

# **LEGAL PROTECTION TO INDIVIDUAL RIGHTS IN LAND PROCUREMENT FOR PUBLIC INTEREST**

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## **Abstract**

*In principle land procurement is done by a method that between the party requiring land and the right owner of land, whose land is required for public interest, under the principle applicable on land control and legal protection provided by the national law on land to the right to the land holders. In the legislation setting forth the land procurement for public interest a fair treatment is given to individual right so the legal protection and certainty for individuals in land procurement can be achieved. However, in the implementation the empirical cases get insufficient protection and fair treatment. There is no balance, equitability and harmony between the state's right to control and protection to individual's property right. On one side, the development for public interest is in an urgent need of sufficient lands, but on the other side individuals also need land for their life continuity. If by reason of development, the land is forcefully confiscated, it means ignoring the protection to individual right on land. Consequently, individuals and community get inadequate justice and protection, legal certainty. This writing is intended to analyze the role of legal protection to individual right in land procurement for public interest. By applying the statute approach method, the state's role in providing legal protection to its citizens can be learnt. In conclusion there is lack of protection and respect to individual right and community provided on proportional basis because the delegation of state's land control authority gives impression of extremely wide and great power.*

**Key words:** *Legal protection to individual right*

## **1. Introduction**

By referring to fundamental requirement in land procurement for public interest as set forth in the 1945 Constitution of the Republic of Indonesia, Article 33 paragraph (3) granted the right to the state namely a 'state's right to control', which state's right covers all lands located within the territory of the Republic of

Indonesia but in fact the state's right to control gives an impression of very wide authority causing the acquisition of individual right for the development of infrastructure often triggers a problem caused by various contradictory interests one against the other. In term of acquiring and releasing the land, any individual's right and obligation on his right to land must also be protected by law from any arbitrary act by the ruler. The need of a balance between the state's right to control and the protection to individual's property right will be discussed in this writing.

This writing is intended to analyze how the role of legal protection is on individual right in land procurement for public interest. By using *Statute Approach* method, it can be known how the role of state is in providing the legal protection to its citizens. In order to be able to disclose the above issue, the writer identifies the formulation of issue to put a focus on this writing i.e. how the role of legal protection is to individual right in land procurement for public interest.

In the end in the legal protection to individual right in land procurement for public interest it will be visible that the justice is something hard to obtain. There are some interests which are contradictory one to the other in term of acquiring and releasing the land. On one side, the development for public interest highly depends on the availability of sufficient land, but on the other side individuals or community need land for the continuity of their life.

## **2. Research Methods**

By using *Statute Approach* method, the issue of legal protection to individual right in land procurement for public interest becomes important to elaborate because in this way one might be aware of the state's role in providing the legal protection to its citizens. The role may, among others, be visible from how does the state make a rule on land procurement issue and how does the state settle any dispute arising in land procurement issue for public interest. With the supporting instrument, some interviews were conducted in connection with the legal protection to individual right in land procurement for public interest i.e. community being the victim in a land procurement act.

### **3. Results and discussion**

#### **3.1 State's authority**

Property right is a fundamental right for each individual. That's why Indonesian citizens are obliged to respect other citizens' basic rights. By this, it indicates that the Indonesian people's human rights are not a loose and completely free individual right, but must be balanced by the basic principle of land management.<sup>1</sup> Whatever right on land belongs to any individual or someone it does not justify whether the said land will be used or not used merely for his personal interest, let alone if that act will cause a loss to community and state. However, the requirement does not mean that an individual interest will be totally eliminated by a public interest. UUPA has also paid attention to individual interest, in which community's interest and individual interest must be balanced each other so the basic objective will be reached i.e. prosperity, justice and happiness for individuals and the people.

