POSESSION AND OWNERSHIP OF LAND RIGHTS AS OBJECTS IN LAND PROCUREMENT PROGRAME (*THE DIGNIFIED JUSTICE PERSPECTIVE*)[1]

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Abstract

In the Indonesian land law, individual right of lands are subject to the public interest. A right of land must have a social function. Nowadays, this policy is taking the form in the Land Procurement Act. One therefore could argue that the legal basic of a compulsory land procurement policy is stronger at the meantime, compare to the one before. Aspects which are regulated in the Law, among other things are the mandatory purchase procedures of land purchasing; the price of the land and these further schedulled in the generally Government regulations. The price of the land is prescribed one-sided by the Government as the purchaser who is the party in the government contract, representing or acting on behalf of the State. This law has been long recognized in the Indonesian legal system. There are several types of Government compulsory purchases of land rights. The first category is a purchasing of a land right from the temporary holder and the second category is the compulsory purchase of an ownership of land from the permanent holder. In this article, this principle will be briefly examined. For this purpose, the writers use a homegrown but internationally recognised legal philosophy called as Dignified Justice Theory or Philosophy.

Keywords. Possession, ownerships, rights of land , the Dignified Justice theory.

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INTRODUCTION

This paper provides a very short juridical overview or the study of the possession and ownership of land rights as the objects of a compulsory land acquisition by the Government. This scheme is utilizing the principle of compulsory purchase. This system is described in the perspective of a pure legal theory of law. This theory has been developed as the Indonesian nations own philosophy of law or jurisprudence.[2] This theory is a pure legal theory. This perspective has bocomming an internationally acknowledged theory. The theory has been coinned as the theory or philosophy of Dignified Justice.[3]

Exposure of the legal issue as mentioned above starts with the study of legal philosophy. Following a brief description of the Dignified Justice philosophy is a brief exposition of the nature (ontology) of the term a right of land holding concept; which is to hold a right of land of other person for a time being not permanetly or the possesion of land. It is then followed by the ontological study of the concept of ownership of land. Both of the concepts, i.e., the land tenure and the concept of ownership of land are two legally recognised land rights as the objects of compulsory government land acquisition. In a very short form after the brief exposition of the rights of land, in this article, a juridical (philosophical)/analysis or study of the concept or institution of the compulsory land acquisition is also taken.

As mentioned previously, juridical studiy or pure legal perspective that is used as a tool to understand the concepts of land tenure and land ownership, especially the term ownership rights to land as the object of the compulsory land acquisition are nothing but the Dignified Justice perspective. To that end, before the juridical study on the concepts of possesion and control or ownership of rights to land as the objecs of the land procurement institution, firstly below is the brief overview of the relevant essence of the theory of Dignified Justice. This paper is closed with a brief conclusion.

DISCUSSION

A Glance about the Dignified Justice Theory/Philosophy.

Dignified Justice philosophy or the theory of the Dignified Justice has been

[2] This is, among others, the theory of *the dignified Justice* contains a concept or dimension named as its characteristic "dignified"; since the Indonesian people can also have their own philosophy of law, they are also able to build their own legal theory or *jurisprudence* itself, without intending to shrink or underestimating their Western counterparts or reject or anti. The theory has been developed not to always had to rely on ideas, philosophy of law, *jurisprudence* and theories which are constructed or derived from other civilized nations, especially theWest that are very far from the reality of legal life in Indonesia. This Dignified Justice Theory was once presented at an accademic forum for an *Academic Community* of the Law Faculty (Dean, professors, PhD and Masters students and a staff on International Relations at the Vrije Universiteit Amsterdam-Holland, in July 2017.

