

PROTECTION IN A BUILD-OPERATE-TRANSFER AGREEMENT ON PRIVATELY-OWNED LAND NOT ACCOMPANIED BY THE GRANTING OF A BUILDING RIGHTS TITLE

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Abstract

The definition of build-to-transfer agreements in several laws and regulations varies, particularly concerning the objects they govern. However, when associated with build-to-transfer agreements as contracts subject to contract law, complications arise, especially in relation to such agreements involving privately owned land. The determination of specific objects, particularly regarding the duration of build-to-transfer agreements on privately owned land, remains unregulated. Therefore, there is a need to establish legal protections for build-to-transfer agreements on privately owned land that do not include the granting of building rights. This research aims to determine the implementation period of build-to-transfer agreements and to regulate

legal protections for such agreements on privately owned land without building rights. The article employs a normative research method with approaches including legal analysis, conceptual exploration, and comparative study. The findings suggest that legal protection can be enhanced by granting building rights on privately owned land, incorporating clauses reflecting the principle of special personality in agreements, and pursuing breach of contract litigation as a final legal recourse. This study contributes significantly to providing legal protection for parties involved in build-to-transfer agreements on private land.

Pengertian perjanjian bangun guna serah dalam beberapa peraturan perundang-undangan bervariasi terutama terkait dengan objek yang diatur. Namun, ketika diterapkan sebagai perjanjian yang tunduk pada hukum perjanjian, terdapat tantangan, terutama jika berhubungan dengan perjanjian bangun guna serah atas tanah milik privat. Penetapan objek, khususnya mengenai jangka waktu perjanjian bangun guna serah pada tanah milik privat, masih belum diatur secara spesifik. Oleh karena itu, perlu adanya regulasi perlindungan hukum yang jelas dalam perjanjian bangun guna serah atas tanah milik privat tanpa pemberian hak guna bangunan. Penelitian ini bertujuan untuk menetapkan jangka waktu pelaksanaan perjanjian bangun guna serah serta mengatur perlindungan hukum dalam perjanjian tersebut atas tanah milik privat yang tidak dilengkapi dengan pemberian hak guna bangunan. Metode penelitian yang digunakan adalah pendekatan normatif dengan menggunakan Undang-Undang, pendekatan konseptual, dan pendekatan perbandingan. Hasil dari penelitian ini menyarankan bahwa perlindungan hukum dapat ditingkatkan dengan memberikan hak guna bangunan atas tanah milik privat, menambahkan klausul yang mencerminkan asas personalitas khusus dalam perjanjian, dan mengajukan gugatan wanprestasi sebagai upaya terakhir dalam perlindungan hukum. Penelitian ini diharapkan dapat memberikan kontribusi signifikan dalam meningkatkan perlindungan

hukum bagi semua pihak yang terlibat dalam perjanjian bangun guna serah di tanah milik privat.

Keywords: agreement, build-operate-transfer, building rights title.

Introduction

Build, operate, and transfer (hereinafter referred to as BOT) is essentially a type of agreement known as an innominate contract. The definition of a BOT agreement varies significantly across different regulations and legislation. For example, according to Government Regulation Number 34 of 2017 concerning Income Tax from Land and/or Building Rentals (hereafter referred to as the Government Regulation concerning Income Tax on Land Rentals), a BOT is described as a cooperative agreement between the land rights holder and an investor. This agreement allows the investor to construct buildings on the land during the term of the agreement and mandates that the ownership of these buildings be transferred from the investor back to the land rights holder either after the investor has operated the buildings or before the operation commences.¹

Government Regulation Number 27 of 2014 concerning the Management of State/Regional Property also provides a definition of BOT, stating that it is the utilisation of State/Regional Property in the form of land by another party through the construction of buildings and/or facilities, which the said party then utilises for a specific agreed-upon duration, and subsequently, the land along with its facilities are handed back after the period ends.² A similar definition is contained in the Regulation of the Minister of Finance Number 96/PKM.07/2007 regarding the Procedures for Implementation, Use, Utilisation, Deletion, and Transfer of State Property, which determines that BOT involves the utilisation of central government-owned land by another

¹ Pasal 1 angka 3 Peraturan Pemerintah Pajak Penghasilan Persewaan Tanah.

