

CHAPTER I

INTRODUCTION

1.1 Background

Indonesia is a country in which 1,811,569 square kilometers are occupied by land,¹ one of the elements or conditions that is needed for the existence of a country. Being an agricultural country, land is one of the crucial sources of livelihood for the people to achieve prosperity.² The relationship between the land and the livelihood of the people cannot be separated.³

Philosophically, from the beginning, land was not given to an individual. When a person sells land, it does not mean that they sell their property, but they only sell their services in maintaining the land when it is still in their possession.⁴

Article 33 paragraph (3) of the 1945 Constitution stipulates that:

The earth, water and natural resources contained therein which are assigned to the State of the Republic of Indonesia must be utilized to the maximum extent possible for the people's prosperity.

The foregoing provision shows that the State has the task and authority to use land to realize a just and prosperous society based on Pancasila and the 1945 Constitution.⁵

¹ Kuoni, *"Far East, A world of difference"*, First Press, (Kuoni Travel & JPM Publications, 1999), p. 88

² Bambang Tri Cahyo, *Ekonomi Pertanian*, (Yogyakarta: Liberty, 1983), p.16

³ Notonagoro, *Kebijakan Pertanian; Antara Regulasi dan Implementasi*, (Jakarta: Kompas: 2007), p. 42

⁴ Soedharyo Soimin, *Status Hak dan Pembebasan Tanah*, (Jakarta: Sinar Grafika 1993), p. 82

⁵ Erna Sri Wibawanti, R. Murjiyanto, *Hak Atas Tanah dan Peralihannya*, (Yogyakarta: Liberty,

To ensure further legal certainty,⁶ the government promulgated Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles (State Gazette 1960-104 or also referred to as the Agrarian Law (hereinafter, “UUPA”) which reflects the Right of State (*Hak Menguasai Negara*)⁷; Article 2 of UUPA states that:

Based on the provision Article 33, paragraph (3) of the Constitution and matters meant in Article 1, the earth, water and airspace, including the natural resources, contained therein are in the highest instance controlled by the State being and Authoritative Organization of the whole People.

The rights that are controlled by the State as mentioned in the above provision, provides authority for the State to:⁸

1. Regulate and implement the appropriation, the utilization, the reservation and the cultivation of that earth, water and air space
2. Determine and regulate the legal relations between persons concerning the earth, water and air space;
3. Determine and regulate the legal relations between persons and legal acts concerning the earth, water and air space.

This right of state is exercised in order to achieve the maximum prosperity of the people in the sense of happiness, welfare and freedom in the society and constitutional State of Indonesia which is independent, sovereign, just and prosperous.⁹

2013), p. 16-17

⁶ Arif Rahaman, “Tinjauan Yuridis Perolehan Hak Atas Tanah Untuk Kepentingan Penanaman Modal Oleh Badan Hukum (Studi di Kabupaten Lombok Tengah. Penelitian yang dibiayai dari Dana DIPA Unram”, Jurnal IUS, Vol 3, Nomor 9, Desember 2015, p. 1

⁷ Bernhard Limbong, *Pengadaan Tanah Untuk Pembangunan*, (Jakarta: Margaretha Pustaka, 2015), p. 39

⁸ Article 2 of Law No. 5 Year 1960 Concerning Basic Regulations on Agrarian Principles (“UUPA”)

⁹ Article 2(4) of UUPA

Viewed from the government's need for land for development purposes, it is very difficult to carry out development for the public interest on limited state-owned land.¹⁰ The remaining existing land are partially controlled or owned by individuals or a community with a right.

As such, to maintain national development, especially in the construction of various facilities for the public interest that requires land, the government must go through legal efforts to acquire lands that are owned by the community.¹¹ One of the measures that is available is by land procurement, or also called land acquisition (*pengadaan tanah*),¹² which is stipulated under Article 18 of UUPA:

In the public interest, including the interests of the Nation and State as well as the common interest of the people, the rights on land may be annulled, with due compensation and according to a procedure laid down by act.

The article provides the state the right to acquire rights to land and provide guarantees for people regarding their rights to land.¹³ This is also possible because land has a social function.