[3] A more detailed picture of this theory can be seen, among others, in Teguh Prasetyo, *Dignified Justice*: *Perspective of Legal Theory* , First Printing, Nusa Media, Bandung, 2015; International publications that use this theory can be seen, among others: Teguh Prasetyo, *Pancasila the Ultimate of All the Sources of Laws* (*A Dignified Justice Perspective*), Journal of Law, Policy and Globalization, International Institute for Science, Technology and Education (IISTE), Vol. 54, October 2016; International articles relating to the Land Law, see: Shallman , Teguh Prasetyo and Amin Purnawan , *Public Service on Land Registration Based on the Dignified Justice*, Journal of Advanced Research (IJAR), Int. J. Adv. Res. 5 (5), 154-163, 1016.

shorten as Dignified Justice. The theory, as said before has also been considered as the name of the Indonesian Jurisprudence. It has been ascociated with an Indonesian legal science. This is so, since it has been developed by the Indonesian people. This legal theory or philosophy of law postulates several principles.[4] One of the postulate is that when people would search for or to find the laws of any particular subject matters[5] then the Theory navigates that the law must be found in the soul of the nation (*Volksgeist*).

In law, it can be immersed in a very famous juridical phrase: *ubi societas ibi ius* . Where there are people there is a law within. Considering the concept of the soul of the nation (*Volksgeist*) as a metaphor abstract, then scientifically juridical metaphor of the soul of the nation (*Volksgeist*) was manifested concretely and therefore it can be observed in the scientific (empirical) and objective maner in two sources (main legal materials), namely: (1) applicable and existing laws and regulations and (2) court decisions or common laws. For this second legal material has also been included, wherever possible, since it is having strength or have permanent legal force (jurisprudence), the decisions have to be a binding and also authoritative (*in cracht van gewijde*).

In addition another important characteristic of Dignity Justice which is also important to point out here is that all legal rules must be legal rules that is aim at justice. However, it is important to note that the justice is a Dignified, provided that it humanizes humans (*nguwongke uwong*). If Western philosophers like Gustav Rardburch for example, in his first and original precept is of the opinion that there is always antimomies or conflict of principles between justice, certainty and expediency; but in the perspective of Dignity Justice theory that upholds a system postulate, justice that humanizes human beings is already inclusive of certainty and benefit or expediency.

To put it simply, while everything is fair or just, it is because everything within the law is humanizing people in society. And in that term, it is always certain, like the eyes of the day (the Sun) which always rises in the East every morning. By certainty, it means that the law is always fair, is the laws that is making human being (individuals) in a communities which holds the rights to the land, whether it is for business or commercial, and also social activities are always reliable because of certainty. So did all is cosidered just, since it is for humanizing human in the societies that always bring benefits and avoid wastes.

All that is just, is because justice is in it is intended to humanize human beings in their society simultaneously is certainty and also at the same time it is justice that brings benefits

[4] Postulates have been defined as statements about truth that “are definitely self-evident and therefore will not be refuted”. The expression of the emphasis on the meaning of the concep postulate was put forward by Soetandyo Wignjosoebroto.

See Soetandyo Wignjosoebroto, *Paradigm Shift in Social and Legal Studies*, First Print, Setara Press, Malang, 2013, p., 46 in footnote No. 14.

[5] Printed in bold by the Authors. It is intended to emphasize that in the context of this paper, the law is those laws governing the possession and control or ownership of land, as the objects of the compulsory land acquisition scheme and must be searchable or can be found in the soul of the nation (*Volksteist*) of Indonesia.

to both human beings themselves, society and the environment and especially to their Creator, the God Almighty. Dignified Justice holds that the principle of just and civilized humanity is prevail since human beings is the creation of God Almighty (*Tuhan Yang Maha Esa*).[6] For the Indonesian people, the mastery and ownership of land rights, including if the possession and ownership must be the object of land acquisition, all must be put in the perspective of such spirit of law's relations That both possession and ownership of land are understood as the gift of God Almighty. Therefore, the responsibility for mastery, ownership, use and in this particular case, the compulsory procurement scheme for the public or development to use of land is not only to each other, but also for the nation and the state but is accountable to God (*Tuhan Yang Maha Esa*) the Creator.

