

THE COMPENSATION TOWARDS LAND RIGHTS OF THE INDIGENOUS PEOPLE IN LAND PROCUREMENT FOR DEVELOPMENT

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ABSTRACT

In Papua Province, Indonesia, the problem concerning land is a fundamental problem because for the indigenous people of Papua land is the mother of life. Therefore, the land procurement by the government for development, requires an equitable compensation for the indigenous people. In fact, both in regulation and practices, the compensation often victimizes the indigenous people's rights and the aspect of justice. It becomes the urgent problem that will be discussed in this paper.

Key words : Land Procurement, Compensation, Indigenous People's Rights

Introduction

Land is central in people's lives. The existence of land is seen in its function, both economically, socially, culturally, politically, legally, and developmentally. In many fields, land has a central role and utility value that is able to develop people's lives. Even without a land, people's existence and identity can be revoked.

The central role of land in people's lives makes Jean Jacques Rousseau to put an aspect of community land ownership as a part of the social contract theory (Bernhard Limbong, 2011). As a part of the social contract, land contains its social function, which is used whilst considering other people's interests and also can be used for public purposes. Within the framework of the public interest, the ownership of land is respected and protected legally, so as not to be broken arbitrarily.

The legal protection of land ownership is provided in the 1945 Constitution Article 28H paragraph (4), which is in the category of protection based on the right of ownership, and Law Number 5 of 1960 on the Basic Regulations on Agrarian (UUPA). In Article 6 of UUPA, it is emphasized that despite containing the private ownership of land, it has a social significance that considers the other people's interests and also can be used for public purposes. Therefore, the private ownership of the land can be revoked if the land is aimed for social purposes, in this case related to the construction of the public interest.

Although the country has a power to revoke the private ownership of the land for development, but it cannot ignore that the majority of land in Indonesia is possessed and owned by the indigenous people composed of different tribes or ethnic groups. The country should provide an equitable compensation to the indigenous peoples as stated in Article 18 of UUPA that for the public interest, including the interests of the country and nation as well as the public, the land rights may be revoked by providing an appropriate compensation and in a manner regulated by the Law.

Regarding the problem, Papua Province which has indigenous peoples with an essential power to the land, often faces a lot of problems related to land procurement for development or public interest. The biggest problem in the land procurement for development in Papua is closely related to the type and amount of compensation. The people feel that the compensation provided by the government is very unequitable. However, on the other hand, the government, based on the regulation, argues that the compensation provided is equitable. The vertical conflict between the indigenous people and the government is often occurred that it inhibits the rate of development in Papua.

Research Method

It is a research of empirical and normative law, that is a law study with a sociological and normative approach that sees the law as a social regulation symptom as well as a social life engineer. It means that besides as a concept of an autonomous normative symptom, law is also a social regulation that is in real will be association to other social variables.

Discussion

A. The Concept of Compensation in Land Procurement Related to Construction for Public Interest

The problem of land procurement for the construction for public interest is critical in its practice, because it concerns on the lives of many people. When it is seen from the government's need for land for development purposes, it is understandable that the state land is in limited availability, so the only way that can be taken is to liberate the land owned by the community, both dominated by the rights under customary law or the other rights under UUPA (Adrian Sutedi, 2008). As for the construction for public interest consists of the constructions on national defense and security; public roads, toll roads, tunnels, railroads, railway stations, and railway operational facilities; reservoirs, dams, weirs, irrigation, drinking water channels, water and sanitary sewer, irrigation and other buildings; harbors, airports, and terminals; infrastructures of oil, gas, and geothermal; power plants, transmissions, substations, networks, and distributions; Government's telecommunication and information networks; landfills and waste processings; Central/Regional Government Hospitals; public safety facilities; Central/Regional Government public cemeteries; social facilities, public facilities and green spaces; nature and cultural conservations; Central/Regional/Rural Government's offices; urban slums restructure and/or land consolidation, and house rent for low-income people; Educational or Central/Regional Government's school infrastructures; Central/Regional Government's sports infrastructures; public markets and parking lots (Article 10 of Law Number 2 of 2012).