¹⁰ Maria S.W. Sumardjono, *Tanah Dalam Prespektif Hak Ekonomi Sosial Dan Budaya*, (Jakarta: Kompas, 2008), p. 256

¹¹ Adrian Sutedi, *Implementasi Prinsip Kepentingan Umum dalam Pengadaan Tanah untuk Pembangunan*, (Jakarta: Sinar Grafika, 2008), p. 45

¹² Article 1 (2) of Law No. 2 Year 2012 Regarding Land Acquisition for the Public Interest ("**Law 2/2012**")

¹³ Article 6 of UUPA

However, aside from the interest of the State, land acquisition must also take the interest of the people into consideration for their settlement and livelihood.¹⁴ This is stipulated under Article 9 of UUPA:

1. Only Indonesian citizens may have the fullest relation with the earth, water and air space within the limits mentioned in Article 1 and 2.
2. Every Indonesia citizen, whether men or women has equal opportunity to obtain a certain right on land to acquire its benefits and yields thereof for himself/herself as well as his/her family.

In December 2011, to support the process of land acquisition stipulated under UUPA, the government passed Law No. 2 Year 2012 concerning Land Acquisition for Development in the Public Interest (hereinafter, “**Law 2/2012**”). This law further governs the procedures for land acquisition in projects such as railways, ports, airports, roads, dams, and tunnels.

As per Indonesia’s legal process, the passing of Law 2/2012 must be followed by an implementing regulation, in this case a Presidential Regulation. The final draft of the regulation was passed into law in August 2012 under the form of Presidential Regulation No. 71 Year 2012 (hereinafter, “**PR 71/2012**”). The Presidential Regulation was revised four times, in which the most recent one is under the form of Presidential Regulation No. 148 Year 2015, also on land acquisition for public interest.¹⁵

¹⁴ Abdurrahman, *Masalah Pencabutan Hak-Hak Atas Tanah dan Pembebasan Tanah di Indonesia*, (Bandung: Citra Aditya Bakti, 1991), p. 9

¹⁵ “Dukung Percepatan Presiden Revisi Perpres Pengadaan Tanah untuk Kepentingan Umum”, <<https://setkab.go.id/dukung-percepatan-presiden-revisi-perpres-pengadaan-tanah-untuk->

In this, Land Acquisition is defined as activities to provide land by giving an adequate and fair compensation to the entitled party.¹⁶ Land acquisition is possible, but it is bound to two conditions: that it must be in the public interest¹⁷ and is followed with the payment compensation.¹⁸

As for the payment of compensation, the appraisal of compensation value is conducted by a land appraiser which is determined by the land agency.¹⁹ This value is conducted per land area, including:²⁰

1. Land;
2. Space above and under the ground;
3. Building;
4. Plants;
5. Objects related to land; and/or
6. Other losses that can be assessed.

According to Soetomo, regarding the granting of compensation:²¹

Giving compensation can be in the form of land of the same size or which value is the same, can be in the form of an agreed amount of money, shares if the land is later used for the benefit of a certain company, a combination of money and land, and/or other forms that are agreed upon. What must be prevented is the compensation that goes beyond the standard of compensation.

As a guidance for the appraisals, Minister of Finance Regulation No. 101/PMK.01/2014 stipulates that assessments by appraisals must be carried

[kepentingan-umum/](#)>, accessed on 20 April 2019

¹⁶ Article 1(2) of Law 2/2012

¹⁷ Article 1(6) and 10 of Law 2/2012

¹⁸ Article 1(10) of Law 2/2012

¹⁹ Article 1(11) and Article 31 of Law 2/2012

²⁰ Article 33 of Law 2/2012

²¹ Soetomo, *Pembebasan, Pencabutan, Permohonan Hak Atas Tanah*, (Surabaya: Usaha Nasional, 1984), p. 57

out in accordance with the Indonesian Assessment Standards (*Standar Penilaian Indonesia/SPI*).

The assessment procedure in the context of land acquisition for public interest is regulated in SPI 306. Based on SPI 306, the basis of the assessment is the fair replacement value. Reasonable reimbursement value is a value based on equity with the market value of the property by taking into account the extraordinary element (*unsur luar biasa*) in the form of non-physical losses arising from the acquisition.

