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THE LEGAL POLITICS OF THE GOVERNMENT ON THE ACQUISITION OF LAND FOR DEVELOPMENT IN TERMS OF THE ASPECTS OF *THE IUS CONSTITUTUM* AND *IUS OPERATUM*

Riadi Asra Rahmad
Faculty of Law, Riau Islamic University / Pekanbaru
E-mail: riadi_arahmad69@yahoo.com

Abstract

The policy of acquiring land for development by the government based on the ius constitutum of the aspect of assessing the amount of compensation, is carried out by means of an assessment of the value / price of the object of land acquisition by the land appraiser and / or public appraiser. Theimplementation of the government's policy towards the acquisition of land for development in the ius operatum phase is carried out through an agreement. The achievement of an agreement on land compensation between the parties in land acquisition will have an impact on the smooth running of the government in carrying out programs and policies in terms of development. So that the word agree is the key to opening the transfer of land rights status with deliberative techniques to reach consensus.

Keywords**:** ***Land Acquisition, Ius Constitutum, Ius Operatum.***

1. INTRODUCTION

There have been many notions or definitions of legal politics given by experts in various literatures. From those various notions or definitions, by taking the substance that turns out to be the same. Some of the legal political notions of experts are as follows:

1. According to Padmo Wahjono,the legal politics is the basic policy that determines the direction, form, and content of the law to be formed. In his other writings, the politics of law according to Padmo is the policy of state organizers on what is used as a criterion for punishing something that includes the formation, application, and enforcement of laws.
2. Thepolitical nature of law according to Teuku Mohammad Radhie is a statement of the will of the ruler of the state regarding the laws in force in its territory and regarding the direction of development of the law that is built.[1]

According to Mahfud MD:

Legal politics is *a legal policy* or legal direction that will be imposed by the state to achieve state goals whose form can be in the form of making new laws and replacing old laws. In this sense, legal politics must be based on the objectives of the state and the legal system prevailing in the country concerned which in the Indonesian context the objectives and systems are contained in the Preamble to the 1945 Constitution, especially Pancasila, which gave birth to legal guiding rules. The National Legislation Program (Prolegnas) can be called an example of legal politics (part of legal political science).[2]

According to Soedarto, legal politics is the policy of the state through state bodies authorized to establish the desired regulations, which are expected to be used to express what is contained in

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1 Moh. Mahfud MD, *Politik Hukum di Indonesia*, Rajawali Pers, Jakarta, 2010, hlm. 1.

2 Moh. Mahfud MD, *Membangun Politik Hukum Menegakkan Konstitusi*, Rajawali Pers, Jakarta, 2011, hlm. 5.

3 Imam Syaukani dan A. Ahsin Thohari, *Dasar-dasar Politik Hukum*, Rajawali Pers, Jakarta, 2010, hlm. 27-28.

4 *Ibid.*, hlm. 29.

5 Achmad Ali, *Menguak Teori Hukum (Legal Theory) & Teori Peradilan (Judicialprudence): Termasuk Interpretasi Undang-undang (Legisprudence) Volume I Pemahaman Awal*, Prenada Media Group, Jakarta, 2009, hlm. 18-19.

society and to achieve what is aspired to. Satjipto Rahardjo defines legal politics as the activity of voting and the means to be used to achieve a certain social and legal goal in society.[34]

According to Achmad Ali, there are several classifications of approaches that can be used to study law. One of the classifications of approaches that can be used is as follows:

1. *ius constitutum*, that is, to examine normatively, the rules, and legal principles that exist in various laws. The object is "*law in books*".
2. *ius constituendum*, that is, it is the study of the ideal things in law. It is commonly called the study of legal philosophy. The object is "*law in idea*".
3. *ius operatum*, that is, is an empirical study of law, which focuses on how law works in reality. The object is "*law in action*".[5]

Based on the description above, this study conducts studies in order to study the law, especially *ius constitutum* and *ius operatum* in terms of land acquisition for development. Land acquisition for development broadly involves two groups, namely the community and the government. If described, community groups based on economic level can take the form of high-, middle- and lower-class economic communities or from professions such as farmers, fishermen, laborers, businesses, and so on. Meanwhile, the government can be grouped in the form of central government and local government.