Upon the above requirement, as a realization of the characteristic of Pancasila-based legal state, especially the just and civilized humanity principle, in acquiring any land belonging to an individual or community required for the said development individual or community must be protected. However, under an argumentation that all rights on land have social function, any land belonging to an individual or community required for the building of public facility pertaining to the development program that requires land, such as infrastructure for public interest, an imbalance of law has occurred between the legal objective and the implementation of law on land affairs. Due to such wrong interpretation, the

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<sup>1</sup> Relating to the foregoing, with the sole national land law philosophy spirit, it is composed in a system based on the common law thought (traditional law philosophy) containing the traditional law concept on land affairs, which was then formed into the national traditional legal concept, namely the religious communalistic with the togetherness spirit formulated as "concept enabling the control over the joint land portions as the blessing of the One Almighty God by the citizens individually with the rights to land which is personal in nature as well as containing the togetherness element. Arie Sukanti, *Konsep Yang Mendasari Penyempurnaan Hukum Tanah Nasional*, Speech in Inauguration Ceremony As Professor In Agrarian Law, (Depok: Faculty of Law of University of Indonesia, 2003), page 17

various suits and actions will reversely create a situation that prejudices the legal certainty for those development actors themselves.<sup>2</sup>

Land procurement by the state for public interest can only be conducted when it is based on the authority assigned by the law. However, the meaning of 'being controlled' is interpreted as if it provides a limitless power to the government so in the implementation it causes the emerge of dissatisfactory feeling among the common people.<sup>3</sup> It is not rare that a land taking over policy in the implementation of development for public interest, either those conducted by the government or private sector, triggers a cause of land dispute.<sup>4</sup> This problem emerges because a spatial arrangement is often translated into a policy that tends to orientate to the fulfillment of land's functions, such as road, bridge and construction allocations. In the meantime, unclear status of ownership on land title becomes an issue that often ends to a conflict in ownership of land among the community.

The orientation of large scale land procurement results in the concentration of land control on one side, and on the other side the absence of agrarian law to give a protection to individual property right on his land, so access to strategic lands is dominated by limited parties for among others: industry, forestry, mining,

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<sup>2</sup> Several examples of development project for public interest in Province of DKI Jakarta which cannot be continued among others due to the refusal by the land right holders. Such projects are among others the shortcut of Mampang Prapatan-Pondok Jaya at the value Rp 8.4 billion, whereas the fund already absorbed was Rp 8.1 billion for land clearing, bridge construction project in the middle of throughway of Mampang Prapatan-Pondok Jaya. Due to the failure of that throughway project, such bridge construction project was also failed. Other construction project namely shortcut construction project from Air Maya to Bungur Road, Kebayoran Lama is at the value Rp 5 billion and Rp 1 billion out of it was already absorbed. Irene Eka Sihombing (2013). "Revocation of Right to Land Viewed From National Land Legal Concept" (Understanding from Religious Communalistic Philosophy (Thesis: University of Trisakti, Jakarta), pages 117-118.

<sup>3</sup> Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Dalam Hubungannya Dengan Tap MPR RI No. IX/MPR*, (Toward The Perfection of Land Law In Its Relation To Stipulation of Consultative Assembly of Republic of Indonesia No. IX/MPR), (University of Trisakti: Jakarta, 2002), page 11.

<sup>4</sup> Case study: the construction of Kanal Banjir Timur intended to overcome the flood in Jakarta city by constructing the channel accommodating the flow of the waters of the big five rivers namely Cipinang, Sunter, Buaran, Jatikramat and Cakung Rivers), in the process some citizens were not involved in the deliberation. This is stated by Tuti Hasuna, a people living in Basuki Rahmat Street, Pondok Bambu, East Jakarta. The result of interview with Tuti Hasuna, June 14, 2013.

plantation, manufacture, housing, and entertainment. Land with social function is not fully implemented on field, to the contrary a land commercialization occurs, which results in the wide community's limited access to land, which in turn results in the increasingly left behind agrarian sector compared to the other sectors.<sup>5</sup> Consequently, currently there are parties who demand for the elimination of such state's right to control, the source of which is the 1945 Constitution.<sup>6</sup> Whereas, such authority was expressed in Article 2 of UUPA, though the law of the concerned states contains no expression formulated in such Article, with various regulations and limitations, the authority is already in any state in its connection with the existing land. Land procurement by the state for public interest can only be executed if it is based on the power granted by law. In fact, however, the power of land procurement is not granted expressly by the 1945 Constitution. That's why an arrangement was made by expanding the interpretation of Article 33 paragraph (3) of 1945 Constitution on the authority to control (*beleid-regel*) and manage (*beheersdaad*) the lands throughout Indonesian territory.<sup>7</sup>

