

SUPERVISION OF FUNCTION OF AGRICULTURAL LAND IN THE NATIONAL LEGAL LEGAL SYSTEM FRAMEWORK

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ABSTRACT

Functional shifting of agricultural land is altering the type of agricultural land, from a productive agricultural land into the land for constructing a building. This means that that shifting will reduce the amount of productive lands (the land used for agricultural means), as those lands are being replaced into un-productive lands. That shifting had taken place for the last 20 years, since the major growing of public housing in Indonesia first occurred. In terms of formal juridical, the functional shifting of land is not opposed to the existing law in the country; however, the influence of economic pressure as well as the influence of government's policy changes how the system is being applied practically. The thorough, resolute, and rigid regulation is still not able to ensure the decline of functional shifting of agricultural land. Land regulation is being addressed in order to ensure that everybody has the same opportunity in terms of land-owning and everybody has the same opportunity to obtain the profit of the land for himself and his family. Sanction for the violation of functional shifting of agricultural land is not merely limited to individual sanction, but it covers the sanction for the agency that violates the functional shifting of the land as well. A supervision regarding functional shifting of the land is not only regulated in the constitution; members of the society can also conduct supervision regarding functional shifting of the land as well.

Keywords: Functional shifting of agricultural land, Control, Framework of national land law

A. Background of the Study

Land is a gift from God Almighty of which it has limited amount and is provided for humankind and other species. Its functions are as a place as well as source of living. Besides, land can also be used as a vehicle to increase the welfare of the people.

For Indonesian people, the development of the country cannot be separated with the land. Land is an important part in the effort of increasing social welfare and achieve the goal of the nation. This happens as land is one of the main factor that contributes to the nation's economic production.²

Indonesia is an agraris country, therefore it has very much potential in terms of fertile soil, adequate water sources, and balanced climate. Those three are the basic requirements for an agraris country to produce maximum agricultural product. One of the natural resources that contributes the most as well as in need of preserve is fertile soil. The reason why fertile soil needs to be preserved is that Indonesia is a country with a growing population; however, the amount of land in the country is not growing just like the population is, but it is subsiding. The reason for this is the growing need for land to meet the need for housing space, building office complex, as well as public facilities and public infrastructure. One of the method used by developers and local government to meet the need for the community settlements and government settlements is by conducting functional shifting of agricultural land, from "rough" land then altered into settlement area that also includes public facilities and infrastructure. That altering process is called functional shifting of land. Functional shifting of agricultural land is altering the type of land, from productive land to become land which functions as a place for constructing building, which then means that the land that is formerly productive is no longer productive anymore; it becomes unproductive land.

Functional shifting of land has been conducted for the last 20 years, ever since there is growing development of housing complex in Indonesia. There are several causes for that functional shifting of land, such as:

- a. Government's policy in terms of economy by supporting industrialization; this increases the growing need for land to accommodate major industry.
- b. Low exchange rate of agricultural product compared to industrial product.
- c. The need for land as a foundation for building housing complex as a means to fulfill people's basic needs besides clothing, of which housing is the second basic needs.
- d. The need for land in terms of public interest as one of the public facilities and infrastructure, for instance to build airports, roads, or local government's office complex.
- e. Law enforcement's lack of ability to control functional shifting of land by housing complex' developer.

According to Gatot Irianto³, this law enforcement's lack of ability to control functional shifting of land causes investors to choose Java as an investment area; this is added with the fact that ever since there was boost in Indonesian economy, the

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²Samun Ismaya, 2004, *Pelaksanaan Perubahan Lahan Pertanian ke NON-Pertanian di Kabupaten Sleman*(The Implementation of Land Shifting from Agricultural to Non-Agricultural Land in Sleman), Result of the Research, BPN Jakarta, Page 1