The two groups as mentioned above in the implementation of land acquisition do not always go through an easy, fast, and low-cost process because each party has its own wishes. Sometimes this desire has also involved third parties who also have their own interests, both positioning themselves from elements of community groups and from elements of the government.

The definition of land acquisition is not found in *the ius constitutum*, especially in Presidential Regulation Number 65 of 2006 concerning Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Development for the Public Interest. The definition of land acquisition was actually regulated in the Regulation of the Minister of Home Affairs and circular letter of the Directorate General of Agrarian Affairs, but the definition was no longer applied at the time of the enactment of Presidential Decree Number 55 of 1993 concerning Land Acquisition for the Implementation of Development for the Public Interest which had been revoked and declared no longer valid based on Presidential Regulation Number 65 of 2006.

The definition of land acquisition that has been revoked is regulated in Article 1 paragraph (5) of the Regulation of the Minister of Home Affairs Number 15 of 1975 concerning Provisions regarding Land Acquisition Procedures, which states:

> Land acquisition is to relinquish the legal relationship that originally existed between the rights holders/rulers of their land by providing compensation. Compensation for lands released is in the form of lands that already have a right based on the Law of the Republic of Indonesia Number 5 of 1960 concerning the Basic Regulations of Agrarian Principles, customary law lands.[6]

Based on the above definition of land acquisition, there is a term legal relationship which is the meeting point between two parties. The meeting point of the parties that is not linked in the acquisition of land for development is basically due to the non-achievement of the parties' agreement in the deliberative forum between the community and the government. Therefore, the word agreement is the main key for the parties in the implementation of land acquisition for development which is stated in the form of an "agreement" with the label of deliberation. The main issue in the

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[6] Supriadi, *Hukum Agraria*, Sinar Grafika, Jakarta, 2009, hlm. 75.

acquisition or acquisition of land for development or any other term related to "land grabs" by the government to the community is the issue of compensation.

Based on this, in every land acquisition for development, there is almost always a sense of dissatisfaction, in addition to being helpless among the people, namely the people who are affected by[7]the project of land for the implementation of development for the public interest. The obstacle is that the land compensation process is based on an agreement by the parties because neither the government nor the community found a common point of agreement at first because the value of the compensation did not match the expectations of the community. Therefore, in the end, the land acquisition committee issued a large form of compensation decision on the grounds that it paid attention to the growing aspirations in society.

The increasing activity of pembangunan in all fields, the pembangunan itself is very closely related to the law, where the law plays a very important role in supporting development activities, because in the development process it is not separated from obstacles and obstacles so that it is necessary to find solutions so that the implementation of development can run smoothly as in the construction of buildings, offices, bridges, housing and others.

Land acquisition or land acquisition has two conflicting sides, on the one hand the government really needs land for development but on the other hand the community also needs land as a settlement and a place of livelihood. Theland cannot be taken for granted by the government even though the Constitution of the Republic of Indonesia of 1945 affirms: The earth and water and the natural wealth contained therein are dikuasai by the state and used for the greatest prosperity of the people. According to the provisions of the applicable law, in fulfilling the supply of land as a means of development from a person or members of society, it can be done in two ways, namely:[8]

1. Liberation of Land
   This land acquisition is essentially a relinquishment of its rights by the holder of the right to the land, but if viewed from the perspective of the government, such an act can be said to be a land acquisition because the government has compensated for the release of the land from the cultivation of the right holder, it can be interpreted that the acquisition of land can only be carried out on the basis of the consent of the holder of the right to his land, voluntarily relinquished his rights after he received proper damages for the land.
2. Revocation of Land Rights
   Disenfranchisement of land rights is the forcible taking of land belonging to a party by the State which results in the right to the land being abolished, without the person concerned committing a violation or omission in fulfilling a legal obligation.[9]

Based on the formulation above, it can be seen that revocation is an act of state tools / equipment carried out by coercion against the land and the objects on it which belong to the residents to be handed over to the person requesting revocation, while the person concerned (the landowner) has never violated the law or neglected a legal obligation imposed on him.

