

## RECONSTRUCTION OF LAND ACQUISITION BASED ON PRINCIPLE OF RESPECT FOR LAND RIGHTS

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### ABSTRACT

*This research aims to first, construct a definition of public interest, compensation and sanctions resulting from the interpretation of the concept of the right to control of the state and the principles of social function of land rights; second, make the construction of land acquisition procedures efficient. This type of research is normative and prescriptive legal research, providing legal advice on land acquisition for the public interest that can realize respect for land rights. Based on the discussion, it can be concluded that the legal construction of land acquisition for public interest based on the principle of respecting land rights must be guided by: first, the legal construction of the definition of public interest in land acquisition includes general guidelines and a list of activities. General guidelines for the definition of public interest, namely the public interest concerning all public facilities for the running of civilized human life, with three limitations: development activities are carried out by the government; government owned; and not used for profit. Second, compensation is compensation for losses both physical and / or non-physical. Third, land acquisition procedures follow ideal bureaucratic principles.*

Key words: Land, Public Interest, Compensation.

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### INTRODUCTION

The Basic Agrarian Law provides strong guarantees for land rights holders if their land rights are revoked for public interest. According to Article 18 of the UUPA, for the public interest, including the interests of the nation and the State as well as the common interests of the people, land rights can be revoked, by providing appropriate compensation and in a manner regulated by law. In other words, the revocation of land rights can only be carried out with the following conditions: first, for the public interest, second, with adequate compensation, third, the method is regulated by law. (Karjoko, 2017)

The mandate of the UUPA has not been implemented by the Government. The principle of respect for land rights has been neglected. What has happened is that there are human rights violations in land acquisition for the public interest. According to Bambang Setiawan, eviction by the government for the sake of development is a jargon that is always used to force residents to leave the land they occupy. Under the pretext of constructing reservoirs, roads or bridges and other public facilities, a number of residents were forced to move with often insufficient compensation. The potential for human rights violations in such cases tends to be further magnified by the enactment of Presidential Regulation Number 36 of 2005 concerning Land Acquisition for Implementation of Development in the Public Interest. In the name of development and public interest, every citizen must be prepared to be evicted from the land they occupy. During the New Order era, such arrangements also existed, namely Presidential Decree (Keppres) Number 55 of 1993 (Kompas, tanggal 12 Desember 2005).

Various cases regarding the land acquisition process indicate compensatory injustices as well as formal injustices. Compensatory injustice is shown by Aminuddin Salle's dissertation entitled "Land Acquisition Law for Public Interest" concludes that first, Presidential Decree No. 55 of 1993 has not met the requirements for legal enforcement and legal basic values. This can be proven by not having fulfilled the conditions applied philosophically, sociologically, and juridically, so that it has not yet provided a sense of justice. This situation occurs because the Presidential Decree No. 55 of 1993 and the Regulation of the Head of BPN No. 1 of 1994 have not created a balance of rights and obligations between agencies requiring land and holders of land rights. Second, the content of the benefits of land acquisition regulations has not yet been felt, especially by land rights holders because the nature of the public interest is narrowly emphasized on considerations of development interests determined unilaterally by the authorities without directly involving the holders of land rights. As a result, people's rights to land are neglected (Aminuddin Salle, 2007: 207-208).

According to Gunanegara, land acquisition in the name of development seems to be one of the crucial issues in Indonesia. It is like a chronic disease in the word development itself. In the name of the state, the government feels that it has the right to take land owned by residents regardless of whether the owner agrees or not. Residents often complain that the compensation offered by the Government is too small, so they are reluctant to give up their property rights (Gunanegara, 2008). According to Zainal Arifin Mochtar, the market as the party that will most often benefit from Presidential Regulation Number 36 of 2005 as amended by Presidential Regulation Number 65 of 2006. If the Presidential Decree No. 55/1993 which regulates types of public interest still includes the basis of public interest, it is not to seek profit, this has been eliminated in this new Presidential Decree. This means that the public interest will be sold for the benefit of the owners of capital [<http://www.ppi-india.org>]2Juli 2010.

