

LEGAL AND POWER RELATIONSHIP : REVEALING THE MYTH OF PUBLIC INTEREST IN LAND ACQUISITION FOR DEVELOPMENT

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ABSTRACT

Law and power , two things can contradict each other , but may also need each other . Law requires power in order to perform its function , otherwise the law requires the legitimate power . Law and power relation in society in fact largely are determined by the development community . In people who are powerless , the low bargaining power against the power , then in terms Philippe Nonet and Philip Selznick , will appear type of repressive law . Repressive law is the law as a tool of repressive rules . The law application in the interest of the ruling power , Legislation on land acquisition is one type of repressive law . Legislation for land acquisition for the construction of public interest is a tool or instrument used by the state in order to provide land for development . In the implementation of this legislation is used as a tool to carry out the agenda of developmentalism . In the New Order era , the law is subordinate to political power . Having national stability reasons , people become powerless . By having reason of development , land acquisition is done with little regard for the rights of the people . Land acquisition was not really done in the public interest . The implementation of public interest turned into the interest of capital owners , private interests or the interests of the industry . Deliberation as an important mechanism in land acquisition is still a media briefing and penetration tools to the people . The public interest has become a myth . In this context , it needs to do that people should be educated to be more empowered to be able to fight for their rights in an atmosphere of state power hegemony .

Keywords: law , power , land acquisition , public interest

INTRODUCTION

The relation of law and power is always an actual phenomenon discussed, not only because both are important elements in a state, but also because of the relationship between the two that is difficult to guess. Initiated the legal hooks and power takes on a field that is not simple. In passing the law and power, mutual disclaims and negates, but when viewed beyond the law and authority of showing the complexity of a good which is richer.¹ Law and power are very closely linked. The law is not synonymous with power, the law does not only limit to individual freedom against the other individual liberties, but also freedom (authority) of the ruling in the State. The law is not against Government, but it needs to manage to live together. A rule of law that is not supported by authority, sooner or later will be paralyzed and lose his dignity.²

In the middle ages arose a stream called *monarchomachen*, a flow that hate the absolute power of the King, which gave rise to the *leges fundamentalis*. Furthermore, it is also known as *constitutionalism*, a doctrine that Government wants the activity conducted by and on behalf of the people, subject to such restrictions with a view to ensure the necessary authority for the Government, which is not abused by those who get the assignment to rule.³

Limitation of power in the country is important, because on the one hand the state is an organization of power, but on another side of the state as a social organization. As an organization of power, the state has the composition of a government order which includes the social life of a nation in a given area.⁴ As a community organization, the state is an organization that has the objective to set the power and prosperity of the people hold the greatest.⁵ The State as an organization of power and as a fellowship of life have a purpose to be achieved, namely the people's wealth as big as possible. According to Huijbers, the state established fact in the public interest, and the law is the primary means to realize that goal. A country is considered good, when the public interest (*bonum commune*) is considered, either by the authorities or by citizens.⁶ Government as the representative of the state has a duty to strive for the maximum prosperity of the people can be realized. Development is a commonly used way to achieve prosperity.

In order to carry out development in the public interest, the State needs the land, by increasing development in all areas of the ever increasing necessity land. On the other hand the lands directly controlled by the State has been limited. As a result, the land already occupied by the people or community customary law, then used for the development.

With its power, through legal instruments, the state made land acquisition agency which then turned into a land procurement agency. Legal instruments for the implementation of development land acquisition is the Minister of Home Affairs Number 15 Year 1975 on Provisions Concerning Procedures for Land Acquisition. Regulation of the Minister was finally replaced by

¹ Satjipto rahardjo. 2006. *Sisi sisi Lain dari Hukum di Indonesia*. Jakarta (Penerbit Buku Kompas), page 71

² Theo Huijbers. 1995. *Filsafat Hukum*. Yogyakarta: Kanisius, page 286

³ Budiardjo Meriam. 1985. *Dasar-dasar Ilmu Politik*. Jakarta: Gramedia, page 97

⁴ Definition of this state as expressed by Diponolo cited by Victor Situmorang. 1987. *Intisari Ilmu Negara*. Jakarta (Bina Aksara), page 17

⁵ Definition of this state as expressed by Logemann cited Samidjo.1986. *Ilmu Negara*. Bandung (Armico), page 29

⁶ Theo Huijbers, *loc cit*.