The revocation of land rights in the public interest can be justified if a person's land rights are exposed to development activities in the public interest. Therefore, the right to land will be revoked because all land rights under Article 6 of the Basic Agrarian Law have a social function.

There are often disputes or misunderstandings between parties affected by land acquisition and disenfranchisement of land rights and parties who liberate land which results in unrest in the community so that it can interfere with the smooth running of the development process. Fenomena the dispute prompted the author to conduct a study, with the title: "**The Legal Politics of**

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7 Maria SW Sumardjono, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, Kompas, Jakarta, 2001, hlm. 77.

8 Pasal 33 ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

9 Abdurrahman, *Masalah Pencabutan Hak-hak atas Tanah dan Pembebasan Tanah di Indonesia*, PT Citra Aditya Bakti, Bandung, 1991, hlm. 10-15.

10 Y. Wartaya Winangun, *Tanah: Sumber Nilai Hidup*, Kanisius, Yogyakarta, 2004, hlm. 89

11 Dwi Adi K, *Kamus Praktis Bahasa Indonesia Lengkap*, Fajar Mulya, Surabaya, hlm. 465.

Government on Land Acquisition for Development Reviewed from aspects of *Ius Constitutum* and *Ius Operatum*".

2. IMPLEMENTATION METHOD

Based on the research phenomenon, this research uses a type of normative legal research using secondary data.

3. RESULTS AND DISCUSSION

3.1 Land Acquisition Policy ufor Development oleh Government ber based on *Ius Constitutum*

Islam and Buddhism give the view that the land is seen as a gift of Allah. The land is seen as something sacred so that the land becomes part of religious life. The soil is the surface of the earth or the layer of the earth that is above once. It is undeniable that property rights to land are also the most important part for the community.[1011]

The issue of property rights in a legal system is the main joint that will determine the entire legal system. The color of the legal system in question for the most part depends on how it regulates its property rights. This is in line with the opinion of Satjipto Raharjo who mentioned ownership and contracts as the joints of civil law.[12]

The Civil Code provides a very important position for the land and objects attached to the land, namely in Article 520 of the Civil Code, provided that the land has a special nature for the state so that in principle all land must have an owner.[1314]

The state as a power organization, regulates the way of formulating regulations that then organize on the use, designation, supply, and maintenance of the earth, water and space and the natural wealth contained therein, as well as to determine, regulate, establish and make regulations on what rights can be developed from the right to control the state.[15]

Relatedto the policy on land acquisition for development by the government based on *the ius constitutum* from the aspect of assessing the amount of compensation, there are two important terminologies as stipulated in Law Number 2 of 2012 concerning Land Acquisition for Development for Development for Public Interest and Presidential Regulation Number 71 of 2012 concerning the Implementation of Land Acquisition for Development for The Public Interest, i.e. Land Appraiser and Public Appraiser.

3.2 Implementation of Government Policy on Land Acquisition for Development in *Phase Ius Operatum*

Land acquisition based on Article 1 of Presidential Regulation Number 65 of 2006 concerning Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Development for the Public Interest is any activity to obtain land by providing compensation to those who release or hand over land, buildings, plants, and objects related to land.

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12 Soejono dan Abdurrahman, *Prosedur Pendaftaran Tanah: Tentang Hak Milik, Hak Sewa Guna, dan Hak Guna Bangunan*, Rineka Cipta, Jakarta, 2003, hlm. 1.