As stated previously, the release of property rights of indigenous people to land for the sake of public interest, must consider the aspect of equitable compensation. Article 18 of UUPA states that the public interest, including the interests of the country and nation as well as the public, the rights may be revoked by giving an appropriate compensation and in manner stipulated by the Law. The definition of compensation is then translated into other various legislations namely Law Number 20 of 1961 concerning Revocation of Land Rights and the Object Over the Land and then completed by the Government Regulation Number 39 of 1973 concerning The Compensation Stipulation by the High Court in relation to the Revocation of Land Rights and the Object Over the Land. A Presidential Instruction Number 9 of 1973 was issued on the same year concerning the Implementation of Revocation of Land Rights and The Object Over the Land.

Furthermore, in 1993, A Presidential Regulation of the Republic of Indonesia Number 55 of 1993 was issued concerning the Land Procurement for the Implementation of Development for Public Interest which then amended by the Presidential Regulation of the Republic of Indonesia Number 36 Of 2005 concerning the Land Procurement for Implementation of Development for Public Interest. A of later, a Presidential Regulation of the Republic of Indonesia Number 65 Of 2006 was re-issued concerning the Amendment to the Presidential Regulation Number 36 Of 2005 concerning the Land Procurement for Implementation of Development for Public Interest. In 2012, Law Number 2 of 2012 was promulgated concerning the Land Procurement for Implementation of Development for Public Interest which was followed by Presidential Regulation Number 71 Of 2012 concerning the Implementation of Land Procurement for Implementation of Development for Public Interest, as amended by Presidential Regulation Number 40 Of 2014 concerning the Amendment of Presidential Regulation Number 71 Of 2012 concerning the Implementation of Land Procurement for Implementation of Development for Public Interest.

Law Number 2 of 2012 concerning Land Procurement for Implementation of Development for Public Interest asserts that the definition of compensation is an appropriate and equitable reimbursement to the person entitled to the land procurement process. The concept of "appropriate and equitable" by the government is implicitly found in the assessment of compensation by the assessors from the government (Article 32, Article 33, Article 34 of Law Number 2 of 2012), which is then used as the basis for discussions on stipulation of compensation. The values that form the basis of discussions on stipulation of compensation seems ascertained in Presidential Regulation Number 71 of 2012. Article 74 of Presidential Regulation Number 71 of 2012 states that the form of compensation provided is according to the value of compensation that is equal to the nominal value of which is determined by the assessors. In this thought, the discussion is only a kind of formality. Right on this point, the land conflicts involved the indigenous people who have rights as indigenous peoples and government that revokes the indigenous people's rights can occur.

It is recognized that the forms of compensation stated in Presidential Regulation Number 71 of 2012 which is the implementation regulation of Law Number 2 of 2012, is more accommodating, they are in the form of money, the replacement land, resettlement, stock ownership, and other forms as agreed by both parties (Article 74 of Presidential Regulation Number 71 of 2012). However, in the discussion, the provision of compensation in the form of money is more emphasized (Article 75 of Presidential Regulation Number 71 of 2012). The emphasis on compensation in the form of money as the primary often cause a prolonged two-way conflict because it is generally difficult to reach agreement on nominal amount of the compensation.

In my opinion, the greatest weakness in the regulation concerning land procurement for development for the public interest lies in the neglect of non-physical losses. Law Number 2 of 2012 and Presidential Regulation Number 71 Of 2012 do not consider the non-physical losses due to the procurement of customary land that has a much greater value. In fact, the

customary lands in Papua are directly correlated with human existence. The loss of land ownership is the same as the deprivation on human existence. In the category of non-physical, land, especially for the communal land, has a high esoteric value because it contains historical value, comfort, calm, pleasure, social interaction, society/solidarity, common memories on the collective lands, according to Maurice Halbwachs (Mudji Sutrisno, 2004). The land conflict in Papua began when the money provided by the government cannot afford to buy or replace the communal lands' historical value, comfort, serenity, calm, social interaction, closeness, society/solidarity, common memories on the collective lands.