Presidential Decree No. 55 Year 1993 on Land Procurement for Development Implementation for Public Interest. After the reforms, land acquisition legal instrument in the form of Presidential Regulation No. 36 Year 2005 on Land Procurement for Development Implementation for Public Interest as amended by Presidential Decree No. 65 Year 2006 on Amendment of Presidential Regulation No. 36 of 2005. This paper only limits to the implementation of land acquisition and procurement regulations of the land above.

Legislation on land acquisition is intended for public use. The law that guarantees the public interest should not be detrimental to the interests of the individual, but to protect it. The law not only guarantees the public interest, but the public interest with the interests of counterbalance individually. The public interest is the interest of the community of its own characteristics. The law that kept the public interest with regard to the protection of the rights of the individual as citizen and concerned the procurement and maintenance of public infrastructure and public services.⁷

This paper aims to reveal the relationship of law and power in the supply of land for development in the public interest. It is true that the public interest is the orientation of land acquisition for development. It is true that the public interest truly been realized in the procurement of land for development. This paper uses the paradigm of Critical Theory, et. al.⁸ In this paradigm, law is characterized (1) as a series of structures, as a virtual reality or historical, which is the result of a long process of crystallization of values the political, economic, social, cultural, ethnic, gender, and religion, (2) as an instrument of hegemony which tend to be dominant, discriminatory and exploitative; (3) at any time is open to criticism, revision, and transformation, leading to emancipation.⁹ The use of Critical Theory et.all paradigm¹⁰ with the intent to reveal that the acquisition of land for development is not all devoted to the public interest. This paper uses non-doctrinal approach. Non-doctrinal approach was used in this paper because the law is conceived of as reality. Statute law as the text is not always congruent with reality in the socio-cultural context.¹¹ This paper discusses the implementation of legislation governing land acquisition for the construction of the public interest. The analysis in this paper uses Philippe Nonet and Philip Selznick thought in his book *Law and Society in Transition Toward Responsive Law*. Moreover, it also uses the empirical realm of critical thinking.¹²

LAW, POWER AND THE LAND ACQUISITION RULES FOR DEVELOPMENT

The relation between law and power in society in fact described by Philippe Nonet and Philip Selznick in his book *Law and Society in Transition Toward Responsive Law*. He explained:

*...three modalities or basic "states" of law-in-society: (1) law as the servant of repressive power, (2) law as a differentiated institution capable of taming repression and protecting its own integrity, and (3) law as a facilitator or response to social needs and aspirations.*¹³

In explaining the power and law relationship, Nonet and Selznick stated that there were three types of law: repressive law, autonomous law, and responsive law. The social system must be serviced by the law with the repressive law, autonomous law or responsive law depend on the development of society. Repressive law is the law as a tool of repressive rule. Autonomous law is the law as an institution that is able to neutralize the repression and protect the integrity of the law itself. Responsive law is the law as a mean of response to the social provisions and the aspirations of the people.¹⁴

Nonet and Selznick also explain in detail the differences between the three types of law. Two of them about the ends of law and politics. The ends of law in this type of repressive law is order, autonomous law is legitimation, and responsive law is competence. In politic, in this type of repressive law: law subordinated to power politics, in autonomous law: law "independent" of politic; separation of powers, while in responsive law: legal and political aspirations integrated; blending of power.¹⁵

Based on the explanation of the relationship of law and the power it can be stated that the legislation on land acquisition for the construction of a state behavioral standards in the supply of land for development implementation. Ideally, with this legislation, on the one hand the state has the authority to provide a basic run land for development purposes. On the other hand, the state will not use its power arbitrarily against people. State power is limited by law, such as legislation on land acquisition.

Norms inscribed in legislation on land acquisition is not the same in its implementation. Legislation made the state power dominant. In the context of this, Satjipto Rahardjo said that optical sociological found the fact that the power that remain latent and at certain times may reappear, in this case using the law as a blanket. In terms Alfin Toffler, that power often comes back in a more delicate clothing, among other laws.¹⁶

⁷ Theo Huibers. *Ibid*.