Hans Kelsen, as quoted by Gunanegara, stated that land as one form of *natural resources* constitutes a territory being the basic element of a country, that land should not be directed as a territory only, but constituting an *integrate of territor*<sup>8</sup> This means the land is a *complete exclusive sovereignty* that must be guarded, cared and arranged as such since the land constitutes a personification of a state's sovereignty,<sup>9</sup> while at the same time serving as one of the sources for people's welfare. Based on this, a state becomes a party having the authority (right) to supervise the land within its territory, which realizes in it a power to regulate the

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<sup>5</sup> Main Report, "To Claim The Agrarian Politics", *Desain Hukum* (Legal Design) Volume 11, Number 3, April 2011, page 11.

<sup>6</sup> Boedi Harsono, *op. cit.*, page 11.

<sup>7</sup> Gunanegara, *Rakyat dan Negara Dalam Pengadaan Tanah Untuk Pembangunan* (People and The State In Land Procurement For Development) (1 Edition, Jakarta: Tatanusa, 2008), page 99.

<sup>8</sup> Hans Kelsen, *General Theory of Law and State* (Transoction publisher, USA & UK, 2005), pages 207-218.

<sup>9</sup> *Ibid.*

‘legal relationship’ between people and lands. Regulating the legal relationship meant here is the state’s decision to grant any right to the land to its citizens but it also contains an authority to take over (revoke) such individual (private) right. Therefore, it can be concluded that the authority of a state in granting a right to the land and revoking those rights are based on the interpretation to Article 33 paragraph (3) of the 1945 Constitution having a correlation to Article 2 paragraph (2) of UUPA Number 5 of 1960, which grants a power to the state a right to control the state.<sup>10</sup>

The state’s power must be limited in two things. First, the matters regulated by the state must not result in violating the human rights secured by the 1945 Constitution. A biased regulation on an interest and causes a loss to the other party is one form of those violations. Someone who releases his right must receive a legal protection and a fair reward on that sacrifice. Second, a substantive limitation, it being understood that a regulation made by a state must be relevant to the objective going to achieve, i.e. for the maximum welfare of the people. According to Maria S.W.Sumardjono, this power can’t be delegated to private sector since it relates to public welfare which is service mission intense. A delegation to private sector which constitutes part of the people will cause a conflict of interest and therefore it is unlikely.<sup>11</sup>

In connection with one of the basic principles in a collective living is that the common interest must be prioritized rather than individual or personal or class interest. This does not mean that an individual interest will be lost totally to public interest. Principle Law On Agrarian also takes into account the individual interests. Therefore, the public interest and individual interest must be in balance one to another, so in the end the principle objective will be achieved, i.e. to bring welfare, happiness and justice for the state and the people, in terms of a just and welfare community, then to give a legal certainty regarding rights on land to the people.

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<sup>10</sup> Vide Article 2 Paragraph (2) UUPA Number 5 Year 1960.

<sup>11</sup> *Design Hukum (Legal Design)*, volume 11, number 3, April 2011, page 11.  
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This is expressed in the general explanation of UUPA on the Principle Law on Agrarian.<sup>12</sup>

With the land procurement for public interest, by a development program that needs land, such development conducted as an effort to achieve the basic objective of the land control certainly needs land, such as the development of infrastructure for public interest. Therefore, the state having a power on the land, under the 1945 Constitution, regulates the individual basic rights as a citizen while at the same time protects the human rights on common basis. The enhanced regulation on a common basic rights will reduce the state's power on individual basic rights a citizen, for example the protection to an individual property right as set forth in Article 28 G *jo* Article 28H paragraph (4) that states, "anyone shall be entitled to the protection for him, family, honor, dignity, and assets being under his control". Moreover, he also gets a guarantee for a legal protection as set forth in Article 28H paragraph (4) stating that "anyone is entitled to have a security on his individual property right and this right may not be taken over arbitrarily by anyone".<sup>13</sup> The implementation of state's right to control the state should therefore be returned to agrarian law politics which is firmly expressed in Article 33 paragraph (3) of the 1945 Constitution, but in the process, by using the conception of state's right, the agrarian politics develops a marginalization process to the position of UUPA 1960 as the master.<sup>14</sup> On one side, by developing it as a master law, and on the other side by developing various other basic laws.<sup>15</sup> With the implementation of land procurement for public interest, an issue which may susceptibly cause a conflict in land procurement for the development of concentrated land control is on forest control, which legal basis is granted by the

