

PUBLIC INTEREST AND THE PROTECTION OF INDIVIDUAL RIGHTS IN LAND PROCUREMENT

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Abstract

The right to control by the State is an authority or formal authority that exists in the State and gives a right to act. In recent years, however, the right to control land by the State is a delegation of rights to then be controlled in the context of realizing the greatest prosperity of the people. This research is a normative legal research. This paper provides information on the latest trend in research. The results show that the legal protection of individual rights to land in land acquisition for development and public interest has not been realized optimally because the assessment of compensation in reality is only limited to the assessment of physical compensation while those who receive the impact of development have not been accommodated in its implementation because there is no clarity in the regulations.

Keywords: Land Rights; Land Procurement; Public Interest; Individual Rights

1. INTRODUCTION

State has the right to control and one of resources in the State power is regulated in the constitution. Therefore, the right to control land by the State is a delegation of rights to then be controlled in the context of realizing the greatest prosperity of the people. The word “controlled” in this legal term does not mean “owning” but is used in the context of granting authority to the State to regulate and administer land-related rights (Bedner, 2016). In order to exercising the function, a State has the right to control and one of resources in the State power is regulated in the constitution. Therefore, the right to control land by the State is a delegation of rights to then be controlled in the context of realizing the greatest prosperity of the people. The word “controlled” in this legal term does not mean “owning” but is used in the context of granting authority to the State to regulate and administer land-related rights.

The power given to the State is a power that creates responsibility for the State to realize prosperity for the people. From this it can be said that the relationship between individuals and land is a legal relationship that gives rise to rights and obligations while the relationship between the State and land is a relationship that gives rise to authority and responsibility (Noor,

2006). A similar view is expressed by Parlindungan (1998) that legal relationship between the State and land gives rise to the right to control land by the State, the relationship between customary law communities and their customary land gives rise to customary rights, and the combination of individuals with land gives rise to individual rights to land.

The right to control by the State is an authority or formal authority that exists in the State and gives a right to act both actively and passively in the field of State government, in other words, State's authority is not only related to government authority alone, but also includes all authorities in order to carry out their duties. This view shows that the State' right to control land is basically part of the State authority in carrying out its duties and functions in the context of achieving State goals (Ayunita et al, 2020). This was confirmed by Ilmar (2012) by arguing that without State control, it is impossible for the objectives of State as stipulated in the constitution to be realized, however, such State' control is nothing more than a kind of "control" over the State accompanied by certain conditions, so it cannot be used legally, arbitrarily that can result in violations of the law to the community.

Formally, the authority of government to regulate the land sector emerges and is rooted in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which affirms that "earth, water and natural resources contained therein are controlled by the State to be used for the greatest prosperity of the people." The regulation of land control and ownership in Indonesia essentially places two interests in a balanced position, namely the public interest without compromising individual rights to land so that in the process of implementing development, land acquisition by the government must provide protection for individual rights to land has been clearly regulated in Act No. 2 of 2012 concerning Land Procurement for Development in the Public Interest and its implementing regulations. However, the reality shows that currently the implementation of land acquisition does not fully reflect the legal protection of individual rights to land so that researchers are interested in conducting studies related to the legal protection of individual rights to land in the implementation of development in Indonesia.

2. METHOD

This research is a normative legal research. It serves to provide juridical arguments that can help if there is a void, ambiguity and conflict over norms (Diantha, 2016). It examines the provisions of the written positive law systematically related to the protection of individual rights to land in development, especially in land acquisition for development in the public interest. This paper provides information on the latest trend in research (Irwansyah, 2020).

3. RESULTS AND DISCUSSION

3.1. Reality of Land Acquisition for Development for Public Interest in Indonesia

The right to control land by the State creates a legal relationship between the State and the land so that the State has a power to regulate control, ownership, regulate the designation and use of land and regulate capital participation in land (Manan, 1995; Limbong, 2014). The State'

right to exercise control over land is carried out with certain restrictions, namely it must not violate basic human rights guaranteed by the 1945 Constitution of the Republic of Indonesia is limited to being delegated to private organizations because it is related to welfare and public services and is limited in public characteristics.