13 Pasal 520 Kitab Undang-Undang Hukum Perdata menyatakan bahwa pekarangan dan kebendaan tak bergerak lainnya yang tidak terpelihara dan tiada pemiliknya, seperti pun kebendaan mereka yang meninggal dunia tanpa ahli waris, atau yang warisannya telah ditinggalkan adalah milik negara.

14 Kartini Muljadi dan Gunawan Widjaya, *Seri Hukum Harta Kekayaan Hak-hak atas Tanah*, Kencana, Jakarta, 2007, hlm. 1.

15 *Ibid.*, hlm. 44.

Land acquisition is the process, method, method of land expropriation and waiver of land rights, which is a legal act that results in the loss of the rights of a person of a physical or non-physical nature, loss of property for a while or forever. In terms of land acquisition there are two balanced interests. Land rights holders certainly want a certain amount of compensation from the government as the executor of the development. On the grounds of two different interests, the issue of land is even more complicated.[1617]

Indemnity consists of two syllables, namely indemnity and loss. A change is something that is an exchanger of something that is lost, while a loss is something that is not good or unprofitable. From the understanding of these two terms, it can be concluded that compensation is something that becomes an exchanger of something missing that is not good or unprofitable.[18]

Compensation is compensation for losses of both physical and/or non-physical nature as a result of land acquisition to those who own land, buildings, plants, and/or other objects related to land that can provide better survival from the level of socioeconomic life before being exposed to land acquisition.[19]

The form of compensation based on Article 13 of Presidential Regulation Number 65 of 2006 concerning Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Development for the Public Interest can be in the form of:

1. Money; and/or
2. Replacement soil; and/or
3. Resettlement; and/or
4. The combination of two or more forms of indemnification as referred to in letter a, letter b, and letter c.
5. Other forms agreed upon by the parties concerned.

Based on the description above, it is known that there are three fundamental things that must be considered in the calculation of the amount of compensation for land acquisition for the implementation of development for the public interest. Therefore, it is necessary to give a brief description of what is meant by the public interest.

According to John Salindeho as quoted by Adrian Sutedi, the public interest is the interest of the nation and the state as well as the common interest of the people, taking into account the social, political, psychological, and Hankamnas aspects. [20] Based on Article 1 number 5 of Presidential Regulation Number 65 of 2006 concerning Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Development in the Public Interest, what is meant by the public interest is the interest of most levels of society.

The basis for consideration of the public interest that requires land is the increasing development for the public interest itself. The principle of the public interest that requires land is to be carried out quickly and transparently while still paying attention to the principle of respect for the legitimate rights of land.

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16 Tatit Januar Habibi, *Pelaksanaan Penetapan Ganti Rugi dan Bentuk Pengawasan Panitia Pengadaan Tanah pada Proyek Pembangunan Terminal Bumiayu*, Tesis, Program Studi Magister Kenotariatan, Universitas Diponegoro, Semarang, 2007, hlm. 38.

17 Adrian Sutedi, *Implementasi Prinsip Kepentingan Umum dalam Pengadaan Tanah untuk Pembangunan*, Sinar Grafika, Jakarta, 2007, hlm. 117.

18 *Ibid.*, hlm. 151 dan 380.

19 Pasal 1 angka 10 Peraturan Presiden Nomor 65 Tahun 2006 tentang Perubahan atas Peraturan Presiden Nomor 36 Tahun 2005 tentang Pengadaan Tanah bagi Pelaksanaan Pembangunan untuk Kepentingan Umum.

20 Adrian Sutedi, *Op. Cit.*, hlm. 59.

Based on a brief description of the public interest in terms of the laws and regulations that have been in force and apply in the current positive law, it can be concluded that the elements of the public interest are as follows:

a. The interests of society.
b. The interests of the nation and the state.
c. For the sake of maintaining the security and order of the community.
d. For the sake of achieving national development goals.
e. For the sake of ensuring domestic security
f. National interest; or
g. The interests of society are many, such as places of education and training of human resources, research or for military exercises.
h. Activities that concern the interests of the nation and the state
i. Activities that concern the interests of the wider community
j. Activities that concern the interests of the people of many / together; and/or
k. Activities that concern the interests of development.
l. The interests of most walks of life.