In relation to formal injustice, according to Achmad Rubaie, in empirical reality there are still problems in land acquisition, namely: difficulty in determining compensation, the existence of games of brokers from both citizens and officials, limited government budget. Disbursement of the land acquisition budget should be conducted first, while discussions with land owners are still not final. When the deliberation process was carried out, it turned out that the land owner asked for a high price so that the funds that had been disbursed were not sufficient to pay compensation. (Karjoko, Santosa, & Rachmi Handayani, 2019)

Finally, the land owner was forced to accept the compensation set by the land acquisition committee (Achmad Rubaie, 2007: 11). The Directorate of Highways of the Ministry of Public Works has made an inventory of problems in land acquisition including: uncertainty of time and cost of land provision, P2T is not firm and consistent in implementing the provisions for implementing land acquisition, there is an opinion from the community that toll roads are not public interests but commercial interests, land acquisition is often used by land speculators to seek maximum profit, deliberations involving large numbers of people tend to find it difficult to reach compensation agreements. (Karjoko, 2017)

To solve the juridical problem, the government has submitted a Land Acquisition Bill for Public Interest and it has been included in the 2010 legislative priorities. According to Iwan Nurdin, in substance, there are several main problems that are blocking the bill. First, the definition of a project with the status of public interest is determined by the president. This is a dangerous thing, so far the experience of the State's Right to Control (HMN) in the agrarian sector represented by sectoral departments such as forestry, mining and land affairs on the grounds that it is in the national interest has proven to be the loophole most often misinterpreted and detrimental to the people. All are open to interpretation. Second, there is no paradigm shift in the compensation process. (Utomo & Karjoko, 2018)

The principle of compensation used is equality and equality. This is surprising, because in the process of taking over the principle land used should be protection and sustainability of the rights of the victims. As a result, this bill still puts forward a buy-out compensation model with a fixed price (deliberation or court). Another scheme is in the form of resettlement, where capital participation is only a mechanism that can be chosen by parties who need land, not obligation. Fourth, this bill will come in the midst of the absence of a land use national map plan that has been expected for a long time. The absence of a land use map has resulted in competition and conflicts over the use of space with land as the main basis for both economic, political and government use, ecology, reserves, and even defense and security. So far, all departments and governments have formulated this partially and according to their own sectoral egos. The derivation of this problem has resulted in the explosion of conflicts such as evictions and land grabbing. Fifth, this bill is the fruit of policy brokers who are poor across the country. As is well known, since 2007, the Asian Development Bank (ADB) has assisted BPN-RI to propose a Land Acquisition Law through a project called "Enhancing the Legal and Administrative Framework for Land Project". Surprisingly, the draft Land Acquisition Law accommodates all the things ADB wants. (Utomo & Karjoko, 2018)

In fact, the essence of the ADB proposal boils down to the liberalization of property and land in the country. It has been widely proven that the liberalization that has been signed so far has often been carried out without thinking and in the end it is more difficult than benefiting the public at large. Thus, there are four problems that cannot be resolved by the law of land acquisition for the public interest, namely first, the concept of state control rights, second, the concept of public interest, third, compensation, fourth, deliberation (land acquisition committee and land acquisition procedures). So it is urgent to carry out research on the Legal Construction of Land Acquisition for Public Interest Based on the Principle of Respect for Land Rights. (Nugroho, Ayu Ketut, & Karjoko, 2018)

## RESEARCH METHODS

This research is a normative legal research, a process to find the law of land acquisition for public interest that can realize respect for land rights. This research is prescriptive, providing legal advice on land acquisition for the public interest that can realize respect for land rights. The sources of this research include primary legal materials and secondary legal materials related to the concept of the right to control of the state, the principle of HAT social function, the definition of public interest and compensation, procedures or bureaucracy of land acquisition for public interest. Induction-deduction and interpretation syllogisms. The induction syllogism is used to discover the concept of HMN and the principle of social function of land rights from statutory regulations regarding land. Furthermore, by using a deductive syllogism, in which the concept of HMN, the principle of social function of land rights, and Max Weber's ideal type of bureaucracy as major premises, will produce an understanding of the public interest and compensation as well as procedures for land acquisition for the public interest.

## RESULTS AND DISCUSSION

### 1. Legal Construction of the Definition of Public Interest in Land Acquisition Resulting from the Concept of Control Rights from the State and Social Functions of Land Rights

To reconstruct the notion of public interest in land acquisition, the concept of the right to control from the State and the social function of land rights is used as the basis for its validity. The authority of the Government to regulate the land sector is regulated in article 33 paragraph (3) of the 1945 Constitution which states that: "the earth, water and natural resources contained therein are controlled by the State for the greatest use of the people's welfare". According to Notonagoro, the word "used" is an objective rather than "being controlled". The notion of being controlled does not mean owned but to the State as an organization the power is given the authority regulated in the Basic Agrarian Law (UUPA) (AP Parlindungan, 1991 : 41-42).