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<sup>12</sup> Main Objective: prosperity, justice and happiness for all people. (Article 2 Paragtaph (3) of UUPA). Boedi Harsono, *Himpunan Peraturan Hukum Tanah*, (Compilation of Legislation on Land), (Jakarta: Djambatan, 2008), page 6.

<sup>13</sup> Amendment to 1945 Constitution Year 2000.

<sup>14</sup> *Design Hukum* (Legal Design), *op.cit.*, page 9.

<sup>15</sup> Agrarian Politic of New Order Regime, as the principle provisions on forestry (Law Number 5 Year 1967), the principle provisions on mining (Law Number 11 Year 1967), principle provisions on rural government (Law Number 5 Year 1979) and Law on Spatial Layout (Law Number 24 Year 1992), *Ibid*.

government through the right of control on forest for private companies and the application of production forest area based on mutual agreed forest use arrangement (TGHK) controlled by Perhutani.<sup>16</sup>

### **3.2 State's Control Right**

By the state's right to control in land procurement for public interest, the authority of state's right to control is to regulate and organize the allocation, use, supply and care for land, water and outer space set forth in Article 14 of UUPA number 5 of 1960, which is not translated further in sectoral interest. The phenomenon that emerges so far, the spatial arrangement in Indonesia is not done integrately. Each sector relating to the arrangement of land, water, and outer space as well as the natural resources contained in them has a separate spatial arrangement.<sup>17</sup> This condition causes a land taking over policy in the implementation of land procurement for the development activity, either those done by the government or private sector, which often becomes one of the causes of land dispute.<sup>18</sup>

The orientation of large scale land procurement results in the concentration of land control on one side, and on the other side the absence of agrarian function to protect the land owner's right as an individual and community so the access to land is limited. Any strategic land for individual is dominated by limited parties, i.e. the government and private sector.<sup>19</sup> Land with social function is not fully implemented on field, on the contrary a land commercialization occurs, which results in the left behind individual and common people's access to land. This state's right to control has a big power, which is much bigger than that of

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<sup>16</sup> *Ibid.*

<sup>17</sup> As in forestry sector, the spatial layout between one sector and other sector does not indicate the synchronization between one and another.

<sup>18</sup> The clash between the security apparatus and the people in the eviction of Mbah Priuk cemetery and land dispute in Koja, Tanjung Priok, North Jakarta. [Http://megapolitan.kompas.com/read/2010/04.15/14590356/](http://megapolitan.kompas.com/read/2010/04.15/14590356/)

<sup>19</sup> For industry, forestry, mining, plantation, manufacture, housng, infrastructure and entertainment. *Ibid.*

individual's or person's and community. The power contemplated here shows that it is the state that has the authority to determine on how is the allocation of and how to act and how to take over any individual property right on land. This is because there is no right that is independent from state's right.<sup>20</sup> Furthermore, it is the state's right to control on constitutional authority basis, which is based on Article 33 paragraph (3) of the 1945 Constitution, which makes it possible to run the land procurement for public interest. On philosophical base, land that pertains to the need of common people is controlled by the state and used for the maximum welfare of people.

By referring to this constitutional authority the state's power emerges to plan, control, use and utilize the land to take over the individual right on land for the development in terms of public interest. This shows that the 1945 Constitution, which regulates the legal protection to individual property right on land, is in fact ignored. To address this, a right protection is needed for individuals regarding his right and obligation as set forth in UUPA, that the community (public) interest and individual interest must be in balance each other.