The state of law places the law by expanding its function to carry out *social engineering*, social engineering, and create a society that is the ideal of a nation. Roscoe Pound states that the law is a tool for renewing (engineering) society. His theory is very well known as[21] *the term law as a tool of social engineering*.[22]

The existence of the law is required to respond to all problems and various intersections of community interests. Law as a social *engineering tool (social engineering by law*) must be based on the aspirations of people who live in lambing. To achieve this goal, legal certainty is needed.[23]

Roscoe Pound's teachings move in 3 (three) main scopes/ dimensions, namely as follows:

1. The law really serves as a tool for organizing and managing society.
2. Law as a tool for regulating and managing society is balanced with the fulfillment of the needs or interests of society.
3. There is supervision in order to maintain and continue human civilization.[24]

Based on the description above and the previous description, it is necessary to analyze the role of *law theory as a tool of social engineering* in theimplementation of government policy towards land acquisition for development in *the ius operatum* phase carried out through agreement. The achievement of an agreement on land compensation between the parties in land acquisition will have an impact on the smooth running of the government in carrying out programs and policies in terms of development. So that the word agree is the key to opening the transfer of land rights status with deliberative techniques to reach consensus. The question is what if the parties do not reach an agreement? And how is thelaw a *tool of social engineering* to renew (engineer) society?

Based on the description of the agreement in terms of agreement in the field of land acquisition for development for the public interest, it can be seen the existence of a paradigm, namely law as a social engineering. Prior to the promulgation of Law Number 2 of 2012 concerning Land

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21 Sabian Utsman, *Dasar-dasar Sosiologi Hukum*, Pustaka Pelajar, Yogyakarta, 2009, hlm. 242.

22 Achmad Syauqi, *Aliran-aliran dalam Filsafat Hukum dan yang Relevan dengan Suasana Kebangsaan Indonesia*, Program Studi Magister Ilmu Hukum, Universitas Mataram, 2012, hlm. 10.

23 Sabian Utsman, *Op. Cit.*, hlm. 333.

24 Nazaruddin Lathif, Teori Hukum sebagai Sarana/Alat untuk Memperbaharui atau Merekayasa Masyarakat, *Pakuan Law Review* Volume 3, Nomor 1, Januari-Juni 2017, hlm. 80.

Acquisition for Development for Public Interest, regulations were still maintainedthat castrated human rights.

Among them is regarding compensation resolved through deliberation. Worse still, this deliberation is limited to a maximum of 90 days. If an agreement is not produced, the land acquisition committee will determine the amount of compensation and deposit it in the district court while the release or revocation of land rights will continue. In fact, the claim for compensation is a civil dispute. This dispute can only be resolved through deliberation and closing the settlement of the dispute through the courts. Deliberation is not a formal path.

Through the promulgation of Law Number 2 of 2012 concerning Land Acquisition for Development for The Public Interest, asocial initiative was also created, namely the community must comply with court decisions that have obtained permanent legal force as a basis for payment of compensation. If the community is still dissatisfied and object to the payment of compensation that has been determined by the court, then the law has engineered the matter in the form of depositing compensation from the agency that requires the land to the chief justice of the district court in the area of the construction site for the public interest.

4. CONCLUSION

Theconclusions of this study are as follows:

1. The policy of acquiring land for development by the government based on *the ius constitutum* of the aspect of assessing the amount of compensation, is carried out by means of an assessment of the value / price of the object of land acquisition by the land appraiser and / or public appraiser.
2. Theimplementation of the government's policy towards the acquisition of land for development in *the ius operatum* phase is carried out through an agreement. The achievement of an agreement on land compensation between the parties in land acquisition will have an impact on the smooth running of the government in carrying out programs and policies in terms of development. So that the word agree is the key to opening the transfer of land rights status with deliberative techniques to reach consensus.

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