² Pasal 1 angka 14 Peraturan Pemerintah Nomor 27 Tahun 2014 tentang Pengelolaan Barang Milik Negara/Daerah.

party by constructing buildings and/or facilities, which are then returned to the property manager after the duration has expired.³

At first glance, all the above definitions seem similar. Yet, there is a significant difference between the definition given by the Government Regulation concerning Income Tax on Land Rentals and the definition given by Government Regulation Number 27 of 2014 concerning the Management of State/Regional Property combined with Regulation of the Minister of Finance Number 96/PKM.07/2007. The difference lies in the object regulated by these regulations, where the Government Regulation concerning Income Tax on Land Rentals mentions the object of BOT is the right over land without specifying state/regional land (which also refers to land with private ownership rights, both individuals and legal entities), whereas Government Regulation Number 27 of 2014 combined with Regulation of the Minister of Finance Number 96/PKM.07/2007 specifically limits the object in BOT to only include land controlled by the state or region.⁴

Normatively, the differences in the objects regulated by these regulations can be understood given that each rule specifically governs its field with its respective subjects. However, if the differences in these objects are associated with the BOT agreement as an agreement subject to contract law, problems will arise with these provisions, especially when linked to BOT agreements with private property land as the object.⁵

A BOT agreement on private property land is a contract bound by the legal conditions of an agreement and the principles of contracts. Therefore, a BOT agreement on private property is based on an agreement made by the

³ Wa Ode Zamrud, Muhammad Syarifuddin, and Nur Sadila Sari Mimu, "Tinjauan Hukum Kedudukan Ahli Waris Dalam Hak Pakai Tanah Di Lingkungan Benteng Keraton Buton Kelurahan Melai," *Jurnal Ilmu Hukum Kanturuna Wolio* 3, no. 1 (January 15, 2022): 31, <https://doi.org/10.55340/jkw.v3i1.562>.

⁴ Indah Juwita Sari, "Regulasi Pemanfaatan Tanah Pemerintah Dalam Perjanjian, Bangun, Guna, Serah," *Cakrawala: Jurnal Litbang Kebijakan* 14, no. 1 (2020): 38.

⁵ The privately owned land referred to in this study includes lands under private ownership rights held by individuals or legal entities, such as the Royal Palace and the Duchies in Yogyakarta.

parties, including the duration of the agreement.⁶ The legal conditions of an agreement are regulated by Article 1320 of the Civil Code, which specifies that the legal requirements of an agreement consist of⁷ mutual consent of those binding themselves, the capability to commit, a specific matter, and a lawful cause.

The determination of consent in the above legal conditions standardises the principle of consensualism, which is key to forming a contract. Nevertheless, the Civil Code does not clearly describe how reaching mutual consent occurs. If detailed, the contract is formed through three stages: the pre-contract stage, the contract execution stage, and the post-contract stage. The pre-contract stage involves creating mutual consent, where the parties engage in offering and acceptance and, if necessary, negotiate what will be regulated as the agreement's content. The formation of mutual consent in the Civil Code is only limited by defects in intent such as mistakes, coercion, and fraud as specified in Article 1321 of the Civil Code,⁸ and this process does not explicitly outline the moral values held by each party.

The common law system also recognises the process of offer and acceptance before reaching mutual consent.⁹ This is more clearly regulated in The United Nations Convention on Contracts for International Sale of Goods (hereinafter referred to as CISG), Unidroit Principles of International Commercial Contracts 2016 (hereinafter referred to as UPICC), Common European Sales Law (hereinafter referred to as CESL), and The Principles of European Contract Law (hereinafter referred to as PECL). In the common law system, a doctrine about offer and acceptance known as "the mirror image rule"

⁶ Putra Harwanto, Budi Santoso, and Hendro Saptano, "Perjanjian Bangun Guna Serah Atau (Build Operate And Transfer) Dalam Pembangunan Pasar Kliwon Di Kudus," *Diponegoro Law Journal* 5, no. 2 (2016): 2.

⁷ R. Subekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Pratama, 2008), 339.

⁸ Ridwan Khairandy, *Hukum Kontrak Indonesia Dalam Perspektif Perbandingan (Bagian Pertama)* (Yogyakarta: FH UII Press, 2013).

⁹ Mariam Darus Badrulzaman et al., *Kompilasi Hukum Perikatan* (Bandung: PT. Citra Aditya Bakti, 2001), 174.

exists (where acceptance stated by a party must match the initial offer).¹⁰ This doctrine can be found in Article 2.1.11 of UPICC concerning modified acceptance (acceptance must match the offer, with no additional clauses allowed). A similar principle is also recognised in Asia with the principle of "equality and mutual benefit" where mutual consent at the pre-contractual stage also considers the moral dimension, accompanied by fairness, good faith, and reasonableness. This aims to balance the rights and obligations of the parties agreeing.