⁸ Egon G.Guba dan Yvonna S. Lincoln. 2009. "Berbagai Paradigma yang Bersaing dalam Penelitian Kualitatif" dalam Norman K. Denzin dan Yvonna S.Lincoln. *Handbook of Qualitative Research* (terjemahan Dariyatno, dkk). Jogjakarta (Pustaka Pelajar), hlm135-136

⁹ Erllyn Indarti. 2010. *Diskresi dan Paradigma Sebuah Telaah Filsafat Hukum*. Pidato Pengukuhan Jabatan Guru Besar Filsafat Hukum pada Fakultas Hukum Universitas Diponegoro, tanggal 4 November 2010, hlm 35

¹⁰ Erllyn Indarti. 2002." Selayang Pandang Critical Theory, Critical Legal Theory dan Critical Legal Studies" dalam *Jurnal Masalah-masalah Hukum*. Vol XXXI No. 3 Juli-September, Universitas Diponegoro, p 137 yang didalamnya diuraikan secara sistematis dan ditunjukkan jalinan benang merah dari critical theory, critical legal theory, dan critical legal studies yang bersumber dari paradigma Guba dan Lincoln dalam buku NK Denzin dan Y.S. Lincoln (ed) *Handbook of Qualitative Research*.

¹¹ Soetandyo Wignjosubroto. *Hukum dalam Masyarakat*. Yogyakarta (Graha Ilmu), hlm 6

¹² Erllyn Indarti. 2010. *Loc cit*.

¹³ Philippe Nonet & Philip Selznick, 2001. *Law and Society inTransition: Toward Responsive Law* , New York, Hagerstown, San Fransisco and London,Harper Colophon Books, p 14-15

¹⁴ *Ibid*, page 16

¹⁵ Phillipe Nonet & Philip Selznick, *loc cit*

¹⁶ Satjipto Rahardjo, *Sisi sisi Lain dai Hukum di Indonesia....*page 72

Law as a blanket rule appears in the legislation on land acquisition. Countries with its power, creating institutions for land acquisition, whereas previously existing land revocation institutions as regulated in Law Number 20 Year 1961 concerning Revocation of Rights to Land and objects above It. In this context Mahfud MD said that the procedure for the removal of perceived inhibits development so the Government looking the other way is easier, the procedure for "procurement", although the risk of arbitrariness and justice for the people or the owner of the land does not have room to negotiate freely.¹⁷ Power inherent in the potential to be abused. In another expression, Satjipto Rahardjo stated that power has the talent to lead to negative practices.¹⁸ There is instrumentalism understood where the law is subject to repressive rulers desire.¹⁹

In relation to the regulation of land acquisition for development, it is apparent that legislation intended to expedite development. Development is the key word in the New Order government. At that time, the word development has tended to be a myth and experience sacralization. As if hidden virtue behind the implementation of development. Because the goals and assumptions are inherently good, then the process of building permit sacrifices humanitarian dimensions.²⁰ People are in a helpless condition, because in the New Order era, one of the cornerstones of important development is the national stability. By the reason of national stability, the people can not freely express their aspirations and prefer silence to safety. In such context, this legislation on land acquisition has a repressive character.²¹ Law is what is desired by the political power in the interest they want. It thus becomes clear that the laws and regulations on land acquisition law is full of powerful interest and at the same time are covered in the form of power law. Law is the will of political power for the sake of interest.²² Land acquisition law and regulation is a full legal interest of the ruler and also a form of rule of law are covered.

THE REALITY OF PUBLIC INTEREST IN LAND ACQUISITION FOR DEVELOPMENT

Article 33 paragraph (3) of the 1945 Constitution states the earth, water and air space, including natural resources contained within it at the highest level controlled by the state, as an organization of the people of Indonesia. The word 'controlled by the state' in the above sentence has a meaning (1) organize and conduct the allocation, supply and maintenance of Earth, water and space, (2) determine and regulate the legal relation between people, Earth, water and space, and (3) determine and regulate legal relation between people and legal actions regarding the earth, air and space.

