

Politics of law of article 9 law number 2 of 2012 concerning land procurement for public utilities construction

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Abstract

Implementation of Land Procurement for Public Interest must pay attention to the balance between development interest and public interest. The government and/or regional government, in this case, is responsible for ensuring the availability of land for the public interest. The politics of law of land procurement for public utilities construction is formulated in Article 9 of Law Number 2 of 2012. The implementation of Land Procurement for Public Interest must pay attention to the balance between development interest and public interest. Land Procurement for Public Interest is carried out by providing adequate and fair compensation. It implies meaning that the land procurement for the public interest should aim at providing land for the implementation of development to improve the welfare and prosperity of the nation, state and community while still ensuring the legal interests of those affected by the object of land procurement by providing adequate and fair compensation to the rightful party.

Keywords: politics of law of land procurement, land procurement for development, public interest

1. Introduction

The implementation of national development, especially the construction of a number of facilities for public use, requires a large plot of land. The required land is generally attached by right of land belongs to the legal subjects of individuals and corporations. Without land, the development will remain a plan; therefore, to procure land for these purposes must be complied as well as possible and carried out taking due account of the importance of land in human life and the principle of respect for legal rights to land. Land, besides having economic value, also has social functions ^[1].

National development is one of the ideals of Indonesian society, so the development is geared towards achieving progress and physical and spiritual well-being for all people. In another sense, national development can be interpreted as a series of sustainable development efforts that encompass the whole life of the people, nation and state to fulfil the task of achieving national objectives. This prosperity can be achieved through physical and non-physical, direct or indirect development and requires land as a medium of development activities.

Compared to previous periods, the need for land in these times is greatly increased. This is since, in general, almost all sectors and development sectors require land as medium and main support for the execution of these development projects and to fulfil the implementation, the government procures or provides land based on the Basic Agrarian Act No. 5 of 1960, also known as UUPA, with policies such as revocation, exemption, and relinquishment of right of land which was originally owned by the community individually or in groups.

However, when the government requires land for the public interest, they face many problems because it involves two interests, including the interests of the Government which are dealing with the interests of the people. Often, it happens because of the factor of interest in the community, in terms of determining who has the most right to use the function of land for the benefit of each of the marginal groups, groups of entrepreneurs or capital owners, and groups of government structures. The Constitution of the Republic of Indonesia of 1945 has provided the foundation as referred to in Article 33 paragraph (3) that the land and the waters, as well as the natural riches therein, are to be controlled by the state to be exploited to the greatest benefit of the people. This basic provision shows that the prosperity of the people is the primary goal in the utilization of the functions of the earth, water and air space as well as the natural resources contained therein.

Regarding the provisions in Article 33 paragraph 3 of The Constitution of the Republic of Indonesia of 1945 concerning the right to control from the State, Article 2 of Act No. 5 of 1960 (UUPA) concerning Basic Regulations on Agrarian Principles regulates the right of control from the State which authorizes the State, as an Authoritative Organization of the whole People, in the highest instance, has the authority to regulate and implement the appropriation, the utilization, the reservation and the cultivation of that earth, water and air space as mention above; to determine and regulate the legal relations between persons concerning the earth, water and air space; to determine and regulate the legal relations between persons and legal acts. Furthermore, based on the State's right of control as it is meant in Article 2, in Article 4 of UUPA, several kinds of rights are determined concerning the surface of the earth, which is called land which may be

¹ Rahayu Subekti, "Kebijakan Pemberian Ganti Kerugian Dalam Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum", *Jurnal Yustisia*. Vol. 5 No. 2 May - August 2016. p.377.

granted to and owned by persons and by Corporations. Article 6 of UUPA stipulates that “All rights on land have a social function”. It means that any right of land that exists on a person, cannot be justified to be used (or not used) solely for personal interests, particularly if it causes harm to the community. The land use must be adjusted to the conditions and nature of its rights so that it benefits both for the welfare and happiness for the owner, the community and the State. However, it does not mean that individual interests will be dismissed at all by the public interest. Regarding the rights referred to in Article 4 paragraph (1), Article 16 of the UUPA stipulates that the right of ownership, the right of exploitation, the right of the building, the right of use, the right of a lease, the right of opening-up land, the right of collecting forest product, another right not included in the above-mentioned right which shall be regulated by law and rights of a temporary nature as mentioned in Article 53 of the UUPA.