What is stated above is a clarification from the legal point of view, or a clarity and purity of legal science, a struggle for the purification of looking at the nature of men in the law, and it is the Dignified Justice. It is also comparable for instance with a view towards humans in the law that was built and developed in Western theory. For example in the theory put forward by Thomas Hobbes. According to Hobbes, humans in the law should be seen as and animal (the Wolf) to other human beings, which are also animals. Every rules, norms and principles of law must be constructed in a Hobbesian perspective, that is that humans are *homo homini lupus*.

It is not the case with humans in Dignified Justice theory, as stated above. In law, according to the perspective of Dignified Justice, human beings are the noble creatures of God Almighty. This thought is derived from Pancasila as the source of all sources of law,[7] including all living laws (customary law) and statutory regulations as well as court decisions that have permanent legal force relating to the field of land law, especially in the context of writing this paper, namely the rules and principles of land law that guide concepts of land tenure, and land ownership as the objects of compulsory land acquisition to further the development in the interests of the the public as a whole.

In the Dignified Justice perspective, whether the rules and norms and principles contained in the legislation applicable to land tenure and land ownership as the objects (provided lands) must not only be seen as the crystallization of a desire to curb the instinct of Hobbesian or "economic/political animals " in humans. More than that the rules and principles of law, in this case land

[6] See: Teguh Prasetyo, *Law and Legal System Based on Pancasila*, First Printed, Media Perkasa, Yogyakarta, 2013, p., 93; compare also with Teguh Prasetyo, *the Pancasila Legal System* (*System* , *Legal System and Establishment of Legislation Regulations in Indonesia*): *Perspective of Dignified Justice Theory*, First Printed, Nusa Media, Bandung, 2016; also, Teguh Prasetyo and Abdul Halim Barkatullah, *Philosophy*, *Theory*, & *Legal Sciences*: *Thought Towards a Justice and Dignified Society*, First Printing, RajaGrafindo Persada, Jakarta, 2012.

[7] See, Teguh Prasetyo, *Pancasila the Ultimate of All the Sources of Laws* (*A Dignified Justice Perspective*), Journal of Law, Policy and Globalization, International Institute for Science, Technology and Education (IISTE), Vol. 54, October 2016.

law[8] regulating the compulsory aquisition of land there is a crystallization of understanding the value that humans are creatures that are different from animals, because humans are created with a special gift, a gift from God Almighty. It is human who are gifted with the ablility to think rationally (*et aequo at bono*). Humans are expected to be able to restrain themselves because of the ratio that is available to him so that he or she or they will not get caught up in the greed to control and own land or other human lands arbitrarily, whether is is by using his own hands or on behalf of the State.

In the light of the philosophy of the Dignified Justice as well as in part of the nature of the *Grand Theory* that have been raised in a very brief and clear above, here below this writers will put forward for understanding or assessment of the concept of land tenure (possession), as well as ownership, especially the possession and the ownership of the property rights to land as the objects of an institution or agency in the compulsory land acquisition for public purposes.

Emphasis is given to the use of the Dignified Justice postulate that if people want to look for the law, which always contains justice whoch humanizing human, in fulfilling the axiological then one need to search for the lawi in the soul of the nation (*Volksgeist*). The manifestation of the soul of the nation is mainly the applicable or existing laws and regulations.

Nature of Land Rights in a Dignified Justice Perspective

The term possession in general is different from the concept of ownership (*ownership*) as they are described below. Generally people argue that possession is half of the ownership. However, the general understanding of the possession of land should be noted that the possession is there only for legitimate causes, and it must not to do with acting against the law. For example, a person hired *(property*) owned by others. However, possession can also occur because of an act against the law, for example a person or legal entity that controls the goods of another party because of an illegal act, namely by stealing.

The concep of possession which is discussed here is the possession derived from the verb, which is mastering or controlling. In relation to that, in the Indonesian land law, the controlling right of the State is the highest right and only held by the State. State possession of any rights, particularly the land is higher than the position of the recipient of the right. Taking into account the Dignified Justice theory above, it can be said that the law goberning the controlling rights of the State can be found in the soul of the nation (*Volksgeist*) Indonesia. It manifests itself in Article 33 paragraph (3) and the 1945 Constitution of the Republic of Indonesia

[8] In order to realize legal order, the state needs to, because the legal dictation that has the spirit of humanizing humans, regulates the legal relationship between humans and land or humans and also with legal entities both private and foreign and domestic public relating to land. The law that governs relations is land law. Compare this understanding with Maria AW Soemardjono, et. al., *Land Law in Various Aspects*, Media Development, Medan, 2000.