With such authority, the State can determine which land should be owned by individuals or legal entities, and which lands should not be owned by individuals and legal entities, since these lands will be reserved for the larger purposes of the public interest. Agrarian law do not regulate in detail the meaning and scope of public interest. In details about it, contained in the implementing regulations. Article 1 (1) Attachment Presidential Instruction No. 9 of 1973 explained that an implementation of development activities in order to have the nature of public interest, if the activity involves (1) the interest of the nation and the state, or (2) public interest, (3) the interest of the common people, common interest, (4) the interest of development. Presidential Decree No. 5 of 1993 on Land Procurement for Development in the Public Interest, Article 1 (3) states the President can determine the forms of other development activities, which he considered necessary for the common good. In the Presidential Decree. 5/1993 [Article 5 paragraph (1)] mentioned the construction of the public interest includes the development undertaken and subsequently owned by the government and is not used for profit, in the fields of, among others, public roads, public hospitals, public markets, government offices and etc. In presidential regulation Number 36 in 2005, the public interest is referred to as the interest of the majority of people. Presidential Regulation No. 65 in 2006, arranging that the construction for the public interest that was implemented by the Government or the local authorities, who then owned or to be owned by the Government or local government.

The regulation has been written about the public interest criteria, but in practice public interest was obscured by developmentalism. In Indonesian Dictionary, the word development has several meanings, among others, (1) it is defined as the process of development, ways, actions to build; (2) development process which starts from developed countries by developing country governments, passed down to the people, and (3) it is the world's development effort to change the state of the ancient world were not in accordance with the ideals of human life physically and spiritually with the aim to pass happy future for generations to come. Merriam Webster Dictionary explains that the development is the act, process, or result of developing.

The core of the definition of development is the existence of certain conditions of social change into better shape. But in reality, development is often understood as a series of efforts to improve the living conditions of society through the achievement of high economic growth with the support of political stability.²³ In the concept of development there are 4 (four) main assumptions, namely: (1) that high economic growth will bring improvements to the lives of most people, especially for the poor; (2) that high economic growth means the wheel production has opened up employment opportunities and exciting market, so that it can respond to the needs of the community, and (3) political or political dynamics that are barriers to the movement of the economy, and (4) that the cultural realities of society, is seen as one of the constraints of the progress, therefore the motion economy

¹⁷ Moh Mahfud MD. 2012. *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta (Rajawali Press), page 255

¹⁸ Satjipto Rahardjo. *Sisi sisi Lain Hukum di Indonesia*, op cit. page 74

¹⁹ Phillippe Nonet & Philippe Selznick. 2010. *Hukum Responsif* (Terjemahan Raisul Muttaqin, Bandung (Nusa Media), page 18

²⁰ Heru Nugroho. 1999. "Kritik Habermas terhadap Postmodernisme dan Relevansinya bagi Pemahaman Pembangunan" dalam Moh Mahfud MD, dkk (Editor). *Kritik Sosial dalam Wacana Pembangunan*. Yogyakarta (UII Press), page 97

²¹ Phillippe Nonet dan Philip Selznick. Page 29 governing power is repressive when it gives short shrift to the interest of the governed, that is, when it is disposed to disregard those interests or deny their legitimacy. As a result the position of the subject is precarious and vulnerable.

²² Daniel S. Lev. 1995. "Lembaga Peradilan dan Kultur Hukum Indonesia" dalam Yahya Muhaimin dan Colin MacAndrews. *Masalah-masalah Pembangunan Politik*. Yogyakarta (Gadjah Mada University Press), hlm 98

²³ Dadang Juliantara (Penyunting). 2000. *Menggeser Pembangunan Memperkuat Rakyat, Emansipasi dan Demokrasi Mulai Dari Desa*. Yogyakarta: Laper Pustaka Utama, page xi

expected to change old culture (traditional) and replace it with a new (modern) culture.²⁴ This description shows that in the concept of development there is a view that puts people in a subordinate position, because they are stupid, lazy, or can not take advantage of the opportunities that exist and that even worse is seen as a barrier to development. As a result, it is not uncommon to suffer with the people living in prison just because they do not agree or do not support the development.

