

A PRINCIPLE OF BALANCE BETWEEN PUBLIC INTERESTS AND INDIVIDUAL RIGHTS TO LAND: DEVELOPMENT EQUITY

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Abstract

The problem of land acquisition for development in the public interest is very prone to triggering conflicts and social and economic problems in society as well as problems for implementers. The emergence of these problems creates a phenomenon that is almost the same in every land acquisition in Indonesia. Type of the study is a normative-legal research by using conceptual, comparative and case approaches. This paper provides information on the latest trend in research. The results show that in Indonesia, effort to find a concept of balance between the public interest and individual rights to land in development is by reconstructing laws and regulations related to land acquisition, namely the publication to landowners of the appraisal mechanism, a deliberation mechanism only as an agreement on the value of compensation and objections to the value of compensation gives large burden on landowners.

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

1. INTRODUCTION

The acquisition of land for development in the public interest is an effort of the State to realize welfare for the community as a goal of development itself. The existence of public interest in land acquisition will weaken the absolute nature of ownership rights. However, there are problems in the acquisition of land that trigger community conflicts which will have an impact on the process of development slowly.¹ Various problems related to land acquisition, both in terms of the nature and legal substance have created a gap between the objectives and principles of land acquisition and the reality of the community's rejection of the value of the compensation given.

The right to land is one of the rights of citizens in the context of fulfilling their life needs. Recognition of land rights especially property rights as rights protected by law are limited by other provisions governing the social functions of land.² This means that land rights give obligations to right holders to pay attention to public interests related to the land they are entitled to. This can be seen in Article 37 paragraph (1) of the Human Rights Law which provides firmness which basically determines the use of land with the status of property rights in the public interest on condition that reasonable compensation is obtained. This provision implies that there is no revocation of ownership rights to objects including land for the public interest which is carried out without the provision of reasonable compensation. Social function of land implies that every land right must be able to provide benefits for the welfare and happiness of the right holders and provide benefits for the prosperity of the community as a

national development goal. However, this does not mean that individual interests are completely forgotten because of the existence of public interests and the interests of society because the substance of agrarian law also takes into account individual interests.³

The problem of land acquisition for development in the public interest is very prone to triggering conflicts and social and economic problems in society as well as problems for implementers. The emergence of these problems creates a phenomenon that is almost the same in every land acquisition in Indonesia, namely the rejection of the value of compensation which causes delays in the implementation of development. Community rejection occurs because the mechanism for implementing land acquisition does not provide legal certainty for them where on the one hand, their ownership rights are recognized by the constitution while on the other hand they have an obligation to participate in development.

In addition, the community mostly rejects the deliberation mechanism carried out by land acquisition implementers which is defined as deliberation on the form of compensation and not deliberation on the value of compensation so that the basic concept of deliberation in this law is reduced to limitations only on the form of deliberation so that it requires a the study of the legal substance of land acquisition in providing deliberative arrangements is only limited to forms of compensation. The community basically understands that the government has good intentions to use these individual rights for the public interest but the occurrence of rejection by the community is a form of distrust in the government for the mandate to carry out the duties of the state in carrying out the public interest.⁴ In practice, the payment of compensation between one land object and another with the same position, location and quality, it turns out that in determining the amount of compensation there are differences from one another.

Various problems in land acquisition both in terms of the nature and legal substance aspects require an ideal concept that will bring fair conditions for land acquisition for the community. The gap between the goals and principles of land acquisition and the reality of the community rejection of the value of compensation. The issue that then arises is that the implementation of land acquisition for development in the public interest shows a paradox between public interests and individual rights to land so that researchers are interested in conducting studies and an ideal concept in an effort to find a concept of balance between public interests and individual rights of land under development in Indonesia.