### **3.3 Balance Between State's Control Right and Legal Protection To Individual Property Right**

With the balance between the state's right to control and the individual right protection in each procurement of individual right in each land procurement activity it is necessary to take into account the prevailing principles on the land control and ownership, and the protection provided by the national law on land for land title holders. These principles are:<sup>21</sup>

1. That the land control and use by anyone and for any purpose whatsoever must be based on right to land provided by National Land Law;

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<sup>20</sup> Gunanegara, *op.cit*, page 14.

<sup>21</sup> Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi Pelaksanaannya*, (Indonesian Agrarian Law: History of Establishment of Agrarian Principle Law, The Implementation Content), (Jakarta: Djambatan, 2008), page 342.7  
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2. That the land control and use without any right basis (illegal) is not justified. Even threatened by a penal sanction;
3. That the land control and use which is based on the right provided by the National Law on land is protected by the law against any interference from any party, both from the fellow community members or even by the ruler, if the interference has no legal basis;
4. That the law provided various legal facilities to overcome any existing interference, as follows:
  - a. Interference by fellow community member: civil lawsuit through a district court or request for protection to the Regent/Mayor pursuant to Law Number 51 Prp of 1960.
  - b. Interference by ruler: lawsuit through a public court or the court of state administration.
5. That in normal condition, required by anyone and for any purpose (including for public interest projects), the land acquisition which right will be taken over by someone must be conducted through the deliberation for consensus, both on the land surrender to the requiring party and on the compensation that must be received by the right holder;
6. That relating to the foregoing, in normal condition, to get a required land it is not allowed to do any force whatsoever and by anyone whomsoever to the right holder, to handover his land and or receive any compensation not agreed, including the use of 'payment offering followed by a consignment at the district court' as set forth in Article 1404 of Indonesian Civil Code (KUHPerdata);
7. That in a force majeure event, if the concerned land is required for public interest, and it is impossible to use another land, while the deliberation conducted failed, the forced take over can be conducted, it being understood that no approval from the title holder is needed, by using 'revocation of right' agenda as set forth in Law Number 20 of 1961;

8. In acquiring or taking over the land, either on mutual agreement or through the right revocation, the title holder covers the land, building and plants belonging to the title holder, and also the loss. He will suffer another loss as the consequence of the relevant land handover.
9. That the form and amount of such fee or compensation whether the land is required for public interest and the revocation of right, must be as such that the former title holder does not suffer a deterioration, both in social aspect and in his economic level.

Based on those principles, an individual can be forced to release his land for public interest. For example, compensation for loss to right on land in the release of individual right for the development of Kanal Banjir Timur infrastructure in East Jakarta, that the state's right to control provides too big power so there was inequality between the state's right to control and the individual property right protection, in which the recognition on individual property right to the land for the compensation no point of agreement was reached between both interests. The provision that regulating the amount of compensation from juridical aspect, both for the government's interest as the land user and the land owner's interest as the charged party, requires the life continuity from the proceeds of his land release. It is this equal interest that must become a basis in a land compensation for public interest, which gives a justice to the recognition to individual property right according to his dignity as human, because the land issue is something a touching issue due to land characteristic which is rare and limited and constitutes the basic need of every human.

It can be concluded that the balance between the state's right and individual right when referring to the provisions in the 1945 Constitution of Article 33 paragraph (3) jo Article 2 paragraph (1) of UUPA Number 5 of 1960 with the philosophy meaning background as contained in the provisions of 1945 Constitution in Article 33 paragraph (3) jo Article 2 paragraph 1 of UUPA Number 5 of 1960, the politics of agrarian law if traced back to the 1945 Constitution and UUPA Number 5 of 1960 indicates that there are two correlated things. *First*, land,