The lack of regulations regarding moral values in forming agreements in the Civil Code could potentially become a problem that disadvantages one party after placing trust in another. One trigger for this issue in BOT agreements is the absence of explicit provisions regarding the duration of the agreement. Government Regulation No. 27 of 2014 concerning the Management of State/Regional Property, as amended by Government Regulation No. 28 of 2020 concerning Amendments to Government Regulation No. 27 of 2014 (hereinafter referred to as the Amended Government Regulation concerning State/Regional Property Management), specifies not only that the object of BOT is state/regionally controlled land but also sets the time limit for creating such agreements. It states that the maximum duration for BOT agreements is 30 (thirty) years from the signing of the agreement.¹¹

This specific determination of the object with a clear time limit is a particularity regulated by this government regulation. This differs from BOT agreements on privately owned land, which do not yet have specific provisions. If referring only to contract law, the duration of an agreement is based on the agreement between the parties. This means BOT agreements on privately owned land have no explicit time limit, including how such agreements will

¹⁰ Bebeto Ardyo, "Formulasi Pengaturan Tahapan Pra Kontrak Dalam Proses Pembentukan Kontrak Di Indonesia," *Jurnal Yustika: Media Hukum Dan Keadilan* 22, no. 02 (June 12, 2020): 84, <https://doi.org/10.24123/yustika.v22i02.2406>.

¹¹ Pasal 36 ayat (1) Peraturan Pemerintah Pengelolaan Barang Milik Negara/Daerah

conclude.¹²If examined based on property law, BOT indeed represents one of the rights that legal subjects have over land, although this right is not regulated in Law No. 5 of 1960 concerning the Basic Principles of Agrarian Law (hereinafter referred to as the UUPA). This is because the right over land in BOT agreements originates from cooperation between the parties. Therefore, the right over land in BOT agreements also ends if there are events that cause the termination of the obligations as specified by Article 1381 of the Civil Code, starting from mutual agreement, unilateral reclamation of the land rights by the owner, or even the death of the land rights owner which leads to the process of inheritance.

This situation will result in a lack of legal certainty for the parties involved because the concept of a BOT agreement involves constructing a building that the investor then operates. Naturally, the investor would want to use the building until it is no longer usable to recoup the capital invested in its construction. On the other hand, the landowner wants their land to be properly utilised so that when the term of the BOT agreement expires, the land can be returned in good condition.

Based on this, the importance of determining the duration of the BOT agreement, as regulated by the Amended Government Regulation concerning the Management of State/Regional Property, is evident. However, this starkly contrasts BOT agreements on private land, which have yet to have specific regulations concerning their duration. The lack of a specified duration for a BOT agreement on private land means such agreements cannot be associated with building rights. This issue arises because the duration of the BOT agreement does not align with the timeframe allowed by building rights. The absence of Building Rights in BOT agreements on private land increases the risk of disputes among the parties, especially if the agreement ends unilaterally, such as through the landowner's death.

¹² Ana Silviana, "Pemanfaatan Tanah Di Atas Hak Pengelolaan Antara Regulasi Dan Implementasi," *Diponegoro Private Law Review* 1, no. 1 (2017): 37.

Given these circumstances, a problem arises concerning the status of the object and the duration determined by the Amended Government Regulation concerning the Management of State/Regional Property as a formal requirement in a BOT agreement. Should a BOT agreement on private land take the duration set by the Amended Government Regulation concerning the Management of State/Regional Property as a formal requirement to grant building rights on that land, even though the object being agreed upon does not comply with the provisions of the Amended Government Regulation concerning the Management of State/Regional Property?

If we adhere to the Amended Government Regulation concerning the Management of State/Regional Property, it is clear that the object is not state or regional land. However, without following this regulation, establishing the duration for a BOT agreement on privately owned land lacks a legal basis. To be granted building rights under a BOT agreement on privately owned land, the minimum agreement duration is 30 years.¹³ Basing this solely on an individual agreement makes such a lengthy duration unreasonable. This results in legal uncertainty regarding the execution of the BOT agreement. Furthermore, in a dispute arising from the BOT execution, legal protection becomes ambiguous, unlike the clearer legal protections afforded when the BOT agreement is established on state or regional land, which is specifically regulated.

The situation of these BOT agreements raises various issues that impact the interests of developing countries, including Indonesia. Research conducted by Destri Putriarni Nurhamim and An An Chandrawulan shows that legal protection is necessary due to the unilateral termination of the BOT agreement.¹⁴ Similarly, research by Indah Juwita Sari indicates that regulation is

¹³ Pasal 37 Peraturan Pemerintah Nomor 18 Tahun 2021 tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun, dan Pendaftaran Tanah.