The concept of development actually leveled with the ultimate goal in order to stem the socialism in the third world. Developmentalism are the steps towards modernity which is translated into higher forms of technology and economic growth following the footsteps of industrialized countries that refer to the industrial revolution. Development is meant as an increase in living standards, and it can only be reached through industrialization. Government in this perspective as a subject whose job is to transform people into objects, recipients, clients or of participants.²⁵

In the era of the New Order government to work with the 'developmentalism', then the acquisition of land for the construction of more and more. The reason for the development, the State assumes all accusations when the country needed the land including land controlled by the people. By reason of the high economic growth of countries provide extensive facilities to private parties or industry. Strong alignments on private or industrial discharge is evident from the Minister of Home Affairs No. 2 of 1976 on the Use of Land Acquisition Event Private Party. It is almost as contained in Presidential Decree No. 36 Year 2005 on Land Procurement for Development Implementation for Public Interest as amended by Presidential Decree No. 65 Year 2006 on Amendment of Presidential Regulation No. 36 Year 2005 on Land Procurement for Development Implementation for Public Interest.

During the new order era land acquisition policy in Indonesia over an economic reason to base, not juridical. Land acquisition policy in Indonesia is in an effort to facilitate owners of capital both Government and private. New Order directing development to the achievement of economic growth pursued through the provision of industry and agriculture modernization.²⁶ From some research on land acquisition, Esmi Warassih show that deliberation only to meet the formal requirements.²⁷ Mahfud MD said that in practice the landowners forced each other to agree among each other (fait accompli) to approve a certain price that actually very detrimental.²⁸ In many cases of land acquisition is often done by intimidation or pressure to bring the owners of land in the village hall and then they were forced to sign an agreement which is claimed as a result of deliberation.

In reality the public interest better understood as the interest of development. Whereas, the public interest has a deeper meaning, as it relates to the interests of society as a whole, which also involves the protection of individual rights as citizens. Maria SW Soemardjono stated that the activities of general interest are included in legislation on land acquisition activities only contains the title alone. There is a concern if too detailed, it can hamper the implementation of development.²⁹

Regulations on land acquisition is a powerful tool to make people's land evictions. The practice of land acquisition for public purposes is a mask for the government to carry out its development agenda. Esmi Warassih stated that the strategy and implementation of development with economic growth model turned out to have implications that are too far away, not trickle down effect goes, the widening gap between social strata and between regions.³⁰ Development for the prosperity of people was defeated by development oriented to economic growth.

CONCLUSION

Law of land acquisition for the development of the public interest is strongly influenced by the power factor. Legislation on land acquisition for the implementation of development in the public interest to show the type of repressive law. Land procurement legislation is more of a State instrument to implement the development agenda. The public interest is not yet a major orientation, as in the implementation of private interest, the interest of the owners of capital and industrial interest that are more mainstream. Repressive type of land acquisition is happening because people are not politically powerless. For reasons of national stability, the state make people helpless. The people are helpless not because they are low-educated or less intelligent, but because of their inability to channel aspirations because of the very strong political pressure.

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²⁴ Dadang Juliantara, *Ibid*

²⁵ Mansour Fakih. 2000. "Tinjauan Kritis Terhadap Revolusi Hijau" dalam Dadang Juliantara (Penyunting). *Menggeser Pembangunan, Memperkuat Rakyat*. Yogyakarta (Laper Pustaka Utama), hlm 5

²⁶ Yusriyadi.2010. *Industrialisasi & Perubahan Fungsi Sosial Hak Milik Atas Tanah*. Yogyakarta (Genta Publishing), page 159

²⁷ Esmi Warassih. 2001. *Pemberdayaan Masyarakat Dalam Mewujudkan Tujuan Hukum (Proses Penegakan Hukum dan Persoalan Keadilan*. Pidato Pengukuhan Penerimaan jabatan Guru Besar Madya Dalam Ilmu Hukum Fakultas Hukum Universitas Diponegoro, Semarang (Badan Penerbit Universitas Diponegoro), page 45

²⁸ Moh Mahfud MD. *Membangun Politik Hukum, Menegakkan Konstitusi*, page 255

²⁹ Maria, S.W. Soemardjono.2009. *Tanah Dalam Perspektif Hak Ekonomi Sosial dan Budaya*. Jakarta (Penerbit Buku Kompas), page 245

³⁰ Esmi Warassih. 2011. *Pranata Hukum Sebuah Telaah Sosiologis*. Semarang (Badan Penerbit Universitas Diponegoro), page 49

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