In relation to compensation, Law Number 2 of 2012 is very repressive. In Article 39, Article 42 paragraph (1) and Article 43 stipulate that in case a party that is entitled to reject the form and/or the amount of compensation, but does not raise objections within 14 working days after the discussion on stipulation of compensation, according to the law, is deemed to accept the form and amount of the compensation. The compensation is then deposited in the district court. At the time of the implementation of the provision of compensation and release of the rights has been implemented or compensation payment has been deposited in the district court, the land ownership or rights of the entitled party will be revoked and the evidence of the rights is declared invalid and the land will be possessed by the state. The abolishment of the land ownership or rights of the party that is entitled to reject the results of discussion but does not raise an objection to it, according to Article 39, Article 42 paragraph (1) and 43, certainly is not in accordance with what has been described in the dictum of Considering, the General Provisions of Article 1 point 2 and 10 as well as Article 2 of the Law confirm that the land procurement for public interest must observe the principle of humanity, justice, agreements, and other principles.

Then, in Article 1 paragraph 4 and Article 33 point b of Law Number 2 of 2012 state that the object of land procurement and compensation assessment by the assessor include the space over and under the land. The definition of 'space over and under the land' in those articles is not described further in this Act or its implementation regulation (Presidential Regulation Number 71 of 2012). This becomes blurred when linked with the content of Article 33 paragraph (3) of 1945 constitution which states that the earth, water and natural resources contained in it are controlled by the state and used for the people's welfare. In this case, the clarity is necessary as well as the limitation of space over and under the land.

Regarding customary lands, the customary lands are not only tangible land which are used only as the villages, fields, gardens but also includes the forests, meadows, swamps, rivers, even the sea in the surrounding (Erman Rajagukguk, 1979). Any member of the association who wants to open the land to be used as a rice field requires a permission in advance to the head of the customs union. If the land that will be opened has never been opened by someone else and the head of the customs union has no objections, after paying some money to the communion, is allowed to open the land. If the land is utilized continuously and processed in such way, by utilizing labors and capital so that the value of the land increases, the relationship between the utilizer and the land will change into ownership relation. It creates property rights to land according to the customary law.

B. Case Study and Implementation of Compensation to the Indigenous People in Papua Province

According to Bernhard Limbong (2011), the land conflict (especially concerning the provision of compensation that is not equitable or equal) becomes a national issue because of the high number and many obstacles in the resolution, which is generally caused by the weakness of regulation and wrong implementation of the land law, so that in practice, the interest of the rights holders of the land (in this case the Indigenous people) is not protected with certainty.

During the New Order until 2001, there were 1.497 disputes, with the total area of land disputed reached 1.052.514,37 hectares, and the number of community members who became the victims were 232.177 families (Jayadi Damanik, 2002). Other data state that at the end of 2001, there were 1.753 disputes (Maria S. W. Sumardjono, 2009). Then, in 2007 it increased to 2.810 disputes (National Land Agency of the Republic of Indonesia, 2007).

In Papua Province, despite the presence of Law Number 21 of 2001 on Special Autonomy for Papua Province, which in Article 43 states that the government of Papua Province shall recognize, respect, protect, empower and develop the rights of indigenous people to be guided by the provisions of the rule of law in effect, but in reality, the conflicts regarding compensation for the rights of indigenous peoples because of the revocation of the rights of indigenous peoples over land for development for the public interests are still occurred.

For example, in Merauke, when there is a transmigration by the central government, there are many indigenous people lose their customary rights because the government, through the police and military (TNI) conduct an aggressive repression that forces the indigenous people to release their customary rights (Theodorus Erro Yapo, 2012). In Sentani, there were several blockade occurred tow Sentani airport as the indigenous people, through Ondoafi or Ondofolo (head of ethnic group or customs), still demand a proper compensation for the rights of indigenous peoples used to build the Sentani Airport. The first demand came from four (4) ethnic groups that recognize the owner of the land rights of Sentani Airport are Taime, Yoku, Palo, and Kopeo ethnic groups (<http://thevoiceofwestpapua.wordpress.com/2013/10/22/bandara-sentani-akan-ditutup/>, 25 April 2013). Other demands came from other ethnic groups that also claimed that the owners of the land in the area around the airport are Mehue and Fele ethnic groups (<http://news.detik.com/read/2010/12/17/110045/1527083/10/bandara-sentani-jayapura-dipagar-betis-penumpang-terlantar>, 25 April 2013).