¹⁴ Destri Putriarni Nurhamim, An An Chandrawulan, and Purnama Trisnamansyah, "Perlindungan Hukum Bagi Investor Akibat Pemutusan Sepihak Perjanjian Bangun Guna Serah/Build Operate And Transfer," *Acta Diurnal Jurnal Ilmu Hukum Kenotariatan Dan Ke-PPAT-An* 4, no. 2 (June 30, 2021): 210–25, <https://doi.org/10.23920/acta.v4i2.609>.

needed to utilise government land.¹⁵ Research previously conducted by scholars shows a fundamental difference in how this research discusses the duration of BOT agreements on private or privately owned land, where there is no clear regulation concerning the duration and a need for legal protection for the parties involved. Based on the above description, it is evident that there is legal uncertainty regarding the duration of BOT agreements on private land and the structure of granting building rights on privately owned land.

Research Methods

From research previously conducted by scholars, there is a fundamental difference in this study, which focuses on the duration of BOT agreements on private or privately owned land, where there is no clear regulation regarding the duration and a need for legal protection for the parties involved. Based on the above description, it is evident that there is legal uncertainty concerning the duration of the BOT agreements on private land and the framework for granting building rights on privately owned land. The legal issues in this study are addressed using a statutory approach, which involves examining all relevant legislation and regulations related to the legal issues. A conceptual approach is used to understand the concepts of the issues being researched. A comparative approach contrasts Indonesian law with the common law system. Furthermore, this study will analyse the regulations in contract law, BOT agreements, and building rights.

This research utilises both primary and secondary legal materials. The primary legal materials include Law No. 5 of 1960 concerning Basic Agrarian Regulation, Government Regulation No. 40 of 1996 concerning Business Use Rights, Building Use Rights, and Land Rights, Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Apartment Units, and Land Registration, and Government Regulation No. 28 of 2020 amending Government Regulation No. 27 of 2014 concerning the Management of

¹⁵ Sari, "Regulasi Pemanfaatan Tanah Pemerintah Dalam Perjanjian, Bangun, Guna, Serah," 37–50.

State/Regional Property. International legal frameworks such as The United Nations Convention on Contracts for International Sale of Goods, the Unidroit Principles of International Commercial Contracts 2016, the Common European Sales Law, and The Principles of European Contract Law are also considered. Secondary legal materials consist of textbooks, law journals, legal articles, and other scientific information relevant to this research, particularly those related to BOT agreements.

The collection of primary and secondary legal materials is conducted through library research. Legal materials relevant to the legal issues are gathered and inventoried based on legislation, legal literature, law journals, and legal articles. These materials are then classified according to the research questions and objectives. Analysis is conducted based on the collected legal materials to address the existing legal issues. From the analysis of the legal materials, conclusions are drawn in the form of arguments to answer the raised legal issues. As a final step, all legal materials are analysed normatively to provide prescriptions based on the new arguments developed in the conclusions as recommendations or suggestions.

Discussion

Protection In A Build-Operate-Transfer Agreement On Privately-Owned Land Not Accompanied By The Granting Of A Building Rights Title

As discussed in the previous chapter, BOT is an agreement regarding utilising state or private property or corporate assets in the form of land by other parties. These parties construct buildings and/or other facilities on the land, utilise them for a specified period, and then return the land, buildings, and/or facilities, along with their utilisation, to the land rights owner after the agreed-upon period ends. Based on this definition, a BOT agreement is closely related to Book III of the Civil Code concerning Obligations (*van verbintenis*).¹⁶To

¹⁶ Anita Kamilah, "Penerapan Asas Proporsionalitas Dalam Pemanfaatan Aset Negara Melalui Model Build Operate And Transfer/Bot," *Jurnal Hukum & Pembangunan* 50, no. 3 (2020): 604.

be legally binding and valid, a BOT Agreement must meet the conditions of a valid agreement as stipulated in Article 1320 of the Civil Code. If the conditions of a valid agreement set out in Article 1320 of the Civil Code are met, then according to Article 1338 paragraph (1) of the Civil Code, the BOT Agreement has the same legal force as law. The provision of Article 1338 paragraph (1) of the Civil Code states that all agreements made legally apply as law to those who make them. Therefore, if a breach of the BOT agreement causing harm to another party, according to Article 1239 of the Civil Code, the party causing the damage is obligated to pay compensation.¹⁷

An agreement is one of the most important sources of obligation in Indonesian law of obligations. In this contract law, one principle known is the principle of freedom of contract (based on the provisions of Article 1338 paragraph (1) of the Civil Code), which grants parties the freedom to make any kind of agreement, both named agreements as listed in Titles V to XVIII of Book III of the Civil Code, as well as unnamed agreements (*onbenoemde overeenkomst*) that evolve within society, such as BOT agreements.