³Kompas, National Newspaper, August 30, 2002

government oftentimes gives incentive to investor in order to pursue government's target in terms of economic growth. At that time, as a compensation of functional shifting of rice field's land in Java, the government decided to build rice field outside of Java by conducting many programs. However, many of those programs were failed to meet government's expectation, for instance a million land clearing program. According to several researches, there are several impacts of functional shifting of agricultural land/concretization:

1. The volume of rain water that can be absorbed by soil drops from 15 percent to below nine percent.
2. The volume of surface flow increases from about 30 percent to 40-60 percent.
3. Surface flow velocity increases from less than 0.7 meter per second to more than 1.2 meter per second.
4. Low increase of ground water (recharge) through infiltration during rainy season will cause the decline of water supply during dry season, of which during dry season the need for water is on its highest. Besides, the decline of water supply during dry season will further have several impacts, such as: the decline of irrigation area, the decline of planting intensity, and even often it also causes the risk of drought in the area. Those conditions will further cause the drop of national food production⁴.

In terms of formal juridical, the functional shifting of land opposes the existing law in the country. However, the functional shifting of land is still applied practically because of economic pressure as well as policy pressure. Economically, this functional shifting of land gives major contribution to local government's treasury and it can also function as a place to increase labor in the area⁵. The regulation regarding functional shifting of agricultural land has not yet generated significant change, as functional shifting of land is still happening and its intensity is even growing from time to time. The data below shows that the declining rate of productive land caused by the functional shifting of land in Central Java reaches 350-400 hectares per year. This is a serious threat for the national production of rice in which 60 percent of it comes from rice field in Java⁶.

There is another data that shows the similar condition:

The land area of rice field in Central Java in 2008 is 963,984 hectares; however, there is a decline of land area in 2009, though it is followed by the increasing amount of land area, increasing 1,703 hectares from the previous year, into 962,471 hectares. However, the increasing amount of land area did not happen in the following year⁷. In 2010, the land area is only 962,471 hectares, while in 2012 it decreases to 959,851 hectares, which means that the decreasing rate is 2,619.94 hectares from 2010⁸. That decline is happening in almost all regions in Central Java. Based on the data, the decline of land area is happening almost every year, and the impact of the decline of land area is the decline of rice production. Even though in some regions in Central Java there are increasing amount of land area, but its rate is not so much rapid as the yearly rate of functional shifting of land is. The national production of rice during January to April 2012 is 30,628,814 tons, in which 9,911,951 tons of them are contributed by rice field in Central Java⁹. Almost every region in Central Java is a potential region for building rice field. If the government do not provide a good control, either by promoting regulations or hard sanctions, then it will cause major negative impact to land area which is regularly declining from time to time. If this condition happens, Indonesia will no longer able to declare herself to be an agraris country. This is a major loss for the country, because if Indonesia wants to declare to be an industrial country instead of an agricultural one, it is still behind from other Asian country in terms of industrial rate.

The thorough, resolute, and rigid regulation actually cannot guarantee the decline of functional shifting of agricultural land. Supervision and coordination from authorities that have jurisdiction regarding functional shifting of agricultural land is very much needed. Those authorities include Local Government as the one who has power to decide the productive land, National Land Affairs Agency as the agency that gives permit, Land Deed Official, Head of District, as well as Village Chief as the one who knows well about the land in his jurisdiction and as the one who is capable of raising participation from the people to prevent functional shifting of agricultural land in order to reduce the rate of it happening.

From that background of the study, the writer intends to conduct a research regarding: "Supervising the Functional Shifting of Agricultural Land under the Framework of National Land Law."

B. Research Question:

The questions raised in this research are as follows:

⁴Muhammad Iqbal dan Sumaryanto, *Strategi Pengendalian Alih Fungsi Lahan Pertanian Bertumpu Pada Partisipasi Masyarakat* (Strategy of Control of Functional Shifting of Agricultural Land which Concentrates on People's Participation), <http://pse.litbang.pertanian.go.id/ind/pdf/ART5-2c.pdf>, accessed July 20, 2016.