Apart from having a social function, right of land can also be revoked for the public interest as stipulated in Article 18 of the UUPA that:

“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.”.

Provisions regarding the revocation of the right of land are further regulated in Law Number 20 of 1961 concerning Revocation of Rights of Land and the Objects over the Land. Revocation of rights of land is the last resort intended for its use for the public interest when the deliberation cannot bring the expected results.

The regulations regarding land procurement for development for public use are subsequently regulated in some regulations. Presidential Decree Number 55 of 1993 concerning Land Procurement for the Implementation of Development in the Public Interest. Article 1 number 3 determines that “public interest is the interest of the whole society”. However, this Presidential Decree was then deemed unable to serve as a legal basis in the development framework of the public interest. The government subsequently issued a new regulation, which is Presidential Decree Number 36 of 2005 concerning Land Procurement for the Implementation of Development for the Public Interest. Furthermore, the government issued Presidential Decree Number 65 of 2006 concerning Amendment to Presidential Decree Number 36 of 2005 concerning Land Procurement for the Implementation of Development for the Public Interest. The definition of public interest in the Presidential Decree still refers to Presidential Decree Number 36 of 2005.

Statutory regulations that previously described is still deemed unable to meet the smooth implementation of development in the public interest. Subsequently, Law Number 2 of 2012 concerning Land Procurement for Public Utilities Construction was issued along with Presidential Regulation Number 71 of 2012 concerning Implementation of Land Procurement for Development for Public Utilities Construction as the implementation regulation that has been amended with Presidential Decree Number 40 of 2014 concerning Amendments to the Presidential Decree Number 71 of 2012 concerning Implementation of Land Procurement for Public Utilities Construction and has been re-amended with Presidential Decree Number 99 of 2014 concerning the Second Amendment to Presidential Decree

Number 71 of 2012 concerning Implementation of Land Procurement for Development in the Public Interest.

Article 1 number 6 of Law Number 2 of 2012 stipulates that “Public Interest means interest of nation, state and society that must be realized by government and used for the benefit of the greatest prosperity of the people”. Regarding this, Law Number 2 of 2012 has given a more concrete confirmation that the intended public interest is the interest of the nation, state and society that must be realized by the government and utilized as much as possible for the prosperity of the people. Land procurement for public utilities construction based on Article 2 of Law Number 2 of 2012 contains fundamental principles that become the basis. This provision formulates that Land Procurement for Public Interest is performed based on the principle of:

- a. humanity;
- b. justice;
- c. favourable;
- d. certainty;
- e. transparency;
- f. consensus;
- g. participation;
- h. prosperity;
- i. sustainability; and
- j. Harmony.

The term land procurement has a better meaning than land acquisition since it can avoid coercion or intimidation in the process of taking community-owned land. The land acquisition must be conducted taking into account the role of land in community life and the principle of respect for legal rights to land ^[2]. Land procurement for the implementation of public utilities construction is increasing along with and in line with the progress and dynamics of the community, both urban and rural areas ^[3]. One of the essential things to pay attention to is as regulated in Article 9 of Law Number 2 of 2012 that:

1. The exercise of Land Procurement for Public Interest must regard to the balance between development interest and public interest.
2. Land Procurement for Public Interest is conducted by granting adequate and fair Compensation.

Based on these provisions, it can be understood that the Implementation of Land Procurement for Public Interest concerns the balance of development interest and public interest. The central and/or regional government, in this case, serve as the official is responsible for guaranteeing the availability of land for the public interest. The government as an extension of the community has the authority to regulate and guarantee the availability of land so that the benefit of the land acquisition can be felt by all the people. Based on descriptions of land procurement for public utilities construction as mentioned above, this paper studies politics of law of regulation regarding land procurement for public utilities construction as stipulated in Article 9 of Law Number 2 of 2012.

² Mohammad Mulyadi, “Implementasi Kebijakan Pengadaan Tanah Untuk Kepentingan Umum Di Jakarta Utara”, *Jurnal Aspirasi* Vol. 8 No. 2, December 2017, p.146.