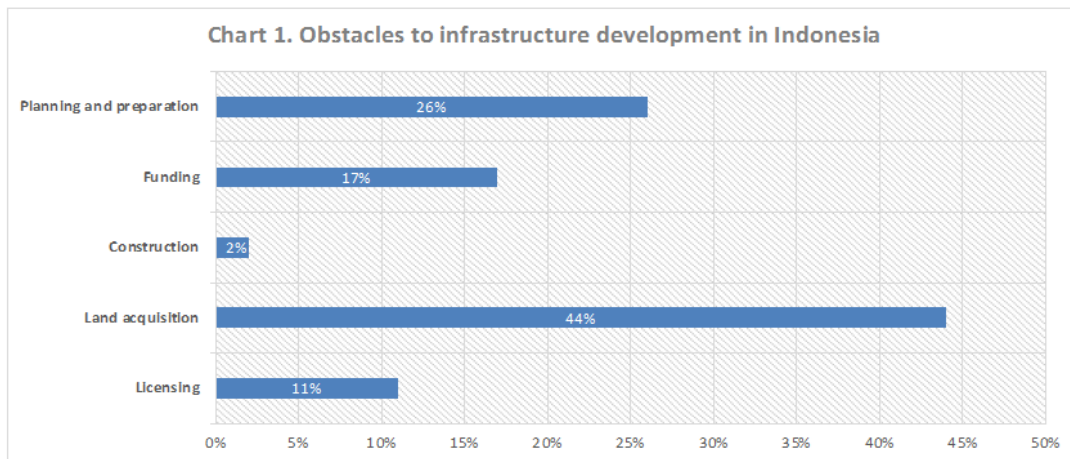
2. METHODOLOGY

This research is normative legal research, to examine written positive legal provisions in a systematic manner related to the prohibition on the conversion of agricultural land, and then exercises an induction-verification test on the facts found in society. It uses conceptual, comparative and case approaches.⁵ This paper provides information on the latest trend in research.

3. RESULTS AND DISCUSSION

3.1. Rejection of Community for Compensation Value

In reality, the implementation of development for the public interest in Indonesia faces obstacles (Chart 1). The biggest obstacle to the implementation of development is in the implementation of land acquisition for development in the public interest. In 2022, there are 45 development projects that require land and require land acquisition in the context of development, which also means that landowners must surrender their land by receiving compensation as a manifestation of the social function of land in Indonesia. The application of the social function of land in everyday life can be seen from the use of a person's land plot for the purpose of road widening where the party holding the land right is obliged to hand over or release part of the land to be used as a road or for the public interest but by receiving proper compensation for releasing the land. This shows that the social function of land in Indonesia still provides a balance between individual and public interests.



Source: Committee for the Acceleration of Provision of Priority Infrastructure, 2022

The Basic Agrarian Law has provided obligations regarding the social function of land so that holders of land rights cannot refuse to use their land for public purposes. This cannot be separated from the position of the state as a party that has tenure rights over land in Indonesia so that it has the authority to regulate and manage and use the authority in the context of relinquishing the legal relationship between a person and his parcel of land provided that such relinquishment is for the public interest as a higher interest of personal interest.⁶ This is then regulated in laws and regulations regarding land acquisition for development in the public interest. Prior to the enactment of laws and regulations on land acquisition, arrangements regarding the revocation of land rights in the context of implementing development for the public interest were regulated in Act No. 20 of 1961 which also laid down the juridical foundations of the authority of the state to revoke land rights over the name of the state for the benefit of the state. However, along with the times, this law was only applied 1 (one) time but was never revoked.

Basically, implementation of development requires respect for community rights so that all forms of use of individual rights in the context of development are carried out in the corridor of a balance between private interests and public interests. Changes to the legal substance of land acquisition in Indonesia through the work copyright law basically aim to provide firmer legal certainty for the state so that it can acquire land for development purposes more effectively and efficiently or it can be said that the main spirit of the change in legal substance is on legal certainty.

Act No. 2 of 2012 was issued within the framework of implementing fair development including for land rights holders or land owners and parties who control land in good faith but after the birth of this law, it shows that the implementation of land acquisition for development in the public interest in Indonesia are still experiencing obstacles and even rejection from landowners. The reason for the rejection of compensation value in Indonesia is that the compensation is below the market price. Based on the provisions in the Government Regulation No. 19 of 2021 concerning the Implementation of Land Acquisition for Development for Public Interest, against a rejection of value, the party entitled to submit an objection to the court no later than 14 days from the implementation of the compensation deliberations.