⁵Ali Sofyan Husein, 1997, *Konflik Pertanahan*, Pustaka Sinar Harapan, Jakarta, page 58

⁶http://perpustakaan.bappenas.go.id/lontar/file?file=digital/138045-%5B_Konten_%5D-Lahan_Pertanian%2020001.pdf, accessed July 10, 2016. And Kompas dated 7 Mei 2013

⁷Zara Rosalia Putri, *Analisis Penyebab Alih Fungsi Lahan Pertanian Ke Lahan Non Pertanian Kabupaten/Kota Di Provinsi Jawa Tengah 2003-2013* (Analysis of the Cause of Functional Shifting of Agricultural Land into Non-Agricultural Land in the Cities in Central Java, period 2002-2003), *Eko-Regional*, Vol.10, No.1 Maret 2015, Magister Ilmu Ekonomi, Universitas Jenderal Soedirman, Purwokerto, page 17-18

⁸*Loccit*

⁹*Jawa Tengah dalam Angka (Central Java in Numbers)*. 2011-2015: BPS Jawa Tengah

1. How is the regulation regarding functional shifting of agricultural land under the political framework of national land law in Indonesia?
2. How is the supervising/controlling system of functional shifting of agricultural land under the framework of national land law?

1. The Regulation Regarding Functional Shifting of Land under the Framework of National Land Law in Indonesia

In the article 33 paragraph 3 of the 1945 Indonesian Constitution, it is clearly stated that land, water, and the whole natural resources contained therein and the sky thereon should be used for the welfare of the people. This article asserts that everything concerning land, water, and the whole natural resources contained therein and the sky thereon inside the nation's jurisdiction should be used according to the existing regulation.

Afterwards, the government issued MPR (People's Representative Assembly) of Republic Indonesia Decree number IX/MPR/2001 regarding Agrarian Renewal and Management of Natural Resources. Because of that decree, the future land regulation therefore needs to be formulated. *Land Management Policy Development Project (LMPDP)*¹⁰ suggested 4 (four) land principals and policies:

1. Improving people's welfare and creating new welfare sources.
2. Improving the level of life of the people that is related with utilization, the use of power, and the owning of land.
3. Ensuring the continuity of the system in the society, by giving the next generation maximum access to economic sources in the society, including land.
4. Creating the system of living together in harmony by resolving the dispute with conflicts regarding land (LMPDP).

According to expert of politic/land policy Maria Soemardjono¹¹, the land policy is implemented to ensure that everybody has the same rights to obtain rights of the land and that everybody has the same rights to gain the benefit of the land for himself and his family.

Specifically, the land policy is intended for:

1. Preventing self-enriching acts which is unfair for low-class society.
2. Attempting to utilize the land optimally and preventing the neglecting of land.
3. Making the price of land affordable for everybody.
4. Preserving the sustainability of food resources.
5. Preserving land and environment as part of natural resources.
6. Protecting the individual right and traditional society's right as well as providing assurance regarding its legal certainty.
7. Providing options for preserving land for the sake public interest by giving compensation, either in the form of physic or non-physic compensation¹².

Afterwards, Maria Soemardjono¹³ states that there are 3 (three) paradigms that becomes the basis of organizing land policy:

1. Upholding human rights.
2. The continuity of the capacity of society's production.
3. Empowering society through the development of good governance.

One of the problem concerning land policy is that there is a shifting of the function of land, from its function as a means of production into an investment tool/capital accumulation. Therefore, the paradigm of organizing land policy is the continuity of productive capacity of the society. Regarding that regulation, one of the important thing is the regulation regarding the layout of the area. The arrangement of agricultural land as productive agricultural land cannot be separated with the Regulation regarding Layout of the Area in each district. The regulation concerning layout of the land has been regulated in the Government Regulation number 15 Year 2010 (in more than 200 articles), which then is still evaluated with the release of evaluation of the Regulation regarding Layout of the Area Number 13 Year 2016. One of the aims of that evaluation is providing stricter supervision, as there are functional shifting in many areas in which its function has been previously set by the Local Government.