(UUD 1945). Based on the State's Rights in Article 33 paragraph (3) of the 1945 Constitution all the land within the Republic of Indonesia is dominated by (*possession*) State. On that basis, the State can determine the land parcels to be possessed and owned by its citizens with a right.

The granting of rights by the State to its citizens is stipulated in a Government Decission Letter, a written stipulation called *beschikking*. Once again it is necessary to emphasize that in *beschikking*, the position of the Government is higher than the position of the recipient of the right of land, wheter it is a right to posses or an ownership. The written stipulation (*beschikking*) is also a legal proof for the people that the person concerned is the possessor or the owner of the land, and therefore has the right to receive protection from the law. There is a general view that such a concept does not mean or does not make the State the owner of all land as adopted by communist countries or which had been adopted by the Dutch colonial government in the past.[9]

In the perspective of the theory of the Dignified Justice as stated above, what is given by the State through the Government as its servant to its people, is based on the spirit of the nation (*Volksgeist*) which manifests itself in the formulation of the provisions of Article 16[10] Act No. 5 of 1960 of the Basic Regulation of Agrarian, or a legal product that had been generaly known as the Basic Agrarian Law (BAL). The types of rights granted by the State through the Government to the people here are understood as ownership of land rights. Given the very limited paper space, the types of rights granted by the State through the Government to its people, among others, namely property rights (HM) which has been mentioned above as the right of ownership.

Ownership of Land in the Perspective of Dignified Justice

Ontologically, see its nature from the philosophical point of view, as already stated above, that the types of rights granted by the State through the Government to the people here is understood as ownership as the permanent rights of land and the temporary possession of the rights of the owner. The first rights has been stipulated as the control of land rights.

Land ownership is a right that is the strongest, most completed and hereditary. So that it can only be owned by Indonesian citizens. However, certain legal entities owned by the Government for certain purposes are possible to obtain ownership rights. This gives a clear signal that the State through the Government can not only have legal relations with its citizens, in granting rights to land. The

[9] See the concept of *domeinverklarring*.

[10] Even though Article 16 of the BAL as a manifestation of the nation's soul (*Volksgeist*) also recognizes other types of rights or ownership such as Right to Use, Right to Build, Business Use Rights, Building Rental Rights, Right to Space and so on, but due to limited space, what is described above is limmited to the possesion and ownership (HM), which is the rights stipulated in Article 16 of the BAL which is popular in the community and given a certificate as proof of ownership.

state also has relations with its Government in granting ownership.[11]

Laws of the land in the soul of the nation contains a general principle which is alive in the Indonesian society that the rights of land is understood can only be placed on the ground that is not bound with other tenure rights is considered as civil law rights in its nature. Juridically, the principle that must also not be forgotten, namely that ownership rights can come from *Ulayat* Land or the Land of Customary Rights (*Adat* Land Rights). Just for being the Right of Ownership, the related *Ulayat* Rights must also be released, in case the public interest needed it. As such as the strongest right, property rights or ownership are free from ties that originate from the civil rights of others. Referring to the Dignity Justice perspective as stated above, the natural the soul of the nation (*Volksgeist*) were manifested or formulated in Article 22 of the BAL, a right of land may occur: (1) under customary law; (2) because of the determination of the Government and (3) because of the provisions of the law.

The occurrence of property rights or ownership under customary law is regulated according to the Customary Law concerned. Property rights occur- this means without State interference through the act of Establishing Property Rights by the Government- according to customary law, it is usually also associated with the intensity of its use and the period of tenure of the land concerned. If the intensity in using the land is high enough and has passed a relatively long period of time, it will then cause a bond between the land and the owner that is getting tighter. In the end the land became the right of ownership.