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water and natural resources are controlled in the meaning that it is well arranged by the State. *Second*, the control by state or state's right is intended to build the people's welfare, Furthermore it is found in UUPA Number 5 of 1960 that some legal politics such as recognition to custom rights and other land control right. The word 'being controlled by the state or State's right' herein can't be interpreted that the state becomes the owner on all natural resources at once. Controlling in legal aspect is defined as regulating in order the individual title cause" will remain acknowledged as instructed in Article 28H paragraph (4) of the 1945 Constitution stating, "each person is entitled to have a personal property right and that right should not be arbitrarily taken over by any person whomsoever." The writer is of opinion that to balance it, there is a provision set forth in Article 33 paragraph (3) of the 1945 Constitution concerning the state's right allowing the state to revoke a right to the land for public interest. However, the provision may not be applied as is by the state in view of the limitation of power coming from the state's right to control existing in our country legal principles completed by the just and civilized humanity principle of Pancasila as well as the provisions in its implementing statutes. Acquiring a land belongs to anyone for any purpose whatsoever and by anyone must be done by a deliberation with the land owner for a consensus, both on land handover and its compensation. It is only in a force majeure condition, in the event of failure of deliberation; such land required for the implementation of public interest project can be taken over forcefully, by a procedure set forth in Law, known as the right revocation. However, even though it is needed for public interest there is a universal common principle, which applies to every legal state, regarding the form and amount of compensation, i.e. the take over the land should not cause a deterioration to the right holder.

Therefore, the state's right to the land is not absolute since it is limited by the provisions set forth in our country legal principles and should not be in contravention of the human rights. The provisions of state's right set forth in the 1945 Constitution must be viewed as a general and special relationship. In general, anyone or individual is entitled to have a property right but in a special condition

for public interest such individual property right can be taken over by the state not arbitrarily. The meaning is, if an individual property right is required for public interest then the individual property right must be defeated, it's being understood that the individual property right is not absolute. In the implementation to defeat an individual property for public interest the "control right" by the state is applied, and this is the populism nature of UUPA Number 5 of 1960 which prioritize the common people's right as a pressure without eliminating any individual right. The term to control in the constitution does not mean to become a direct owner, but to regulate how a property right occurs and how is the method to convert such property right into another right for another party for public interest.

A problem frequently occurring is a shifting on the use of control right which means "to regulate" into 'to own' in implementing the economic development program which is growth-oriented, thereby resulting in other problems such as the absence of proper attention to lands belong to individuals for the development purpose. The writer is of the opinion that there must be a point of balance between both interests i.e. The state's right to control and the individual property right protection. It is the balanced interests that become a basis of land procurement for public interest that provides a justice and benefit for community.

Justice is an *equal distributor among equals*.<sup>22</sup> Justice is a complex process of balancing which moves among various factors including equality. Therefore, the legal protection in land procurement for public interest is to eliminate any imbalance, equal comparison, and harmony between the state's control right and the protection of individual property right. The justice suggested by John Rawls in its connection to the transfer of land for public interest is never felt as fair. Upon some interests, it seems that there is no balance between the state's control right and the individual property right protection. On one side, the developer side of public interest is in urgent need of a sufficient availability of land, while on the

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<sup>22</sup> Maria S.W. Sumardjono, *Kebijakan Pertanahan Antara Regulasi dan Implementasi*. (Policy on Land Affairs Between The Regulation and The Implementation), (Jakarta: Kompas, 2001), page 15.

other side the individuals also need land for the continuity of their life. If by reason of development the land is taken over as such, this clearly ignores the protection to individual property on land. Therefore, any law made should protect the individual property right on land, to have an equal right and opportunity, to receive a share of land benefit, both for he himself and his family, so a decent life can be reached in justice concept based on the need of equal standing.

#### **4. Conclusion**

Legal protection to individual and citizens' right in land procurement for public interest has no justice, protection, and respect to the rights of individual and community because the delegated power of state's control on land gives an impression of wider authority so by referring to the ignored philosophical frame of land which stands on people's side the land management must be returned to the fundamental philosophical value and legal politics without shifting the populism characteristic of UPPA with the necessity to build the people welfare on equal distribution basis, where the principle of people justice and welfare principle exist. On this basis, it is recommended to have clearer understanding on the context of land procurement for public interest. Therefore, in its use it is necessary to understand the principles on land control and legal protection to the land title holders.

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