The regulation concerning functional shifting of the agricultural land has been regulated in the Law Number 41 year 2009 regarding Protection of the Sustainable Agricultural and Food Land. That regulation has organized in detail about: understanding

¹⁰ LMPDP, 2007, **Kerangka Kebijakan Pertanahan Nasional (Framework of National Land Policy)**, in Buletin Land Edition 02 February-April 2007

¹¹ Ajarotni, Nasution, et al 2009, *Perencanaan Pembangunan Hukum Nasional Bidang Pertanahan, Badan Pembinaan Hukum Nasional* (The Development Planning of National Law in the Field of Land, National Law Development Agency), Department of Law and Human Rights Republic of Indonesia, Jakarta page 7

¹² Ibid, page 8

¹³ Maria S.W., Soemardjono, 2006, **Penerapan Prinsip Penghormatan Terhadap Hak Atas Tanah Dalam Pengadaan Tanah Untuk Kepentingan Pembangunan (The Implementation of Principal of Rights for Owning Land for the Interest of Development)**, Paper in National Seminar: **Procurement of Land for the Interest of Development**, organized in partnership between Faculty of Law Universitas Padjajaran with Student Association BKU, Law Business Academic year 2006-2007 Master Program UNPAD, Jakarta, September 14, 2006

sustainable agricultural and food land, protection of agricultural and food land, its supervision, in which it covers sanctions to those who violate the regulation. The sanction can be administrative sanction or criminal sanction. In the article 44 of the same law, it is stated that the land that has been declared as sustainable agricultural and food land is protected and its function is prohibited to be changed.

Law Number 41 year 2009, in the article 50, stated that:

1. Any form of permission that causes functional shifting of agricultural and food land is “void ab initio”, excepting that is for the public interest as stated in the article 44 paragraph 2.
2. Each person who conducts functional shifting of sustainable agricultural and food land outside of the regulation as stated in paragraph 1 is required to restore the condition of agricultural and food land to its former condition.
3. Each person who has sustainable agricultural and food land can transfer the ownership of the land to other party under the condition that the other party does not change the function of the land as sustainable agricultural and food land.

In article 51, it is stated that:

1. Each person is prohibited to do activity which can damage irrigation system and other infrastructure, as well as reducing the fertility of sustainable agricultural and food land.
2. Each person who conducts an activity which causes damages as stated in paragraph (1) is required to enter rehabilitation program.

The administrative sanction is regulated in the article 70, which stated that:

1. Each person who violates the obligations and restrictions as stated in article 34, article 45, article 57 paragraph 3 and paragraph 4 is punished with administrative sanction.
2. The administrative sanction as stated in paragraph (1) includes:
 - a. Written warning
 - b. Temporary termination of the activity
 - c. Temporary termination of public service
 - d. Closing of the working area
 - e. Permission repeal
 - f. Permission nullification
 - g. Demolition of the building
 - h. Restoration of the land function
 - i. Incentive revocation, and
 - j. Administrative fine.
3. Each government official who violates the regulation as stated in paragraph (1) is charged with administrative sanction according to the existing law.

The criminal clause is stated in article 72, 73, and 74, which stated:

Article 72 paragraph (1):

Each individual who conducts any functional shifting of sustainable agricultural and food land as stated in article 44 paragraph (1) is sentenced to maximum 5 (five) years of imprisonment and maximum fine of Rp. 1,000,000,000.00 (one billion rupiahs).

Paragraph (2) states that:

Each individual who does not does not fulfil his/her obligation to restore the condition of sustainable agricultural and food land to its former condition as stated in article 50 paragraph 2 as well as article 51 is sentenced to maximum 3 (three) years of imprisonment and maximum fine of Rp. 3,000,000,000.00 (three billion rupiahs).

Paragraph (3) states that:

In the event that the crime as stated in paragraph (1) and paragraph (2) is done by government official, the punishment is added 1/3 (one third) from the normal punishment.