As an agreement whose object is the management of a parcel of land, the BOT agreement is inherently linked to land law, particularly the provisions within the Basic Agrarian Law (UUPA). Article 16 of the UUPA lists several types of land rights recognised in Indonesia: Ownership Rights, Cultivation Rights, Building Rights, Right of Use, Right of Lease, Right to Open Land, Right to Collect Forest Products, and other rights not included in the previous land rights which will be established by law and are temporary as mentioned in Article 53 UUPA, such as Mortgage Right, Profit-Sharing Venture Right; Right to Lodge; and Right to Lease Agricultural Land.

In relation to BOT agreements, the type of land rights that can be the object of such agreements is the right of ownership as regulated by Article 20 of the UUPA as an inheritable, strongest, and most complete right that a person

¹⁷ Dessy Sagita Caesaria Ginting, “Kedudukan Hukum Pemerintah Dan Mitra BGS Dalam Aktivitas Pemanfaatan Barang Milik Negara/Daerah Melalui Sistem Build, Operate and Transfer (BOT),” *Jurnal Notarius* 2, no. 2 (2023): 292.

can have over land, taking into account the provisions of Article 6 of the UUPA. Owners of land rights, whether the government or individuals, can optimise the land they control to engage in partnerships with third parties through the BOT agreement. The ownership rights over the land that is the object of the BOT agreement can then be coupled with the right to build based on the principle of horizontal separation known in the UUPA. Article 5 of the UUPA states that the agrarian law applicable to land, water, and airspace is customary law as long as it does not conflict with national and state interests, which are based on national unity, Indonesian socialism, and the regulations set forth in this law and other legislation, taking into account elements that rely on religious law.

One customary law referred to in Article 5 of the UUPA concerns the recognition of the horizontal separation principle in Indonesian land law, where a person may construct buildings on land owned by another. This principle is reflected in the provisions of Article 20 UUPA, Article 35 UUPA, and Article 41 UUPA concerning the Management Right. Based on the horizontal separation principle and the implementation of BOT agreements,¹⁸ the development of construction, particularly in urban centres where land is limited and increasingly scarce, coupled with rapidly growing populations and the need for the development of residential areas, industrial zones, commercial areas, and continually expanding office buildings, can be met using these agreements while still retaining land ownership with the original owners without having to resort to expropriation or revocation of land rights, which often causes new problems and harms community rights.

By using BOT agreements, communities can still enjoy the benefits of their land through a business partnership with capital owners. On the other hand, entrepreneurs who need land for their business activities do not need to own land rights; they can simply collaborate with the land rights owners. Thus, land rights owners will voluntarily relinquish their land, as they will not be disadvantaged and will not lose their rights; in fact, the community can

¹⁸ Cicilia Putri Andari, "Akibat Hukum Asas Pemisahan Horizontal Dalam Peralihan Hak Atas Tanah," *Notarius* 12, no. 2 (2019): 704.

collectively participate in national development and benefit from the increased land value due to such development. Furthermore, based on these BOT agreements, land rights owners can own the buildings and supporting facilities after the agreement period ends and can lease these buildings to others. Based on the above explanations, it is evident that the use of BOT agreements has a significant positive impact on economic, social, and community development in Indonesia. Therefore, their implementation must provide legal certainty to the parties involved, ensuring that the objectives of the BOT agreements are achieved.

Indonesia is a constitutional state based on Pancasila and the 1945 Constitution, which aims to realise a just and prosperous national and state life that is secure, peaceful, and orderly and to ensure equal legal standing for all citizens. The assertion of Indonesia as a rule-of-law state is normatively regulated in Article 1, paragraph 3 of the third amendment of the 1945 Constitution, which states that the State of Indonesia is a constitutional state (*rechtsstaat*), not based on sheer power (*Machtsstaat*), and the government is based on a constitutional system (basic law), not characterised by absolutism (unbounded power). The term 'rule of law' in foreign languages is *rechtsstaat*. The term *rechtsstaat* has been popular in Europe since the 19th century, while the term the rule of law became popular with the publication of a book by Albert Venn Dicey in 1885 titled "Introduction to the Study of the Law of the Constitution." The difference between the two is that the *rechtsstaat* concept relies on the continental legal system called civil law, while the rule of law concept is based on the common law system.¹⁹

On this basis, M.C. Burkens further explains that the basic conditions of a *rechtsstaat* are as follows:²⁰ The principle of legality, where every government action must be based on legislative regulations (*wettelijke grondslag*), with this

¹⁹ Bagir Manan, *Kedaulatan Rakyat, Hak Asasi Manusia Dan Negara Hukum* (Jakarta: Gaya Media Pratama, 1996), 75–76.