3.2. Legal Reconstruction of the Substance of Legislation in the Land Acquisition

Activities of land acquisition by parties who need land on land rights of other parties are known as land acquisition. Based on the interest, land acquisition is divided into 2 (two) types, namely: the first, land acquisition for public interest. Parties who need land in land acquisition for public interest is agencies, namely state institutions, ministries, non-ministerial government agencies, provincial governments, district/city governments, state-owned enterprises. The second, land acquisition for the interest of private companies, parties who need land in land acquisition for the interest of private companies are limited liability companies.⁷

Land acquisition by the state, whether by central or regional government agencies or State/Regional Owned Enterprises is carried out through land acquisition activities which essentially release the legal relationship between the parties entitled to land and their land through the provision of compensation. This is in line with Oloan Sitorus's view that legal subjects are bearers of rights and obligations (*de dragger van de rechten en plichten*), for human (*natuurlijke person*), legal entity (*rechtspersoon*) or position (*ambt*) can take legal action based on the ability (*bekwaamheid*) or authority (*bevoegdheid*). This legal action is the beginning of the birth of a legal relationship (*rechtsbetrekking*) that is interaction between legal subjects that have legal relevance or have legal consequences. In order for the legal relationship between legal objects to run harmoniously, balanced and fair in the sense that every legal subject gets what is his right and carries out the obligations imposed on him, the law appears as a rule of the game in regulating this legal relationship. Law was created as a means or instrument to regulate the rights and obligations of legal subjects.

As argued above, it can be said that the state has a role in regulating the rights and obligations of legal subjects on land where the state in its authority can grant land rights to someone, however the state in its authority can also terminate the legal relationship between land and a

person by taking into account the person's rights, namely through the provision of compensation so that in the view of researchers, land acquisition is essentially a process to acquire land by terminating the legal relationship between the land owner and the land object by means of providing compensation.

The compensation for land by the state is in line with the integralistic understanding in Soepomo's view⁸ which requires a unity between society and the state where individual interests merge in the State interests so as not to cause conflicts of rights and interests between citizens and the State. This has also given birth to a concept of land tenure and ownership in Indonesia known as the social function of land which requires a balance between individual interests and public interests so that the ideal land law system is a land law system that functions to maintain benefits in the relationship between land and its owners and relationship between the land and its owner and the state.⁹

Reviewed in depth, loss is a relative meaning; it is based on a comparison between two circumstances. Loss is the differences between circumstances that arise as a result of violations of these norms do not occur.¹⁰ Therefore, it can be said that with compensation, the party entitled to the land can obtain compensation for the benefits that he should have received if the land acquisition was not carried out. It shows that the losses referred to in this case are not only in the form of physical losses such as land and buildings but non-physical losses including economic losses (premium) such as loss of job, loss of business, including changing professions, emotional losses (solatium) in the form of losses intangibles relating to the expropriation of land used as a residence from the owner, transaction costs, transfers, vacancies, permits, taxes, waiting period costs and loss of remaining land.

Individual rights are rights owned by individuals against the state. The state may not interfere with individuals in realizing their rights. Social rights are rights that humans have as members of society along with other members of society. Determination of compensation for land is carried out properly and fairly but the indicators of eligibility and fairness in the view of researchers are based on applicable laws and regulations and for land acquisition for development in the public interest in Indonesia, it has been clearly regulated that the determination of fairness and appropriateness is carried out through Objective and professional assessment by experts is called appraisal.¹¹ Appraisals who carry out appraisals for land acquisition for public development are appraisers who have obtained a license as a land appraisal from the Minister of Agrarian Affairs and Spatial Planning.