According to Sudargo Gautama, this power over earth, water and space must be seen as the authority that is in the state to impose various regulations and actions in the agrarian sector. As a power organization of the Indonesian nation at the highest level, various regulations can be made. The state here acts as a state, as an organization of power. With this in mind, there is no more room for domein theory, the domein principle has been abandoned. The term "controlled" as used in Article 2 of the UUPA does not mean owned (Sudargo Gautama, 1990 : 92-93).

Maria SW Sumardjono said that the state's authority must be limited by two things: first, by the 1945 Constitution. That matters regulated by the state must not result in violations of human rights guaranteed by the 1945 Constitution. other party is one form of such violation. A person who gives up his rights must receive legal protection and fair respect for this sacrifice. Second, substantive restrictions in the sense that regulations made by the state must be relevant to the objectives to be achieved, namely for the greatest welfare of the people. This authority cannot be delegated to the private sector because it involves public welfare which

is full of service missions. Delegation to the private sector who is part of the community will create a conflict of interest, and therefore not possible (Maria SW Sumardjono, 1998).

According to Notonagoro, there is a strong direct relationship between the state and land, namely that there is state power over land, not only over land use. This form can make it easier to guarantee the existence of various kinds of land according to the needs of the modern state, namely the existence of land for public purposes, land for religious or sacred purposes and land for the needs of the common people in addition to individual needs. (Notonagoro, 1984 : 105-106).

The formulation of the definition of public interest contained in the legislation is as follows. According to Article 18 of the Basic Agrarian Law, it states that: "for the public interest, including the interests of the nation and the state as well as the common interests of the people, land rights can be revoked by providing appropriate compensation and in a manner regulated by law. "This means that the state can take away private rights that a person has over land for the public interest which is aligned with the interests of the nation and state, the common interest of the people and the public interest. (Gunanegara, 2008 : 58). In Article 1 of Law no. 20 of 1961 stated that "for the public interest, including the interests of the nation and state as well as the common interest for the people, as well as the interests of development ....". The term "development interests" is an addition to the definition of public interest contained in Article 18 of the UUPA (Maria SW Sumardjono, 2009: 284).

The meaning of public interest seems to be in line with the orientation of government policies. When the orientation is more focused on economic growth, the public interest tends to be broadly defined. Conversely, if economic growth is not the focus, the public interest tends to be narrowly defined (Maria SW Sumardjono, 2006: 107). Lilis Nur Faizah describes the development of the conception of public interest in the legislation as follows. The rationale used in the formulation of the UUPA, especially the conceptualization of the State's Right to Control, is the placement of the State as the personification of the people as a whole (integral). In the understanding of this integralistic State also places Indonesian people as dualistic beings where social interests (public interests) take precedence over individual interests, on the assumption that the public interest naturally contains individual interests.

The conception of public interest that places the interests of the people as a whole is seen in the UUPA, Law Number 20 of 1961 and Presidential Decree Number 55 of 1993. This conception is then influenced by utilitarianism which only requires the public interest to be the interest of most layers of society, as in the Presidential Regulation Number 36 of 2005 and Presidential Regulation Number 65 of 2006. With such a concept, it is understood that there is a possibility that certain sections of society will be sacrificed for the "public interest". This should be balanced with legal protection for the people against the possibility of arbitrary actions in the name of the public interest (Lilis Nur Faizah, 2007).

According to Presidential Decree No. 36/2005 as amended by Presidential Decree No. 65/2006, the public interest is the interest of the majority of society, without restrictions. In Presidential Decree No. 55 of 1993, the public interest and the interests of all levels of society are limited by three criteria, namely that development activities are carried out and subsequently owned by the government and are not used for profit. Land acquisition by the private sector is carried out by means of sale and purchase, exchange, or other methods agreed upon voluntarily by the parties concerned. According to the Minister of Public Works, because in the Perpres there are no criteria for limiting public interests, it opens up the possibility of private land acquisition facilitated by the government, while the costs are borne by the private sector or investors. Thus, there are two alternatives that need to be considered, namely (1) to continue distinguishing between development activities for the public interest and not for the public interest. Development activities for the public interest can only be carried out by the government, and the private sector is absolutely not possible in any way using government facilitation; (2) It is not necessary to distinguish between development activities for the public interest and not for the public interest, but for every development activity requiring the availability of land which has an impact on the socio-economic welfare of the holder of land rights, the procedure is regulated in law. (Maria SW Sumardjono, 2007: 102-103).