Transition to another party or the right of ownership or ownership, among others, is due to voluntary release by the owner or revoked in the public interest. At this point the relevance of the formulation of this paper shows, namely: the control and ownership of land rights and the object of land acquisition. A manifestation of the philosophy of law (epistimologi) which is the basis of the compulsory acquisition of land by the State, which can be grouped anatomically into three main pillars. Firstly, in the usual way, through sale, exchange or otherwise agreed by both parties. Secondly, by the compulsory land acquisition scheme regulated by an Act of Parliament. Thirdly, by extraordinary means or by force, that is by using institutions to revoke land rights.

Philosophically, as stated above, Land Procurement is only one method (epistimology) in the law so that the Government, according to the law, it is the institution which is designed to fulfill land needs to carry out development.Epistimologi or method of land acquisition, in practice taken by the Government in the name of the

[11] It is clear from the description above that the Government is not a State but a party acting on behalf of the State. Juridically, the Government is only one element of the State, although it must be seen as the Ruler. Such a position of the Government is the same position as citizens. For as the Government, citizens are also an element other than the State in addition to the following elements, namely the territory, and no less important element, namely the recognition by internalnational community.

State when civil law acts rearche the point of a deadlock.

Jurisdictional studies or looking at the theory of Dignified Justice on the soul of the nation (*Volksgeist*), in this case especially the legislation in the field of land, it turns out that the legal mandate of the Land Procurement institution comes from public policy or *beleidsregel* (policy rules) that are most frequently changing, adjusting the demands of law and justice.

Policy rules which take the form of Presidential Regulation relies on the interpretation of institutions voluntary partake with rights of land by its rights holders as stipulated in the soul of the nation (*Volksgeist*) and maniffest in the Article 27 point (a) number (2), Article 34 letter (c) and Article 40 letter (c) of the BAL and based itself on the principle that all land rights have social functions as well as manifesting themselves in the soul of the nation (*Volksgeist*), namely Article 6 of the BAL. Thus, answering the nature or epistemology of Land Acquisition, essentially is a process of releasing the rights to the ownership of people (individuals) over land and/or objects on it which are carried out nonvoluntarily for the public interest.

CONCLUSION

Noting all the description and a exposition of the concepts of land possession and ownership perspective, as has been stated above, it can be concluded that the voluntary land acquisition are two objects of land procurement programe by the Government to further the national development for serving the public interest. Ontologicaly or the nature of land acquisition is the process of releasing the rights to ownership and/or control of people over land and/or properties on it which are carried out voluntarily for the public interest. If the voluntary process failed, as the Government on behalf of the State needs the land to fulfill its task to serve the interest of the public, there would be a complsory purchase of land.

Perhaps it is accepted that in the process of Land Acquisition in which control and or ownership rights over land into an object, there is a relationship between the three parties, namely the State as the first party and represented the Government as the second party on the one hand and members of the community (the indovidual) who controlled and or own land on the other side. The relationship is relatively unbalanced, because of the position of the Government as the Ruler on one hand and the individual as the rulled on the other. One party appears to be that the Government has a higher position than the community members (individual) on the other side in the legal relationship.

Considering the Dignified Justice Theory as already mentioned above, it can be expressed a view (suggestion) that the act of the acquisition of land by the Government on behalf of the State for the public benefit (*common bonum*) through the compulsory procurement of land draws attention to the principle of fairness or literary Justice, in which this juistice must be understood as

humanizing humans as a noble creatures of God Almighty. One aspect of the most practical, but do not leave the base or legal values, namely justice in the maning to make human as human being *(nguwongke uwong)* are: the Land Acquisition, both process and formulation as well as laws that regulating the Land Acquisition and implementation must comply with the law, among others so as not to violate human rights. To comply with this basic principle of law, it has been suggested that the Government, on behalf of the State, is obliged to provide adequate compensation or compensation in the compulsory land aquisition in order to further the National development and for public interest based on the clear and transparent land law.

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