Related to various demands, in December 2010, the Government provided compensation payments that are used to build the Sentani Airport to Franzalbert Joku, the Ondofolo (head of ethnic group) of Ifar Besar village for Rp 3.400.000.000; to Pallo Dominikus R, the head of Koselo Ethnic Group for Rp 5.500.000.000; to Hendrik Pallo, the head of Keret Ethnic

Group for Rp 3.500.000.000; to Bhulende Imea Uriel O. Pallo, the head of Koselo Ethnic Group for Rp 1.000.000.000; to the Family Members of Demetres Yoku for Rp 2.000.000.000; to the head of Keret of Kopeuw Ethnic Group, Mapjail G. Kopeuw for Rp 500.000.000; to the Family Members of Demas Taime for Rp 360.000.000; to the Head/Konselor of Taime Ethnic Group, Melkianus Taime for Rp 240.000.000, and Rp 1.000.000.000 to Akhona Meshakh Pallo (<http://komisikepolisianindonesia.com/umum/read/3152/17-5-miliar-ganti-rugi-tanah-bandara-sentani-dibayar.html>, 25 April 2013). Then, in April 2014, the blockade was occurred again by the indigenous peoples at Sentani Airport who demanded compensation again for Rp 400 billion, with the threat of transferring the management to a foreign party if there is no payment of compensation (Berita Sore Papua TV, 18 April 2014).

Another conflict is the demand for compensation by the Doyo Lama, Yahim, and Ifale villages, to the land that becomes the Indonesian Air Force headquarters located in Sentani District of Hinekombe village. Indonesian Air Force claims that the land has been used for many years as a military headquarters. This statement is very weak because the land actually belongs to the Papuan indigenous people.

The Papuan Indigenous people also demanded the compensation for the land used as a military training center of the Indonesian National Army (TNI) in Rindam. Nendali, Netar, Ifar Besar, Sereh, and Ormu villages claimed that the land is owned by the indigenous people. The problem is that the ethnic groups had not agreed yet in terms of the oldest ownership of the land, so that there is no certainty on the payment of compensation from the TNI to the customary lands until now. The similar case also happened to the land of Advend airport in Doyo Baru Village. The land is claimed by some ethnic groups of Doyo Lama, Doyo Baru and Bambar villages. Until now, there is no discussion conducted regarding the compensation to the customary lands.

In my opinion, there are still injustice occurred in the implementation of compensation to the indigenous people in Papua Province due to 2 things below, they are:

1. The form of compensation emphasized by the government is in the form of money; whereas, in the law, it is possible for the compensation to be in the other forms, they are the replacement land, resettlement, stock ownership, and other forms agreed by both parties (Article 74 of Presidential Regulation Number 71 of 2012). If the government offers other forms of compensation in the form of stock ownership, the indigenous people will still exist since they have a property in the form of infrastructures built by the government.
2. The amount of compensation provided by the government still cannot afford the non-physical losses experienced by the indigenous people.

Certainly, those two problems highlight the justice value in the compensation to the indigenous people in Papua Province.

C. Questions Regarding the Justice in the Compensation to the Indigenous People in Papua Province

In the practice of customary land acquisition for development, Papuan indigenous people always feel revoked from their own indigenous lands. In my interview with the Head of Papuan indigenous people (June 21, 2014) I found that the government often ignore the aspirations of the indigenous people. It is known through the act of "coercion" by the government through the formulation of legislation. The coercion is that in Article 1 paragraph 2 of Presidential Regulation Number 71 of 2012 which states that the land procurement is the activity of land provision by giving a proper and equitable compensation to the entitled party. Then, in Article 86 of Presidential Regulation states that if there is no agreement in the discussion of stipulation of the form and amount of compensation, the land procurement committee will entrust the compensation to the Chief of the District Court. This indicates that the government unilaterally and "carelessly" makes a decision to stipulate the form and amount of the compensation. The heads of ethnic groups note that instead of government action that causes dissatisfaction of indigenous people and then results in demand for compensation from every generation considering that the land for the Papuan indigenous people is a mother that must be protected and respected.