Meanwhile, in terms of the list of activities which are included in the public interest, which are contained in Presidential Instruction Number 9 of 1973, Presidential Decree Number 55 of 1993, Presidential Regulation Number 36 of 2005 and Presidential Regulation Number 65 of 2006, the interpretation of the public interest is fluctuating, in the sense of interpretation. carried out extensively in Presidential Instruction Number 9 of 1973, then narrowing to Presidential Decree Number 55 of 1993, but extending again to Presidential Regulation Number 36 of 2005. While Presidential Regulation Number 65 of 2006, in general still adheres to a broad interpretation, that is, if seen of the criteria, and the selection of several activities that are still accommodated as the public interest — eliminating other activities — but the number or types of these activities are reduced.

Likewise, a shift in interests occurred, from a capitalistic orientation in Presidential Instruction No. 9 of 1973, namely by providing private opportunities in carrying out listed "public interests", even using procedures for revoking land rights such as the Government (with an "equal" placement, namely by using the word "or"). Then "smoothed" with the land acquisition procedure in the Minister of Home Affairs Regulation No. 15 of 1975 which gives equal opportunities to the private sector in the Minister of Home Affairs Regulation No. 2 of 1976. But then the criteria "not for profit" in Presidential Decree No. 55 of 1993 normatively eliminating the possibility of private parties to use land acquisition procedures for public purposes by the Government. Furthermore, profit-seeking orientation is possible. Likewise, the involvement of the private sector is re-opened in Presidential Regulation Number 36 of 2005. Namely by removing the requirements of "being owned by the government" and "not for profit" in the general guidelines for the criteria of general interest. Interpretation of public interest in the list of activities which includes types of activities such as construction of toll roads, drinking water / clean water channels, and electricity generation, transmission and distribution. Likewise, the criteria for "owned or will be owned by the Government" in Presidential Regulation Number 65 of 2006, although it reduces the opportunity for the private sector to take advantage of the procedures in this Presidential Regulation, it still opens opportunities for partnerships between the Government and the private sector that can be carried out by means of a BOT or KSO agreement, which is facilitated. Government, but the financing is borne by the private sector. Moreover, this Presidential Regulation still eliminates the "not for profit" requirement and interprets the public interest as the interest of most layers of society (Lilis Nur Faizah, 2007).

## 2. Legal Construction Definition of Compensation in Land Acquisition Resulting from Interpretation of Principles of Social Function of Land Rights

To reconstruct the definition of compensation in land acquisition, the principle of social function of land rights is used as the basis for its validity. Maria SW Sumardjono said that the principle of the right to control the state must be interpreted as the role of the State, namely as a fair referee who determines the rules of the game that are obeyed by all parties and that the State is also subject to the rules it makes itself when taking part as an actor. The first limitation of the state's right to control is parallel to the principle of social function of land rights. According to Article 6 of the UUPA all land rights have a social function. In the general explanation number II point (4) UUPA.

The most difficult understanding of the meaning of the social function of land rights is the description of the "balance" between public interest and individual interest. In the case of land acquisition for development purposes, the holder of land rights has given something very valuable to his life which can be called a willingness to sacrifice for the benefit of the wider community; something which probably never occurred to him that the acquisition of the land would affect his land rights. The participation of rights holders in realizing the interests of development is the main basis for giving equal appreciation to the obligation to comply with the implementation of the principle of social function. Respect for land rights taken for development purposes is manifested in the provision of compensation. It is admitted that in reality, one of the most complicated things in any process of taking over land rights is the problem of determining the amount of compensation (Maria SW Sumardjono, 2009: 249-250).

According to Lieke Lianadevi Tukgali, if something that is obtained by someone must be in the form of a loss for others, then the arrangement must prioritize the old owner by putting aside the prospective new owner, because the amount that must be lost or sacrificed will reduce happiness greater than the happiness of the prospective owner who his wealth has increased. So that compensation must be given to the old owner not only on the value of ownership, but must be greater than the happiness of the prospective owner who has increased. Wealth that is not the same, if the person who feels that he is being aggrieved is poorer, then the suffering will be stronger because of the inequality. If the person experiencing the loss is a richer person, the suffering caused will be partially offset by the benefit obtained (Lieke Lianadevi Tukgali, 2010 : 172).

First of all, it needs to be understood that the definition of compensation is not the same as buying and selling, but in order for compensation to be called fair, a guideline should be maintained, that the provision of compensation must not make someone richer or otherwise poorer than that. its original state. UU no. 20 of 1961 states, that the appropriate compensation is based on the real or actual value of the land or object concerned, and the price based on the real value does not necessarily equal the general price. Because the general price can be a "cutut" price, but on the other hand, this price does not mean a cheap price. Compensation for damages is determined by the Government at the recommendation of an assessment committee consisting of expert officials whose fields of work are related to the matter.