Moreover, the distribution of compensation may be granted in the form of:²²

1. Money;
2. Land replacement;
3. Resettlement;
4. Share ownership; or
5. Other form approved by both parties.

The payment of compensation is one of the most problematic steps in land acquisition,²³ in which it is difficult to attain balance between the individual and public interest.²⁴ Therefore, the parties must reach a consensus or an agreement.

The way to do this is with the process of deliberation (*musyawarah*).

The compensation value based on the assessment result of the Appraiser is

²² Article 36 of Law 2/2012

²³ Achmad Rubaie, *Hukum Pengadaan Tanah untuk Kepentingan Umum*, (Malang: Bayumedia, 2007), p. 11

²⁴ Maria S.W. Sumardjono, *Kebijakan Pertanahan antara Regulasi dan implementasi*, (Jakarta: Kompas, 2001), p. 80

used as the basis for deliberation on the determination of compensation.²⁵

Deliberation to determine the form and / or amount of compensation based on the results of the assessment of compensation is carried out between the Land Agency and the party entitled to compensation.²⁶

The Land Agency must conduct deliberation with the entitled parties at the latest period of 30 (thirty) working days since the assessment result from the Appraiser is delivered to the Land Agency to determine the form and/or amount of Compensation.²⁷

The deliberation is carried out by involving agencies that needs the land.²⁸ During deliberation, the entitled parties will be given the result of an assessment of compensation in the form of a reasonable replacement value, which contains indication of the value of physical, and non-physical losses.²⁹

Indication of the value of physical losses means the compensation value for:

1. land,
2. land and underground space,
3. buildings,
4. plants,
5. objects related to land, and
6. other losses which can be assessed.

²⁵ Article 34(3) of Law 2/2012

²⁶ Article 1(3) of Law 2/2012

²⁷ Article 37 of Law 2/2012

²⁸ Article 68(2) of Presidential Regulation No. 71 Year 2012 on the Implementation of Land Acquisition for the Public Interest (**"PR 71/2012"**)

²⁹ Technical Guidelines for Assessment of Land Acquisition for Development in the Public Interest Public Interest (*Petunjuk Teknis Penilaian Terhadap Pengadaan Tanah Bagi Pembangunan untuk Kepentingan Umum/SPI 306*)

Meanwhile, indication of the value of non-physical losses means compensation value in the form of:³⁰

1. premium, such as loss of job or business loss, or emotional loss (*solatium*),
2. transaction costs, namely moving costs and taxes in accordance with applicable laws and regulations.
3. compensation for the waiting period (interest), and
4. loss of the remaining land, namely the decrease in land value due to the partial collection of land.

There are 3 (three) approaches that can be carried out by assessors in assessing physical and non-physical losses, namely market approaches, income approaches and cost approaches. The use of the approach depends on the type of object being assessed. For example, to assess physical losses in the form of land and buildings, appraisers can use the market approach and income approach. Meanwhile, to assess non-physical losses in the form of transaction costs, the appraiser can only use the cost approach.³¹

Deliberation process is an important part of land acquisition as it protects the interest of both parties and aids in reaching a consensus or agreement, making sure that the process is conducted in a fair manner.

However, in cases where the deliberation process does not lead to an agreement, then the Land Agency has the right to proceed with the land acquisition and deposit the amount of compensation to the local district court.

³⁰ *Ibid*

³¹ *Ibid*

This is called the consignment system, and it is stipulated under Articles 42 – 43 of Law 2/2012. Article 42(1) of Law 2/2012 states that:

In the event of the Entitled Party refuse the form and/or amount of Compensation based on the deliberation result as mentioned in Article 37, or the district court/Supreme Court's decision as mentioned in Article 38, the Compensation may be deposited in the relevant district court.

This system fastens the process of land acquisition, as the delay of land acquisition is mostly in the granting of compensation. Other than due to an agreement that is not reached during the deliberation, consignment system can also be done on other conditions. This is written in Article 42(2) of Law 2/2012, when (1) the Entitled Party's location is unknown; or (2) the land is subject to pending dispute in the court, the ownership is still in dispute; it is being seized by the authorized official; or is a security for bank.

However, in this research the Author would like to focus on the condition in which an agreement is not reached between the parties. The Land Agency has the right to consign compensation without prior agreement with the entitled parties, when an agreement after a deliberation is not reached.