Article 73 states that:

Each government official who is authorized to issue permit regarding functional shifting of sustainable agricultural and food land but violating the regulation as stated in article 44 paragraph (1), is sentenced to minimum 1 (one) year and maximum 5 (five) years of imprisonment and/or minimum fine of Rp. 1,000,000,000.00 (one billion rupiahs) and maximum fine of Rp. 5,000,000,000.00 (five billion rupiahs).

Criminal sanction is given not only to government official who issues permit regarding functional shifting of agricultural land, but it also covers any party who contributes in the activity of shifting the function of agricultural land. In article 74 Law Number 41/2009 regulates that the party as stated in article 72 paragraph (1) and (2) is the management branch of the corporation. The management branch can be sentenced to minimum 2 (two) years and maximum 7 (seven) years of imprisonment, and minimum fine of Rp. 2,000,000,000.00 (two billion rupiahs) and maximum fine of Rp. 7,000,000,000.00 (seven billion rupiahs). Another sanctions as stated in article 74 paragraph (2) are:

- a. Expropriation of fortune that is the result of the criminal activity.
- b. Cancellation of business contract with the government.
- c. Dismissal of the board.
- d. Restriction of the board to build another corporation in the same field.

2. Supervising/Controlling System of Functional Shifting of Agricultural Land under the Framework of National Land Law

The concept of welfare state as developed by A.V Dicey and Stahl is re-formulated according to the demand of twentieth century. According to Julius Stahl, the concept of law state (*Rechtsstaat*) covers four important elements: human rights protection, separation of power, the working of government based on the existing law, and administrative court. A.V Dicey states 3 important characteristics of each law state, called *The Rule of Law*¹⁴, as follows:

1. Absolute supremacy or predomination from regular law to oppose the influence of arbitrary power; abolishing arbitrariness, prerogative, and discretionary in the government as authority.
2. Equality before the law or equality of all classes before the ordinary court. This means that there is nobody above the law; there is no state administrative court.
3. Constitution is the result of authority law of the land. This means that constitutional law is not the source, but it is the consequence of individual rights that have been formulated and uphold by the court.

Indonesia is a democratic and lawful country, meaning that is a country that institutionalizes the principal of people's sovereignty as well as principal of lawful states in all aspects of the country. The basic principal of democratic country is that the source of legitimacy of power is the people; therefore, the government is in truth comes from the people, by the people, for the people. Universally, the manifestation of people's sovereignty in real life is attributed to two things: people's representative agency/parliament, and in the form of constitution as manifestation of agreement between the government with the people. On the other hand, lawful state wants the power of law to be the highest power in the state. The law is the commander, therefore the one who governs the nation is actually the law and not the people (the rule of law and not of man). Constitutionally, the implementation of the concept of lawful state and the concept of people's sovereignty's state is stated in article 1 paragraph 2 and paragraph 3 of the 1945 Constitution of Republic of Indonesia, which states that the sovereignty is in the hand of the people and is held according to the constitution, and that Indonesia is a lawful country.

The concept of lawful state places constitution as the basic and highest law in the state. As the basic law, constitution becomes reference and grounding for the country to work. With that position, its supremacy needs to be kept in order to prevent any deviation, as the formulation of each article has political and law substances. The normative and empiric law towards supremacy of law is implemented in the hierarchical construction of law norms, of which constitution supremacy sits at the top; while empirically it is implemented in the action of government and the people who base their action based on the law.

Theory of legal system according to Lawrence M. Friedman¹⁵ explains that whether or not implementing the law is successful depends on three elements of law system, which are structure of law, which concerns the law enforcement apparatus, substance of law, which covers the existing legislation, and culture of the law, which covers the living law upheld by the people in the society. Culture of the law covers the behavior of the people (including the culture of law enforcement apparatus) towards law and system of law.