²⁰ Manan, 76.

foundation, formal laws and the Constitution itself are the basic supports for government action. In this connection, the creation of laws is an important part of the rule of law. Separation of powers implies that state power should not be concentrated in one hand, and in terms of fundamental rights (*grondrechten*), these rights are targets of legal protection for the people and simultaneously limit the power of law-making; Judicial oversight so that the public has access to free courts to test the legality of government actions (*rechtmatigheids toetsing*).

Under the principle of the rule of law, when implementing BOT agreements, the state is obligated to ensure legal certainty and protect its citizens' rights, including in forming BOT agreements. The creation of these agreements involves several risks for the parties involved. These include²¹ Political Risks, such as the nationalisation of projects, the state's failure to fulfil its obligations, legal amendments that adversely impact the project, and failures in state payments; Legal Risks, where legal challenges might arise, such as the non-enforcement or partial enforcement of contracts; Economic Risks, which occur when project estimates are based on incorrect assumptions, potentially affecting project costs, market conditions, or causing sudden currency value fluctuations that challenge the continuation of the agreement;²² and Market and Revenue Risks, including revenue losses due to insufficient direct earnings from the project or external financial sources, or government-imposed restrictions like tariff increases or limited operational durations for the project. These risks necessitate careful consideration and can lead to complex negotiations among the parties involved in a BOT agreement.

As previously outlined, a BOT agreement involving privately owned land is bound by legitimate contractual conditions and foundational principles of contract law. Therefore, a BOT agreement on privately owned land is based on

²¹ Anita Kamilah, *Bangun Guna Serab (Build Operate and Transfer/ BOT) Membangun Tanpa Harus Memiliki Tanah (Perspektif Hukum Agraria, Hukum Perjanjian, Dan Hukum Publik)* (Bandung: Keni Media, 2012), 115.

²² Holijah, "Revitalisasi Pasar Tradisional Sebagai Upaya Pelayanan Terhadap Masyarakat (Analisis Hukum Ekonomi Terhadap Konflik Pasar 16 Ilir Palembang)," *Doctrinal 2*, no. 2 (2017): 536.

the agreement made by the parties, including the duration of the agreement. While it is explicitly regulated that for BOT agreements on state or municipal land, the maximum duration of the agreement is 30 years from the date of signing,²³ BOT agreements on privately owned land do not have specific regulations. If only referring to contract law, the duration of a BOT agreement will be based solely on the agreement of the parties involved. This means BOT agreements on privately owned land have no clear time limit, including how the agreement will end. As a right owned by legal subjects over land, the right to the land under a BOT agreement arises from the cooperation of the parties involved. Therefore, this right also ends if events lead to the termination of the obligation as stipulated in Article 1381 of the Civil Code.

The absence of a specific duration for a BOT agreement on private land means that the agreement cannot be linked with the building rights title. This issue arises because the duration of the BOT agreement does not align with the timeframe of the building rights title. The lack of building rights title attached to BOT agreements on privately owned land increases the risk of disputes among the parties, especially if the agreement ends unilaterally, such as through the landowner's death. The risks involved in BOT agreements are not trivial for the parties to face because a BOT agreement is a complex obligation involving three stages: construction, operation, and handover. Moreover, the risks borne by the parties are substantial, including political and economic risks, breach of contract, force majeure, and the duration of the agreement, which typically spans about 30 years.²⁴

Discussing legal protection, Isnaeni argues that legal protection can be divided into two types: external legal protection and internal legal protection.²⁵ External legal protection is devised by authorities and is general in application,

²³ Pasal 36 ayat (1) Peraturan Pemerintah Pengelolaan Barang Milik Negara/Daerah

²⁴ Kamilah, *Bangun Guna Serab (Build Operate and Transfer/BOT) Membangun Tanpa Harus Memiliki Tanah (Perspektif Hukum Agraria, Hukum Perjanjian, Dan Hukum Publik)*, 233, 246.