This is a different consignment concept that is implemented under Articles 1404 – 1412 of Indonesian Civil Code (hereinafter, “**ICC**”). Article 1404 of ICC states that:

If the creditor refuses to accept payment, the debtor may offer him immediate payment of the debt, and if the creditor refuses again to

accept such, may place the money or goods in legal custody. Such offer, followed by placement in custody, shall release the debtor and shall be considered as payment in this regard, provided that it is done in a legal manner; the goods placed in such custody shall be for the account of the creditor.

As mentioned in the foregoing provision, the consignment system that is stipulated under ICC can only be done if there is a legal relation between the parties beforehand.

As such, the consignment system under land acquisition law is subject to discussion and criticism as can be seen from numerous cases that exists. The implementation of the consignment system in land acquisition law is said to be one-sided and unfair to entitled parties. This is the issue that will be analyzed further in this thesis.

Even if the interest of the public and the state must be put forth before individual interest in terms of usage of land, the rights of an individual must still be protected in the form of providing appropriate compensation to the entitled party.³² There must be fairness that is accorded to entitled parties and clear deliberation process is required, especially those who does not live in the city but in rural areas and is not familiar with the laws and regulations.³³

Therefore, the Author hoped to clear the process of land acquisition for development in the public interest and its consignment system and

³² Adrian Sutedi, *op. cit*, p. 70-71

³³ *Ibid*

provide the best possible recommendation through this research, titled
**“THE IMPLEMENTATION OF THE CONSIGNMENT SYSTEM IN
LAND ACQUISITION FOR DEVELOPMENT IN THE PUBLIC
INTEREST”**.

1.2 Research Questions

With regard to the topic of this thesis, the Author will discuss the following formulation of issue:

1. How is the land acquisition for development in the public interest regulated under Indonesian legal system?
2. How is the implementation of the consignment system in land acquisition for development in the public interest?

1.3 Research Purpose

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. To understand how the land acquisition for development in the public interest is regulated under Indonesian Law.
2. To comprehend the implementation of the consignment system in land acquisition for development in the public interest.

1.4 Research Benefits

1.4.1 Theoretical benefits

Theoretically, the Author hopes that this research will give an insight of provision on land acquisition for development in the public interest for entitled parties as well as the consignment system. From such provision, the Author hopes that this research will successfully point out the implementation of the consignment system in land acquisition. All in all, the Author hopes that this research will provide further knowledge on Indonesian law, especially in the field of land, along with the hierarchy and binding power of laws and regulations under Indonesian legal system.

1.4.2 Practical benefits

Practically, the Author hopes that this research can provide an input for the government in fixing the process of land acquisition, specifically on the consignment system in land acquisition process and its relevant laws and regulations. The Author realizes that a revision of the provision is needed as an act of prevention of future practical problems that could arise, particularly regarding the consignment system.

Lastly, the Author also hopes that this research can be useful for the general public, appraisals, other officials who directly and/or indirectly have a relation to land acquisition for public interest and are still unsure regarding the consignment system.

1.5 Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

This chapter consist of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

In the literature review chapter, the Author will give a basic theory of Indonesia's legal regime in land law, such as constitutional state, the authority of the state, and the principle of agreement and justice. Second, the Author will determine the laws, regulations, and policies that regulates about land acquisition for development in the public interest in Indonesia, as well as relevant terms and the consignment system in general.

CHAPTER III: RESEARCH METHODS

This chapter will discuss in general about the type of research, the type of data, data analysis technique and the type of research

approach. Followed by the types of research, data, data analysis technique and research approach that the Author use to discuss the issues in this thesis.

CHAPTER IV: ANALYSIS AND DISCUSSION

The fourth chapter will discuss the research problems along with its solution. This chapter will answer the respective research questions as stipulated in chapter two of this thesis. The chapter will analyze how the land acquisition for the public interest is regulated under Indonesian Law and then the implementation of consignment system.

CHAPTER V: CONCLUSION AND RECOMMENDATION

In this last chapter, the Author will explain the conclusion as an answer to the issue that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also give suggestions and recommendations towards these issues and the probable regulation that could be drafted and implemented in the future to ease the public in better understanding land acquisition for public interest and its consignment system, guaranteeing legal certainty and justice for all parties.