Rawls in his theory offers a form of settlement of justice problems by building a contract-based theory of justice. In his view, an adequate justice must be established by means of a contractual approach, because the principles of justice that are chosen together really are the result of the collective agreement of all individuals who are free, rational and equal. In the land acquisition for development in the public interest, this is often becomes a problem where the position of the state is considered to be very dominant in the land acquisition mechanism regulated in Act No. 2 of 2012 because it did not provide space for agreement for landowners so that landowners were only given two choices, namely agree or disagree. In this regard, the researcher cites the view of John Stuart Mill that justice is a relative feeling because it cannot be separated from

the involvement of the human person as a subject of law while humans find themselves within the framework of the value system that they are born with or that are obtained due to the learning process so that a sense of justice for each individual is often difficult to apply in general. This is the basis for finding a concept of justice that includes two principles, namely beneficial justice and justice as a psychological basis in human nature.

The assessment of proper and fair compensation in the land acquisition cannot only be seen from the basis of the contract as John Rawls's view, but can be seen from the point of view of benefits and human psychological conditions. The use of an appraisal mechanism through appraisal is basically not a mechanism that reduces the value of justice in land acquisition, however, the appraisal capability to understand the benefits and psychological conditions of the landowner community is very important in order to be able to provide an assessment of the fairness and feasibility of compensation in land acquisition. One of the universal basic principles in land acquisition by the state is that: "no private property shall be taken for public use without just and fair compensation," so that in the process of land acquisition, the principles of justice should be taken into account so as not to harm the initial owner. In this case concretely that it is true that the Indonesian nation adheres to the concept of social justice.¹²

Violations of human rights in land acquisition in various experiences as argued by Johnson Anyasi Braun¹³ that the process of land acquisition by the state started and stopped at the earliest stage because the state forced it to continue to occupy the land. This happened because of the bad governance structure. This phenomenon continues to exist and is detrimental to landowners. Resentment and agitation by owners as result of the State perception as a continual predator of nature and private property.

The impact of not providing protection for human rights in land acquisition was stated by Phan Trung Hien¹⁴ that in peace, public interests need to respect private interests and vice versa. If the public interest is not respected, then public infrastructure, public roads, public construction may not be protected. In this case, there will be problems or contradictions between the governments (either central or local government) and the people (or groups of individuals). If this problem cannot be solved, it will directly affect society and politics in general. It directly impacts individuals in that society. In that state, it is impossible for individuals to enjoy their personal interests. If the government does not respect private interests, denies its existence society will be chaotic. They no longer have the motivation to work, to improve their life.

The results of research show that the government wants to uphold human rights in land acquisition, but the reality shows that these arrangements are not accompanied by clarity regarding compensation for non-physical impact, In fact, all forms of public consultations, deliberations, outreach are only a formality, various agrarian conflicts as a result of land acquisition it has become a reality that there is a reduction in the protection of human rights in land acquisition, even in terms of legal substance, this is very clearly seen, for example by not allowing objections to values other than through courts and negotiations in deliberations, not even regarding value but only in the form of compensation. During the deliberations, the community was only given envelopes containing written compensation figures without

previously making clear announcements regarding the matters being assessed and the basis for evaluating their land but in deliberations, the appraiser was not presented to provide an explanation regarding the standard of their assessment.¹⁵

Community losses in land acquisition do not only involve physical losses but also non-physical losses, for example loss of livelihoods. Providing compensation that is insufficient to buy back land to be used as a source of livelihood is one form of non-protection of human rights in land acquisition.¹⁶ Likewise, losses due to indirect impacts suffered by the community, for example, a developer has bought and built several houses to sell and for this they have to owe the bank. After the location set, they are prohibited from continuing development and are prohibited from buying and selling while their debts at the bank continue to run along with the interest they have to pay. Users who had previously paid down payment asking for their money back and users who were outside the land acquisition location also canceled their agreement because they did not want to buy land that was close to public facilities such as railroads or toll roads.

Clearly, various non-physical losses suffered by the developer have to be taken into account in land acquisition, but the reality shows that the land acquisition is limited to physical compensation, even paying compensation for the rest of their land which is no longer used after land acquisition is very difficult to realize because of the fear of land acquisition executors to provide recommendations due to the specter of law enforcement against them.