³ Evi Fajriantina Lova, 2016, *Pengadaan Tanah Dalam Pembangunan Infrastruktur Jalan Tol Oleh Badan Usaha Milik Negara (Persero)*, Notary Masters Study Program Faculty of Law University of Brawijaya, Malang, p.4

2. Research Methods

This research used a normative approach with a legal positivism approach^[4]. The legal positivism concept views law as a normative system that is independent, closed and unassociated of real community life^[5]. The writing in this research is described in analytical descriptive, in which descriptive means describing the applicable laws and regulations related to legal theory and practice of implementing positive law. Meanwhile, analytical means that subsequently, an analysis of aspects is conducted by using the principles of law, rules of law, and various legal understandings associated with the problem under study. Data collection was conducted by applying several methods. Secondary data in normative research was used as primary data, while the secondary data was collected using the literature and documentary inventory methods such as legislation, official documents, and literature. The utilization of this data collection method is a logical consequence of the use of secondary data^[6]. The collected data was presented in the form of a description^[7]. The data obtained in this study would be presented in the form of a description collected systematically following the systematic flow of the discussion. It means that the overall data obtained was subsequently linked to one another with the primary problem, making it one unit. The data obtained were analyzed in qualitative normative, which in conducting discussion and elaboration on the results of the research would remain grounded in relevant legal norms, theories and doctrines to the subject matter investigated. The use of this qualitative data analysis method according to Ronny Hantijo Soemitro is a logical consequence of the application of normative-type research and examines the laws and regulations by constructing law into categories according to the basic understandings of the legal system^[8].

3. Discussion

The government's authority in land procurement for public utilities construction is based on The Constitution of the Republic of Indonesia of 1945, primarily Article 33 (3) which states that: *"The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people."*

This provision set up and became a reference for the issuance of the Basic Agrarian Act (UUPA) Number 5 of 1960. One of them regulates land procurement for construction. This foundation establishes the right to control the state^[9] which authorizes the state to regulate and conduct the designation, use, supply and conservation of the earth, water and space. It also regulates the legal relations between people and the earth, water and space and legal actions related to earth, water and air space. Based on Article 2 of the UUPA, the law authorizes the state to regulate:

- a. to regulate and implement the appropriation, the utilization, the reservation and the cultivation of that

- earth, water and air space as mention above;
- b. to determine and regulate the legal relations between persons concerning the earth, water and air space;
- c. to determine and regulate the legal relations between persons and legal acts concerning the earth, water and air space.

Besides government authority, the land law also provides protection for community members, even acknowledges and respects rights to land and objects of the community related to the land of the right of ownership, as well as grants public authority to the state in the form of authority to make regulations, policies, management, as well as organize and conduct supervision as stipulated in the mainland procurement principles as follows:

- a. The government and regional government guarantee the availability of land for public interest and funding;
- b. Land procurement for public interest is performed in accordance with regional spatial plans, national/regional development plans, strategic and work plans of each agency that requires land;
- c. Land procurement is performed through planning by involving all stakeholders;
- d. The implementation of land procurement considering the balance between development interests and public interests;
- e. Land procurement for public interest is performed by providing adequate and fair compensation.

Some of the above information shows that the authority to procure land is possessed by the central government. It is in line with Law Number 2 of 2012 which states that the procurement of land for public interest becomes the authority of the central government. However, the agency which requires land shall prepare the plan of Land Procurement for Public Interest according to the prevailing laws and regulations to further complete the plan with Land Procurement plan document^[10].

Regulation of revocation of the right of land based on the provisions of Article 18 of the UUPA which contains that 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, this is one of the interests in the issuance of Law Number 20 of 1961. Related to the above provisions, the legal politics in the formation of the law is to implement the provisions of Article 18 of the UUPA, which is the revocation of the right of land and objects thereon to implement state development efforts.

Law Number 2 of 2012 concerning Land Procurement for Public Utilities Construction Article 1 number 2 stipulates that Land Procurement means activities to provide land by giving adequate and fair compensation to the entitled party. The government and/or regional government, in this case, guarantee the availability of land for the public interest. Then the entitled party is obliged to release the land at the time of the implementation of land procurement for the public interest after giving compensation or based on a court decision that has obtained permanent legal force.