Compensation as an effort to realize respect for the rights and interests of individuals who have been sacrificed for the public interest, can be called fair, if it does not make a person richer or vice versa becomes poorer than the original situation (Sumardjono, 2007). To create a sense of fairness for the right holder, Harsono (2004) put forward certain criteria, among others, the final determination of the amount of compensation was reached by deliberation between the right holder and the agency requiring the land, the estimated compensation was carried out by taking into account the costs incurred for repair and relocation, the policy regarding the provision of compensation is actually not limited to replacing the value of land, buildings and plants, but should also include an assessment of immaterial losses and losses that arise, such as business activities, due to displacement to other places, the number of customers and reduced profits (Miru & Sitorus, 2021).

The implementation of land acquisition for development in the public interest aims to achieve justice as required in Act No. 2 of 2012 so that the implementation must really be able to provide rights that are in accordance with the things sacrificed by the land owner and the impact received as a result of the land acquisition, either directly or indirectly. In the experience of land acquisition in other countries that land acquisition is carried out to eliminate imbalances. Land acquisition causes large-scale population movements so that a form of compensation is needed that minimizes displacement in the sense of that the displaced person will always be in a position to afford alternative land for him or her. This is basically one of the souls of the Land Procurement Act where it is stated that in land acquisition, the welfare of land owners must remain the same or more than their condition before the implementation of land acquisition. Land acquisition should not impoverish land owners.

In Indonesia, the reality of land acquisition shows that its implementation is very complex with conflicts between the community and the government. Various objections to the implementation of land acquisition arise because of things that according to the community are very far from justice. The rejection of Kendal Regency residents of the compensation value in land acquisition for the toll construction of Batang-Semarang, the reason for the rejection of the compensation value is that it is not in accordance with the prevailing market price in the sale and purchase transaction of land in the area. Another reason is the deliberation mechanism which is considered not to reflect the actual deliberation because residents are only given envelopes containing the value of the land without a complete explanation of the basis for the emergence of the value (Kompas, 2017).

In another case, demonstrations by the land-owner community for the object of land acquisition for the construction of Makassar-Parepare railway in Maros regency who rejected the compensation value for their land parcels on the grounds that the value issued by the appraisal did not match the value of the land transaction in Maros regency and not considering the condition of their land, which is mostly paddy fields and productive ponds. In addition, society.

Likewise, the rejection of the compensation value for the land procurement for the toll construction of Bitung–Manado by the landowners in Bitung on the grounds that the appraisal assessment is very low and does not take into account the condition of the people who have lost their livelihoods and businesses due to the construction of the toll road (Fajar, 2019). The process of acquiring land to be acquired is considered by the community to be flawed by the procedure. One of the reasons is that the land or building is not compensated in its entirety, only what is needed by the toll road, so that the land is cut in half either in the middle or on the left and right sides of the land and this is considered detrimental because the rest of the building cannot be used anymore (BPHN, 2013).

From the cases above, it can be seen that the main factor causing rejection by the community is that the compensation value determined by the appraisal does not match the perceived value or estimate of the land owner. The second, the value of compensation does not take into account the non-physical losses experienced by the community. The third, the deliberation mechanism which is not actually considered deliberation because it cannot be changed except by a court decision.

Implementation of development for the public interest requires the development of infrastructure that requires land so that the community must first acquire land owned by the community. The acquisition of lands that will for the construction of public facilities, it is known as a compensation agency in land acquisition. Compensation as an effort to realize respect for the rights and interests of individuals who have been sacrificed for the public interest, can be called fair, if it does not make a person richer, or vice versa becomes poorer than the original situation (Sumardjono, 2007). To provide justice for rights holders, certain criteria should be applied objectively, with predetermined standards. In addition, the final determination of the amount of compensation must be reached by deliberation between the right holder and the agency requiring the land. For buildings, the estimated compensation should take into account the costs incurred for repairs as necessary, after the announcement of the land acquisition. The policy regarding the provision of compensation is actually not limited to replacing the value of land, buildings and plants, but should also include an assessment of immaterial losses and losses that arise, such as business activities, due to relocation to other places, the number of customers and reduced profits.

The implementation of land acquisition for development for the public interest aims to achieve justice, so that its implementation must be truly capable of providing rights in accordance with the things sacrificed by the land owner and the impacts received as a result of the land acquisition, either directly or indirectly. In the experience of land acquisition in other countries land acquisition is carried out to eliminate imbalances (Tanner, 2010). Land acquisition led to large-scale displacement of people so that a form of compensation that minimized displacement was needed in the sense that the displaced person would always be in a position to be able to purchase alternative land for him. This is basically one of the souls of the Land Procurement Act where it is stated that in land acquisition, the welfare of land owners must remain the same or more than their condition before the implementation of land acquisition.