No matter how well the arrangement of the structure of law in order to implement the law that previously has been set is, and no matter how well the quality of the substance of law is, the implementation will not be effective if it is not supported with the good culture of law by people involved. Law as a tool to change the society or in other words, social engineering, merely contains ideas that the law would like for the people to be implemented. To ensure that the function of the law as social engineering can be implemented successfully, there needs not only the availability of the law in the sense of regulation and convention, but it needs assurance that the rule of law will be implemented in practicality as well, or in other words, the assurance that the law is being enforced just as it should be.

Supervision as the process of judging the object of inspection, is aimed to ensure that the planning as well as the implementation of the law is conducted according to the regulation, therefore the implementation will then meet the target that has previously been set. Furthermore, the aim of supervision is also that the implementation and development of the general assignment can run as planned, therefore the government's policy lying in the assignment will meet the target that has been set efficiently and usefully.

Tjokroamidjojo defines supervision/control not only as an act of inspecting whether or not there is deviation regarding how the project is being conducted happening, but it also covers the act of finding the cause of that deviation. Because of that, according to Tjokroamidjojo, supervision/control needs to be conducted simultaneously with coordination, in order to make the supervision be uphold continually and periodically, as the supervision which is done together with coordination will be supported by the increase of reporting system from a good data processing staff. According to Presidential Instruction number 15 year 1983 regarding The Guidelines of Implementing Supervision, the supervision/control consists of two things:

1. The control conducted directly by the leader/top branch of the government, whether in the level of central or local government. The control is conducted based on the organizational structure, in which the top of the structure is held by the leader, who supervises the positions below the leader.

¹⁴ Miriam Budiardjo, 1996, *Dasar-dasar Ilmu Politik*, Gramedia Pustaka Utama, Jakarta, page 59

¹⁵ Lawrence M. Friedman, 1975, *The Legal System: A Social Science Perspective*, New York: Russel Sage Foundation

2. The control conducted functionally by the functional apparatus. Functional control is the control conducted by functional apparatus, whether it comes from internal government or external government¹⁶.

Functional control is the control conducted functionally by the government official, whether external or internal government. The aim of the control official is to ensure that the implementation and development of general assignment is conducted according to the existing law in the country.

According to Presidential Instruction number 15 year 1983, it can be concluded that functional control is the control conducted by the apparatus of which their special job is to help the top branch supervises his organizational environment which is part of his responsibility.

Society control is the control conducted by the society, of which the people deliver constructive ideas, suggestion, notion, or complaint/admonition, either orally or in written, towards the government apparatus. Those ideas can be expressed directly or via the use of media.

The societal control is an attached control that comes from outside of the management or activity process, for instance society's norm and regulation, which also includes ethics. Of all those three, the social control, direct control from the top branch, and attached control, they all have close relationship with the other. The relationship is as followed: to implement the function of social control, there needs to exist intelligent and skilled people in the society, of which their job is to provide limitation in the process of constructing that infrastructure. Each member of the society then can communicate their feeling towards other member of the society, especially the member who holds the responsibility regarding things that are experienced and felt by many other members of the society. In essence, social control is the process of distributing facts from the society to the government apparatus with the purpose of implementing the general assignment of the government, which includes the development of the area as good as possible.

The relationship between social control and attached control may include: the social control is hoped to help the attached control in upholding the discipline of people in low level in each division of government's bureaucracy.

It is hoped that the social control will function as proponent if the attached control in the event of the leader or the top branch is very busy, therefore he/she lacks in terms of supervising the low level staffs.

It is further hoped that the social control can function as automatic regulator in the working of government's bureaucracy which involves feedbacks from the leader of the society.

Social control as one of the form of attached control that comes from outside of the organization has wider reach compared to the direct control from the top branch. It is not only for the sake of the leader of the unit, but it is also in the interest of every apparatus in the organization¹⁷.