In the Regulation on Land Procurement for Development in the Public Interest, the principles of land acquisition are regulated, namely the principles of humanity, justice,

⁴ Soerjono Soekanto, 1985, *Penelitian Hukum Normatif*, Raja Grafindo Persada, Jakarta, p.15.

⁵ Rony Hanitijo Soemitro, 1988, *Metode Penulisan dan Jurimetri*, Ghalia Indah, Jakarta, p.11.

⁶ M. Syamsyudin, 2007, *Operasionalisasi Penelitian Hukum*, Rajawali Press, Jakarta, p. 101-102.

⁷ Ronny Hanitijo Soemitro, 1982, *Metodologi Penelitian*, Ghalia Indonesia, Jakarta, p107.

⁸ Soerjono Soekanto and Sri Pamuji, *Op. Cit.*, p.255.

⁹ Article 2 paragraph (2) of the UUPA

¹⁰ Article 14 and Article 15 Law Number 2 of 2012

favourable, certainty, transparency, consensus, participation, prosperity, sustainability, and harmony. The land procurement for Public Interest aims to provide land for the construction to enhance the welfare and prosperity of the nation, state, and society while ensuring the law interest of Entitled Party.

Implementation of Land Procurement for Public Interest concerns the balance of development interest and public interest. The government and/or regional government, in this case, serve as the official is responsible for guaranteeing the availability of land for the public interest. The government as an extension of the community has the authority to regulate and guarantee the availability of land so that the benefit of the land acquisition can be felt by all the people. The land procurement process related to the determination of locations to be affected by development activities for the public interest must be in accordance with the Neighborhood Association/Citizens Association (RT/RW), Regional Spatial Layout Plan, National/Regional Development Plan, Strategic Plan, and Work Plan of each Agency which requires land.

Regarding the understanding of the public interest, Article 1 number 6 of Law Number 2 of 2012 stipulates that the public interest means interest of nation, state and society that must be realized by government and used for the benefit of the greatest prosperity of the people. Based on these provisions, it can be formulated that the intended public interest includes: the interest of the nation, the interest of the state, the common interests of the society, the interest of development. Limitation on the definition of public interest as regulated in the law still seems abstract, resulting in different interpretations in society. Some types of development activities do not show targets towards types of development activities for the public interest. Therefore, every effort to perform an activity that will be associated with the public interest should be preceded by a study by ensuring that the activity is genuinely socially profitable^[11]. When the essence of the public interest can be realized, the benefits of development for the public interest can be felt by the entire community directly. The usefulness of this law needs to be considered because everyone expects advantages in the implementation of law enforcement. Based on the National Land Law Conception, there is a balance between public interests and individual interests. The principle of land procurement is to realize land procurement that fulfils a sense of justice, both for people affected by land procurement by being compensated to ensure their survival and for Government Agencies that require land to obtain land and protection and legal certainty^[12].

The law serves as the basis of legality for all elements of the state, particularly for state administrators in organizing and managing the state. There is no government action that should be performed without a legal basis unless the government intends to be considered wrong or arbitrary. In a democratic country, laws are made by the people through their representatives in the legislative body according to the aspirations and wishes of the people. Through this

legislative body, the interest of the community is aggregated and then included in the law. Then, the law applies and must be obeyed. For this reason, ideally, the law is the formalization or crystallization of the desired norms and rules or in accordance with the community's aspirations. Ideally, statutory regulation is in the context of the realization of social justice for the whole community because social justice is a matter that must be interpreted as something universal.

The principle of land procurement is an embodiment of the normative manifestation of Article 18 of Law Number 5 of 1960 concerning Agrarian Principles of the UUPA, considering that land has a social function and public interest. Therefore, the Right to Control over the earth, water, and natural resources contained therein is essentially protection and guarantee of the optimal welfare of the people. However, if the meaning of the right to control owned by the state shifts from "beherdaad" (management) to "eigendaad" (ownership), then there will be no guarantee of the utilization of the object of control to the greatest prosperity of the community^[13]. The right to control the state has meaning^[14]

- a. Regulate and implement the designation and utilization of ownership objects;
- b. Determine and regulate the relations between persons and the object of ownership;
- c. Determine and regulate the relations between several people and legal acts on the object of ownership.