In the context of restorative justice, the government has to attempt to provide healing both physical and non-physical to the indigenous people who hold the land rights, who have an emotional bond, memories, very strong histories towards the inhibited lands and have a livelihood. I see that the category of non-physical healing in the form of memory to the land taken by the government, in which I see that the government should be the basic of the government to stipulate the forms of compensation that are suitable for the Papuan indigenous people. In other words, the central focus of the procurement of land for development in Papua should be placed on the existence of the sustainable community. This is reasonable given that the concept of restorative justice itself demands a compensation plus apology and rehabilitation. That means there is a healing character given in the concept of restorative justice (Achmad Ali, 2009).

Furthermore, based on the theory of Restitutive Justice, economically, the compensation must be a monetary compensation, repair and improvement of livelihood compensation, community development compensation which presuppose the existence of sustainable human development, because (1) the compensation helps the victims (the aggrieved) to overcome the material aspects and losses (in case of being continuous), (2) compensation is an official recognition for the loss/suffer experienced, which allows for the reintegration of the aggrieved people of the aspect of the experienced losses, and (3) the compensation can prevent the existence of injustice and/or new losses in the future. It means that the restitutive justice presupposes the existence of a contractual character between the parties. By assuming the existence of a contractual character, restitutive justice requires a replacement (restitution) against losses experienced by one of the contracting parties (Achmad Ali, 2009). In the frame of restitutive justice, compensation is actually a substitute or a reward for what has been lost, by considering losses that might refer to things that are not tangible, something that can not be replaced, and other losses than the patrimonial losses (Bernhard Limbong, 2011). Regarding the land compensation, it has to meet the aspects of economic, sociology, and philosophy. Economically, the compensation should be in the form

of monetary compensation, repair and improvement of livelihood compensation, community development compensation, and compensation for development of catchment areas. Sociologically, compensation means profession transition, social environment transition, and emotional transition. Philosophically, compensation means distribution, that is the distribution to those who are in need. I see that in the category of restitutive justice, it contains a meaning of sustainable indigenous people development, and not just give the money and let the indigenous people take care of themselves.

In the context of *justice as a fairness*, John Rawls, 1997, there are several things that should be considered in the provision of compensation to the indigenous people, they are:

1. In the discussion of stipulation of the compensation, as prescribed in Law Number 2 of 2012, the parties must be in a condition of veil of ignorance (John Rawls, 1997) so that the decisions made are certainly resulted from the honesty of earlier position of the parties. In the discussion, when following Rawls' thought, it is unfair to sacrifice the rights of one or several people only for the sake of greater economic benefits for the society as a whole, because it is contrary to the principle of justice that requires equal freedom for everyone. The social decision that has consequences for all members of society must be made on the basis of rights rather than on the utilization (Andre Ata Ujan, 1999). It means that there must be a reciprocal benefit from the stipulation of the amount of compensation, both for government and the indigenous people.
2. The provision of other forms of compensation payment in the land procurement for development in Papua. By considering the provisions of Article 74 of Presidential Regulation Number 71 of 2012 which states that the form of compensation can be in cash, replacement land, resettlement, stock ownership, or other forms agreed in the discussion, then I have an opinion that the most possible form of compensation for the Papuan indigenous Peoples is the share involvement, in order to achieve sustainable development for the indigenous people.

Conclusion

The provision of compensation to the Papuan Indigenous People regarding the land acquisition for the sake of public interest is an obligatory for the government to conduct. The compensation. The compensation has to be able to embody the justice value since in reality, the Papuan indigenous people have a right to determine and develop their priorities and strategies for development using the lands or territories and other resources. Ironically, the justice value in compensation for Papuan indigenous people regarding the use of customary land for public interest construction is utopian because both legally and in implementation, the government seems negated the existence of indigenous peoples' rights. Therefore, the regulation concerning the provision of compensation related to land acquisition for the development of public interest is highly in need of revision.

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