Permendagri No. 15 of 1975 states that in order to determine compensation, at least two things must be considered, namely: (1) the determination must be based on deliberation between the Committee and the holders of land bag rights; and (2) the determination must take into account the local general price, in addition to other factors that affect land prices. Presidential Decree No. 55 Th 1993 states that compensation can be in the form of (a) money; (b) replacement land; (c) resettlement; (d) a combination of two or more damages a, b, c; and (e) or other forms agreed by the parties (Article 13). In addition to individual land rights, this Presidential Decree stipulates that land parcels controlled by customary rights are given replacement in the form of construction of public facilities or other forms of benefit to the local community. The basis and method of calculating compensation for buildings and plants is the selling value estimated by the regional government agency responsible for this sector, while for land, the calculation of compensation for the price is determined based on the real or actual value, taking into account the latest Land and Building NJOP. (Article 15 letter a) (Maria SW Sumardjono, 2007 : 76).

According to Article 1 paragraph (11) of Presidential Regulation Number 36 of 2005, what is meant by compensation is compensation for losses both physical and / or non-physical as a result of land acquisition to those who own land, buildings, plants, and / or other objects. relating to land that can provide a better survival of the socioeconomic level of life before being exposed to land acquisition. The Perpres does not further elaborate on the form of non-physical compensation. For the record, losses of a physical nature include loss of jobs, business fields, sources of income, and other sources of income which have an impact on decreasing the level of one's welfare. Alternative compensation includes providing replacement employment, training assistance and credit facilities. Non-physical compensation is complementary to physical compensation (Maria SW Sumardjono, 2007 : 103-104).

According to Article 13 of Presidential Decree No. 36 of 2005, the form of compensation can be (1) money; and / or (2) replacement land; and / or (3) resettlement. In the event that the holder of land rights does not want this form of compensation, compensation can be given in the form of equity (shares) in accordance with the provisions of the statutory regulations. This provision is amended by Presidential Decree No. 65 of 2006, the form of compensation can be (1) money; and / or (2) Replacement land; and / or (3) Resettlement; and / or (4) A combination of two or more forms of compensation as referred to in letter a, letter b, and letter c; (5) Other forms approved by the parties concerned.

Article 15 of Presidential Decree No. 36 of 2005 states that for land, the basis for calculating the amount of compensation is based on the Sales Value of the Tax Object or real / actual value by taking into account the Sales Value of the Tax Object for the current year based on the determination of the Institution / Team for Appraising Land Prices appointed by the committee. This provision is amended by Presidential Decree No. 65 of 2006, for land, the basis for calculating the amount of compensation is based on the Tax Object Selling Value (NJOP) or real / actual value by taking into account the Sales Value of the Tax Object for the current year based on the assessment of the appointed Land Price Appraisal Agency / Team. by the committee. Justice should be defined in terms of distributive justice which is linked to corrective justice. Distributive justice concerns the understanding of equal distribution among equals, while corrective justice seeks to restore disturbed equality, assuming that the situation fulfills the principles of distributive justice. Dias views that justice is not a static concept or an object that can be completely defined; justice is a process, a complex balance that moves between various factors, including equality. Franz Magnis Suseno said that justice should be based on the abilities and needs of each person (Maria SW Sumardjono, 2009 : 253).

In relation to the determination of the various factors that can affect the price of land, these factors will be perceived as relatively fair even though if it is applied to various subjects (in this case land rights holders) the final result does not need to be the same, given the differences in circumstances and the condition of each of these objects or subjects. For example, if the status of land tenure is to be used as a determining factor for the price of land, then the amount of compensation given to legal land rights holders and land cultivators without permission is not equal. Likewise, more strategic land locations will be valued more highly than less strategic ones, and so on. What needs to be considered is that the various factors that determine the price of land must be applied objectively with predetermined standards (Maria SW Sumardjono, 2009 : 253).

## CONCLUSION

The legal construction of the definition of public interest in land acquisition includes general guidelines and a list of activities. General guidelines for the definition of public interest, namely the public interest concerning all public facilities for the running of civilized human life, with three limitations: development activities are carried out by the government; government owned; and not used for profit. The list of development activities that meet the criteria of public interest are: Public roads, sewers; Reservoirs, dams and other irrigation structures including irrigation channels; General Hospitals and Community Health Centers; Port or airport or terminal; Worship; Education or school; Public Market or Presidential Instructions Market; Public funeral facilities; Public Safety Facilities such as embankments for handling flood, lahar and other disasters; Post and Telecommunication; Sports facilities; Radio, television broadcasting stations and their supporting facilities; Government offices; Facilities of the Armed Forces of the Republic of Indonesia.

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