²⁵ Moch. Isnaeni, *Mutu Manikam Asas Hukum Kontrak* (Surabaya: Revka Prima Media, 2020), 97–110.

not discriminating or selective, whereas internal legal protection allows parties to create safeguards through mutual agreement. Based on these two forms of legal protection, if analysed according to the regulations in Indonesia, legal protection for parties executing BOT agreements on private land can be achieved in the following ways:

First, Granting of Building Rights Title (HGB) on the land rights subject to the BOT agreement. Granting this title on privately owned land used in a BOT agreement will provide certainty and legal protection for both the landowner and the investor. For the landowner, granting the title of building rights ensures that the land will be used according to the agreement and the purposes of such an agreement. This is because the granting of building use rights requires the investor to obtain the necessary permits, which guarantees that the land is used in accordance with the granted permissions.²⁶

On the other hand, for the investor, there will be certainty and legal protection regarding the duration of land use, which will align with the agreement between the parties since the granting of building rights title is accompanied by a period specified by the legislation. Therefore, the risk of the landowner's cancellation or breach of contract is minimised because the cancellation of the BOT agreement does not automatically terminate the building rights title granted to the investor.

Second, Agreeing on the principle of special personality as stipulated in Article 1317 of the Civil Code. As an agreement, the determination of clauses by the parties can also provide certainty and legal protection to the parties involved. Given the significant risks in the execution of BOT agreements as discussed previously, to provide legal certainty and protect the positions of the parties in the agreement (both the land rights owner and the investor), as well as other involved parties such as contractors, lessees, banks, insurance companies, and other third parties, the parties must craft the agreement as carefully and

²⁶ Triadi Kurniawan, "Pemberian Hak Guna Bangunan Di Atas Bagian Tanah Hak Pengelolaan," *Keadilan : Jurnal Fakultas Hukum Universitas Tulang Bawang* 18, no. 1 (February 3, 2020): 71, <https://doi.org/10.37090/keadilan.v18i1.293>.

meticulously as possible in specifying the clauses of the BOT agreement, thus protecting the rights and obligations of the parties.²⁷

In addition to ensuring the agreement meets the requirements of Article 1320 of the Civil Code regarding the validity of an agreement and Article 1338 of the Civil Code concerning the principle of *pacta sunt servanda*, which stipulates that all legally made agreements serve as law for those who make them, all agreements must also be executed in good faith (*te goeder trouw*). Subekti notes that good faith, referred to in Dutch as *te goeder trouw*, is a critical cornerstone in contract law.²⁸

In relation to this, to provide certainty and legal protection to the parties, especially in the event of the death of the land rights owner, one of the clauses that must be included in the BOT agreement is a clause on the principle of special personality as regulated in Article 1317 of the Civil Code. Article 1315 of the Civil Code governs a principle that is one of the most important in Indonesian contract law, the principle of personality or privity of contract, which generally determines that no one can bind themselves or demand the establishment of a promise except for themselves.²⁹ The phrase "*mengikatkan diri*" (*zich verbinden*) binding oneself is mentioned in Article 1315 of the Civil Code and refers to the party who commits to performing something or the party who has obligations to bear. Conversely, the phrase "*minta ditetapkannya suatu janji*" (*bedingen*) requesting for the setting of a promise—refers to the party who obtains rights or benefits over something or can demand something.³⁰

Article 1315 of the Civil Code determines that a promise made by someone in their capacity as an individual and an independent legal subject will

²⁷ Rachmatia Adonara Korebima, "Keabsahan Perjanjian Bangun Guna Serah Yang Dilakukan Pemerintah Provinsi Atas Objek Yang Terletak Di Kabupaten Yang Mengalami Pemekaran," *Dih: Jurnal Ilmu Hukum* 14, no. 27 (September 3, 2018): 102, <https://doi.org/10.30996/dih.v0i0.1597>.

²⁸ R. Subekti, *Hukum Perjanjian* (Bandung: Intermasa, 1992), 41.

²⁹ R. Subekti, *Hukum Perjanjian*, 16th ed. (Intermasa: Jakarta, 1996), 29.