The function of the supervision/control system is to prevent the leakage and to suppress any squander, as well as easing the implementation of the program and the policy that previously has been set. Meanwhile, in the control function there is also management system, which means that any effort or any activity is implemented to ensure that every assignment can be implemented according to its purpose. From other perspective, the function of the control system is to obtain feedback which then is used to create any revision if there is any error and deviation before that error worsens and difficult to be repaired. This can be done anytime, whether in the management process or during the administration process, even it can be done in the end in order to know the level of attainment of an organization or a system.

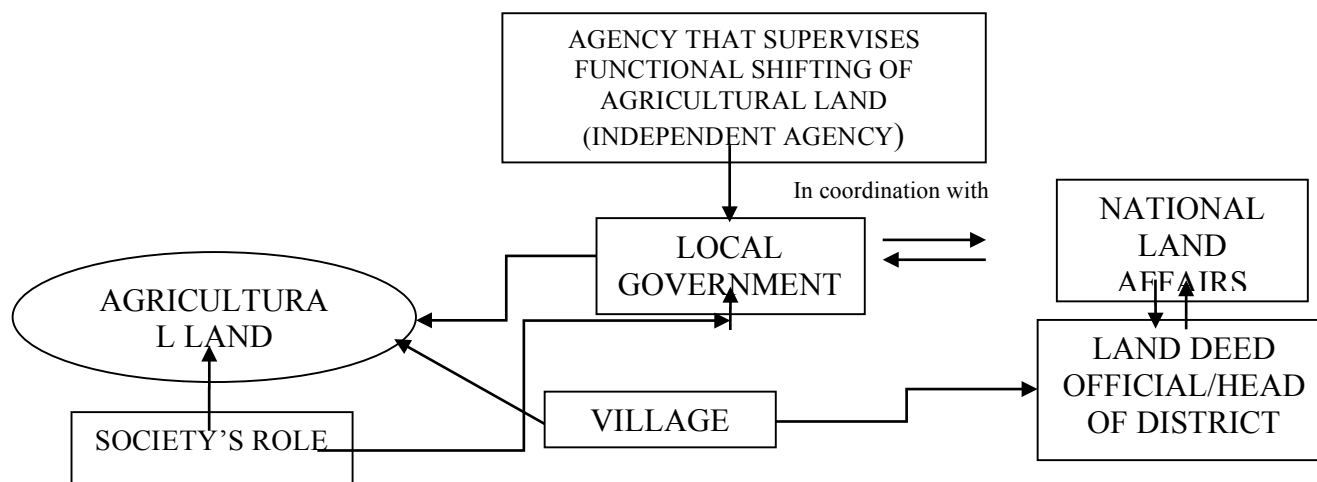
The government has issued several regulations to restrain the rate of functional shifting of the land. However, the functional shifting of the land from productive to non-productive land is still happening. The control needs to be conducted via coordination between each relevant agencies and via the forming of independent agency as the deciding agent of the policy regarding functional shifting of agricultural land. Besides, the society's role also needs to be supported as well.

Based on the consideration regarding the urgent need of control of the functional shifting of agricultural land from productive to non-productive agricultural land, below is the supervision/control scheming that can further be delivered to agencies that has the authority regarding functional shifting of the land:

¹⁶<http://pengertian-pengertian-info.blogspot.co.id/2015/12/pengertian-pengawasan-menurut-ahli.html>, accessed Juli 19, 2016

¹⁷*Loccit*

Image 1
System of Functional Shifting of the Land



Annotation:

1. Minister of Land Affairs gives authority to agency that supervises functional shifting of agricultural land to supervise the implementation of functional shifting of agricultural land.
2. The government can draw up city planning plan, of which regarding the stipulation of functional shifting of agricultural land there is coordination with National Land Affairs Agency in order to maintain the function of agricultural land as productive land.
3. Land Deed Official/Head of District has a role in the execution of the land deed which is in line with the area of agricultural land that previously has been established by the local government.
4. The people supervise Land Deed Official/Village Chief/Head of District regarding functional shifting of agricultural land.

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