Land acquisition should not impoverish land owners. The aspect of justice in land acquisition emphasizes that there needs to be controls that protect and preserve, and control the full use of land for future development. Adverse things need to be taken into account in land use planning so that they do not become predators for the community and dogmatism in using land for the public interest is not allowed. The protection of citizens' rights to property in this case, Indonesian land rights as human rights in the land acquisition process must be protected and upheld by the State as the organizer of land acquisition for the public interest. This is done so that with the land acquisition process intended for the development of the public interest as part of the government' sustainable development program, the government can realize social justice for all Indonesian people and welfare for all Indonesian people (Bedner & Arizona, 2019). The process of land acquisition by the State started and stopped at the earliest stage because the state forced to continue occupying the land. This is because of poor governance structures (Bastakoti & Davidsen, 2017). This phenomenon continues to exist and harms land owners. The hatred and agitation by the owners due to the view of the state as a continuous predator of nature and private land. The impact of not providing protection for human rights in land acquisition in peace, the public interest needs to respect private interests and vice versa (Hirsch et al, 2015).

If public interest is not respected, then public infrastructure, public roads, public construction cannot be protected. In this case, there will be problems or contradictions between the government (either central or local government) and the people (or individual groups). If this problem cannot be solved, it directly affects society and politics in general. This has a direct impact on individuals in that society. Under those circumstances, it is impossible for individuals to enjoy their vested interests. If the government does not respect private interests, denying its existence society will be chaotic. They no longer have the motivation to work, to improve their lives. This phenomenon may cause immediate problems in the economy, society and politics. The reality of land acquisition arrangements in Indonesia in the researcher' analysis is still full of potential for injustice. The appraisal system for compensation that is currently in effect is only based on the valuation of the object at the time of land acquisition for the public interest when in reality the relinquishment of the right to acquire land for development sever the relationship between the owner of the right and the land and also stop the acquisition of benefits on the land at that time and in the future. A price assessment carried out using the value at the time of determining the location while the implementation of compensation payments can take years after the refusal causes low prices for the community while the calculation of the value of their waiting time turns out to be calculated only from the date of implementation of the assessment until the estimated date of payment of compensation.

The regulation of non-physical compensation is very difficult in the laws and regulations, either indicator, forms and parties who should determine whether or not the physical compensation can be paid to the community. This causes uncertainty for the appraisal party as well as the Land Procurement Executor or parties who need land. They generally consider that the determination of land parcels for which physical compensation can be calculated is not their authority, so what happened later the appraiser chose not to include it in the appraisal element. This is further exacerbated by the condition of law enforcement on corruption which has always

been a scourge for all implementers so that a principle emerges that in land acquisition it is better to harm the community than harm the State.

3.2. Legal Construction of Individual Rights Protection to Land in Land Acquisition for Development in Public Interest

Natural law theories have been known since the time of Socrates to Francois Geny by placing justice as the crown of law or in natural law theory referred to as “the search for justice” (Tanya, 2006). Various theories about justice and a just society show how much attention is paid to the issue of justice. One of these theories of justice related to rights and freedoms, opportunities for power, income and prosperity is the theory of John Rawls. With the theory of justice is one of the experts who have always been a reference for philosophy, law, economics, and politics in all parts of the world. Rawls is known as one of the famous American philosophers at the end of the 20th century. John Rawls is believed to be one of the most influential thinkers on the discourse on the values of justice to this day (Huijbers, 1993). John Rows’ theory of justice produces 2 (two) principles of justice, which are often used as references by several experts, namely the equal liberty principle and the differences principle.

This freedom is the most basic thing (human rights) that everyone should have. In other words, only with the guarantee of equal freedom for all will justice be realized (the principle of equal rights). The principle of the greatest equal principle, is ”the principle of equal rights” which is the principle that provides equal rights and of course is inversely proportional to the burden of obligations that everyone has. This principle is the spirit of the rule of law theory. There is also the inequality principle, which Rawls divides into two, namely: difference principle, namely social and economic inequalities are regulated in such a way, so that the maximum benefit is obtained for the least advantaged members of society and the equal opportunity principle namely positions must be opened to everyone in circumstances where there is fair equality of opportunity.

