sydney Law School Research Paper* 07, no. 09 (2009).

36 Frej Klem Thomsen, "Concept, Principle, and Norm-Equality Before the Law Reconsidered," *Cambridge University* 24, no. 2 (2018): 103-34, <https://doi.org/10.1017/S1352325218000071>.

3. CONCLUSION

The extension and renewal of the right to use, the right to cultivate, and the right to build on management rights simultaneously is in contrast to BAL and GR No. 40/1996 to encourage and attract investors because it eases investment. The existence of this contradiction not only creates legal uncertainty but also the state's right to control. This is also showing injustice, especially for weak communities, because the state only sides with investors or entrepreneurs.

Furthermore, the concurrent extension and renewal of land rights constrains the state's authority to oversee and regulate land use. This also impedes the state's capacity to fulfill its obligation to ensure equality of access and opportunities for all. Therefore, the concurrent extension and renewal of land rights presents a multitude of challenges, namely: (1) legal uncertainty due to overlapping regulations; (2) inequality and injustice for the community due to liberal-capitalist and investment-oriented policies; and (3) unconstitutionality because it basically violates the Constitutional Court's decision.

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