³⁰ Subekti, 29.

only be valid and binding on themselves.³¹ This is also regulated in Article 1340 of the Civil Code, which generally stipulates that agreements made between two parties will only be valid and binding for both parties involved so that obligations agreed upon can only be claimed between the two parties. Third parties outside the agreeing parties cannot have their interests harmed due to an agreement between the two promising parties, and it is also not possible for third parties to gain benefits from an agreement made by the agreeing parties except as regulated in Article 1317 of the Civil Code.³²

The stipulations in Articles 1315 and 1340 of the Civil Code include an exception as detailed in Article 1317, which permits agreements to be made for the benefit of third parties. Specifically, Article 1317 states: "It is also permissible to request the establishment of a promise for the benefit of a third party if a promise or grant made by someone includes such a provision. Once such a promise is made, it cannot be withdrawn if the third party has declared their intention to utilise it".

Article 1317 of the Civil Code explicitly mentions a promise made by someone to benefit a third party, known by the term *derden beding*.³³ Although it is principally stated that the promise is for the benefit of the third party, the wording of Article 1317 of the Civil Code reveals two distinct elements related to the promise for the third party, both of which are independent of each other:³⁴ 1) The first aspect concerns a promise made by one party in an agreement, binding themselves to fulfil an obligation to a third party at a later date. It is important to note that although the agreement is said to be made for the benefit of a third party, it is made for the benefit of the person who creates the agreement; 2) The second aspect relates to the provision of a specific object. This exception can be found in Article 883 of the Civil Code, which states, "It is valid

³¹ Kartini Muljadi and Gunawan Widjaja, *Perikatan Yang Labir Dari Perjanjian* (Jakarta: PT Raja Grafindo Persada, 2003), 15.

³² Gunawan Widjaja, *Seri Aspek Hukum Dalam Pasar Modal Penitipan Kolektif* (Jakarta: PT Raja Grafindo Persada, 2006), 156.

³³ Subekti, *Hukum Perjanjian*, 1996, 30.

³⁴ Widjaja, *Seri Aspek Hukum Dalam Pasar Modal Penitipan Kolektif*, 157–59.

for a testamentary disposition to stipulate that the usufruct of an object is granted to one person, while the sole ownership of the object is granted to another.”

Article 883 of the Civil Code provides the possibility for someone to grant ownership of an object to another person, but with the condition that this person must grant the right to use the yield of the object to a third party designated by them for the duration of that third party's life.³⁵ Additionally, Article 1317 of the Civil Code only allows someone who meets specified conditions to enjoy the benefits of a particular object or matter based on an agreement between two specific parties. There are two types of conditions set forth alternatively.³⁶ 1) Although the agreement is made for the benefit of a third party, it is made for the benefit of one of the parties themselves. For example, in a conditional sale, where it is stipulated that A will only sell his house to B if B agrees to extend the lease of that house to C for a specified period. This provision also applies to insurance contracts or coverage for a third party, including a banker's clause in a property insurance agreement and the continuation of coverage in the form of a life insurance agreement. And 2) The gratuitous transfer of an object. Based on this, the clause regarding the principle of special personality in a BOT agreement needs to be agreed upon by the parties that if the landowner dies, all rights and obligations listed in the BOT agreement will transfer to the heirs to be continued and cannot be terminated based on the death of the landowner.

Third, A lawsuit for breach of contract represents the weakest form of certainty and legal protection that can be offered to the parties involved. This condition is because a breach of contract lawsuit requires costs incurred by the parties and involves a relatively long period until a legally binding decision is reached, with no guarantee or certainty of winning the case to obtain the

³⁵ Refer to Pasal 807 KUHPerd which implies that the right to use will terminate upon the death of the user.

³⁶ Muljadi and Widjaja, *Perikatan Yang Labir Dari Perjanjian*, 22–23.

expected compensation. Therefore, opting for a breach of contract lawsuit as a form of repressive legal protection³⁷ should ideally be the last resort for the parties involved.

Conclusion

The research demonstrates that using external and internal legal protection theories can effectively safeguard the interests of parties involved in BOT agreements on privately owned land. The recommended forms of legal protection include granting Building Rights Title (HGB) on the property as external legal protection, establishing the principle of special personality as outlined in Article 1317 of the Civil Code for internal legal protection, and, as a last resort, using breach of contract lawsuits for repressive legal protection. Given these insights, it is advisable for the government to formulate specific regulations tailored to BOT agreements on privately owned land, focusing particularly on the duration of the agreement and the inclusion of building rights. Parties drafting such agreements should also ensure that legal protection clauses are integrated thoroughly and precisely.

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³⁷ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Di Indonesia. Sebuah Studi Tentang Prinsip-Prinsipnya, Penanganan Oleh Peradilan Dalam Lingkungan Peradilan Umum Dan Pembentukan Peradilan Administrasi Negara* (Surabaya: PT Bina Ilmu, 1987), 205.

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