The implementation of the assessment in land acquisition for development for the public interest has not been able to provide justice and feasibility to the community because the legal substance of land acquisition has not provided space for the creation of justice and feasibility, namely: the first, the planning document does not include things that should be points appraisal by appraisal; the second, the planning document is only an estimate prepared without involving experts related to land acquisition to be carried out; the third, the limited time for land acquisition implementers and the land appraisal team, which is regulated for only 30 days without considering the area and number of land parcels that must be identified and assessed. The three things above show that the legal substance of land acquisition has not shown an idea that was emerged from social reflection in the form of values. Justice is a value is very abstract and depends not only on the rationalization of the mind, but also on the transcendental based on conscience. This value regulate the selection of right and wrong, good and bad, evil and virtue, or which one is desired or rejected. These values should be concretized become a norm or rule of law (Mertokusumo, 2011). This view shows that positive law and values in society in a legal formation are connected by a principle called principle. This principle is the general

thought or instructions in the formation and enforcement of law. In other words, in other words, the principle of law is the basics or directions in the formation of positive law.

Justice in land acquisition is difficult to realize because the substance of land acquisition arrangements is formed without involving the values and principles that should be the basis for the formation of rules so that in order to actualize these abstract values, the legal substance of land acquisition should be formed by prioritizing conscience in order to protect the interests of the people who less fortunate as John Rawls's views in the theory of social justice. An ideal concept of the legal substance of land acquisition which is able to provide protection of individual rights to land can be realized if there is a re-arrangement of the substance of the planning document in the legal substance of land acquisition considering that this document is the initial document of the party who needs the land to be the basis for the preparation team and the team. implementer in order to create a fair and appropriate land acquisition process for the community. The emergence of doubts from the land appraisal team in providing an assessment and the emergence of doubts from the implementation team to include things other than material things in the nominative list due to the planning team's incomprehension in stating things that need to be included in the planning document. The planning document should contain things that need to be assessed by the assessment team and things that should be included by the land acquisition implementation team in the nominative list. In the planning document, non-physical losses should be stated in full so as not to cause doubts for appraisers and implementers in land acquisition. However, to be able to produce a comprehensive planning document, the laws and regulations on land acquisition must provide a legal umbrella for the planning team in the preparation of the planning document.

As described earlier, it has been mentioned that the implementation of the complaint mechanism is rarely carried out by the community due to limited costs and public understanding of this legal remedy. This should be one of the concerns of legislators. The understanding of the legislators regarding the condition of the community should be considered before determining the mechanism regulated in the legislation. The implementation of objections in the district court is carried out by continuing to charge case fees and legal aid to the community so that it will increase the community's burden in land acquisition. The state provides space for people to pursue their rights but does not provide space for convenience for the community. People's understanding of the courts is not all the same and some people, especially in the research location, have very minimal legal knowledge and are even afraid of dealing with courts. The impact of this is that the community chooses to use other means, such as demonstrations or actions to disrupt the implementation of development.

The right to obtain legal aid is a basic or human right for someone who is in legal trouble. Because obtaining legal aid is one form of access to justice for those who are or are dealing with legal problems. Obtaining legal aid is also a manifestation of equality before the law. The principle of equality before the law has been contained in Article 28D paragraph (1) of the 1945 Constitution, namely that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law. This is the consequence that the State of Indonesia is a state of law (article 1 paragraph (3) of the 1945 Constitution as a result

of the third amendment). There are three principles of the rule of law (*rechtstaat*), namely supremacy of law, equality before the law, and due process of law.

From the development of ideas regarding the concept of legal aid, various variations of legal aid are provided to members of the community. Cappelletti and Gordley in an article entitled "Legal Aid Modern Themes and Variations," as quoted by Soerjono Soekanto divide legal aid into two models, namely the juridical-individual model of legal aid and the welfare model of legal aid. According to Cappelletti and Gordley, individual-juridical legal aid is a right given to citizens to protect their individual interests. The implementation of this legal aid depends on the active role of the community in need where those who need legal aid can ask for the help of a lawyer and then the attorney's services will be paid for by the State.¹ The existence of legal aid for people who will file an objection to the value of compensation is one of the alternative solutions that can be done in order to provide optimal services for the community in obtaining their rights so that the state is really present in providing legal protection.

4. IMPLICATIONS AND RECOMMENDATIONS

In Indonesia, legal protection of individual rights to land in land acquisition for development and public interest has not been realized optimally because the assessment of compensation in reality is only limited to the assessment of physical compensation while those who receive the impact of development have not been accommodated in its implementation because there is no clarity in the regulations. In addition, the existence of an objection institution on the value of compensation has not functioned optimally because the community has not fully understood the procedures litigation.

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DECLARATION OF INTEREST

Authors declare there are no competing interests in this research and publication.

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