In the researcher' analysis, the reality of land acquisition arrangements in Indonesia is still full of potential injustices. This can be seen in several legal substances in laws and regulations related to land acquisition. The system of valuation for compensation currently in effect is only based on the valuation of the object at the time land acquisition for public interest occurs, whereas in reality the relinquishment of rights for land acquisition for development terminates the relationship between the owner of the right and the land and also stops obtaining benefits from the land at that time and in the future. Price assessments are carried out using the value at the time of location determination while the implementation of compensation payments can take years after the location marker 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.

In legislation, the existing compensation calculation system does not take into account the loss of the value of the acquisition of benefits from land in the future. The term "real value" cannot be applied without providing clear arguments and reasons. The ambiguity of real value in the law causes the appraiser to hesitate to use market value, because market value is of course very subjective, so for this it is necessary to revise the law to determine the standard value for land acquisition.

The regulation of non-physical compensation is very vague in terms of laws and regulations, both in terms of indicators, forms and parties that should determine whether physical compensation can be paid to the community. This causes uncertainty for the appraisal party as well as the land acquisition executor or those who need land. They generally think that it is not their authority to determine land parcels for which physical compensation can be calculated,

so what happens next is that the appraiser chooses not to include it in the valuation element. This is further exacerbated by the condition of law enforcement on corruption crimes which has always been a scourge for all executors, so that a principle emerges that in land acquisition it is better to harm the community than harm the state.

The deliberation in the land acquisition law appears to be just a formality because the land owners are required to agree to the price set by the appraiser and if they object they have to go through the courts. There is no space for the community to negotiate the price set by the appraiser. Justice in land acquisition becomes difficult to realize because the substance of land acquisition regulation is formed without involving values and principles that should be the basis for forming 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 view in social justice theory.

Based on this legal construction, the ideal concept in the context of realizing justice in land acquisition appraisal is the preparation of planning documents involving land agencies and land appraisal agencies and the preparation of temporary nominative list documents at the preparation stage in which all data on the subject and object of land acquisition has been stated in full including includes material and immaterial losses to the land owner.

As a comparison in China, land acquisition regulations are regulated with great regard for the welfare of the community, both landowners and affected people. In the implementation of land acquisition in China, the state strictly oversees supervision in order to improve the welfare of the people living in the reallocation area so that the state's participation is not only during the implementation of land acquisition but after the reallocation process and ensures that all communities living in the reallocation area are has experienced an increase in the welfare of life. The Chinese government provides assistance to the people who are in the reallocation area, builds facilities and infrastructure and conducts periodic supervision to ensure an increase in people's welfare after land acquisition.¹⁷

The coercive attitude towards the community without respecting the holders of land rights is clearly felt by the community, because the appeals made mean nothing when the revocation of rights is carried out by the State, the protection provided by the State is so limited that it is impossible for the community to resist development activities for the public interest and possible conflicts will arise physically and non-physically. In this case it seems that the interpretation of the principle of the social function of land rights.¹⁸ In addition to implying that the right to land must be in accordance with the nature and purpose of the right, so that it is beneficial to the right holder and society in general, it means that there must be a balance between individual interests and public interests, that individual interests are recognized and respected in the context of implementing society interests as a whole and finding a balance between land rights holders and government interests is not easy to find the true meaning, but the most important thing is to be able to reach an agreement without any settlement in court. The court decides on compensation so that it feels fair to the holders of land rights. Certain criteria are applied objectively with predetermined standards and also the right holder needs to know the basis for determining the amount of compensation received.

4. IMPLICATIONS AND RECOMMENDATIONS

In Indonesia, effort to find a concept of balance between the public interest and individual rights to land in development is by reconstructing laws and regulations related to land acquisition, namely the publication to landowners of the appraisal mechanism, a deliberation mechanism only as an agreement on the value of compensation and objections to the value of compensation gives large burden on landowners.

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DECLARATION OF INTEREST

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

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