The government has the obligation to provide the land required for development, such as from state land controlled by the people or by providing land for the interest of development. Article 18 of Law Number 5 of 1960 concerning Agrarian Principles (UUPA) as a fundamental concept of land procurement 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. Therefore, revocation of the right of land for the public interest is the last resort to procure land for particular purposes for the public interest. Therefore, if it is deemed urgent, the revocation of certain rights should be followed with appropriate compensation. Based on this, the land has a social function, which is, from the community, by the community and again the allocation is to the interests of the community.

The issuance of Law Number 2 of 2012 concerning Land Procurement for Public Utilities Construction from the spirit of state development and the mandate of Article 18 of Law Number 5 of 1960 concerning Agrarian Principles (UUPA) is expected to provide something new to the implementation of development that remains within the framework of respect and fulfilment of human rights. Article 9 of Law Number 2 of 2012 formulates that:

1. The exercise of Land Procurement for Public Interest must regard to the balance between development interest and public interest.
2. Land Procurement for Public Interest is conducted by granting adequate and fair compensation.

¹¹ Priska Yulita Raya, 2014, "Kepentingan Umum Dalam Pengadaan Tanah Bagi Pembangunan Berdasarkan Undang-Undang Nomor 2 Tahun 2012 Dalam Mewujudkan Kemanfaatan Hukum Bagi Masyarakat", Faculty of Law University of Atma Jaya, Yogyakarta, p.12.

¹² Mohammad Mulyadi, *Op. Cit.*, p.157.

¹³ Mukmin Zakie, 2013, *Kewenangan Negara dalam Pengadaan Tanah bagi Kepentingan Umum di Indonesia dan Malaysia*, Litera, Yogyakarta, p. 69.

¹⁴ *Ibid*, p.69.

National land law acknowledges and respects the rights of land and objects of the community related to land, as well as grants public authority to the state in the form of authority to make regulations, policies, management, and perform and conduct supervision contained in the principles of Land Procurement as follows:

1. The Government and Regional Government guarantee the availability of land for Public Interest and its fund.
2. Land Procurement for Public Interest is carried out in accordance with the principles and objectives:
3. The Land Procurement is conducted through the planning which involves all stakeholders.
4. The implementation of Land Procurement shall concern the balance of development interest and public interest.
5. Land Procurement for Public Interest is carried out with
 - a. Regional Spatial Layout Plan;
 - b. National/Regional Development Plan;
 - c. Strategic Plan; and
 - d. Work Plan of each Agency which requires land granting adequate and fair compensation.

In Understanding of Law Number 2 of 2012 concerning Land Procurement for Public Utilities Construction, what is meant by land procurement is activities to provide land by giving adequate and fair compensation to the entitled party. This means that the intended land procurement activity has 2 (two) variables, including:

1. Activities provide land for the interests of the state;
2. Activities provide adequate and fair compensation to persons whose right of land have been revoked.

That land procurement for the public interest should aim at providing land for the implementation of development to improve the welfare and prosperity of the nation, state and community while still ensuring the legal interests of those affected by the object of land procurement. Therefore, the state through the government guarantees the availability of land for the public interest, including funding for the public interest. The variables referred to above must be implemented justly. Then, it is appropriate if there is no land procurement without the implementation of compensation for the holders of the right of land which are the object of land procurement.

To make an understanding of the concept of public interest that has been interpreted by the understanding of the government as a party requiring land and the society as the party affected by the object of land procurement, the Land Procurement Law has provided clear limitation. Providing a limitation of the public interest is not easy since the assessment is subjective and too abstract to understand. It is the same as judging something as fair or unjust. However, in the context of revocation of community lands, the affirmation of the public interest that will be the basis and criteria need to be determined strictly so that the revocation of the intended lands is genuinely in accordance with the applicable legal foundation.

4. Conclusions

Politics of law of provisions of Article 9 of Law Number 2 of 2012 formulates that the Implementation of Land Procurement for Public Interest considers the balance of development interest and public interest, then Land Procurement for Public Interest is carried out by granting adequate and fair compensation. It implies meaning that the

land procurement for the public interest should aim at providing land for the implementation of development to improve the welfare and prosperity of the nation, state and community while still ensuring the legal interests of those affected by the object of land procurement by providing adequate and fair compensation to the rightful party.

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