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Regulations of Land Procurement for The Development of Public Purposes Involving Private Entities

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Abstract
The research on the regulations of land procurement for the development of public purposes involving private entities was aimed to address the issues of legal principles in land procurement for the development of public purpose, and the formulation of land procurement regulations involving private entities. Research results show that land procurement for the development of public purpose was conducted under the principles of humanity, justice, expediency, certainty, transparency, agreement, participation, welfare, sustainability, and harmony. The regulation formulation of private enterprise involvement in land procurement for the development of public purposes was through the model of Public Private Partnership (PPP) in the implementation of development.
Keywords: Land Procurement, Public purpose, Private Entities.

1. Introduction

Land issue in development is a quite sensitive issue. As development increased, land requirement for development is growing anyway. Land does not only contain economic aspects but also the issues of social, politics, law, and so forth (Andrian Sutedi, 2008). On the basis of the need for land for development, it is not an easy thing, but it is a substantial problem. If the solution is wrong, it will cause unrest which destabilizes society (Andrian Sutedi, 2008).

Land procurement for the implementation of development is carried out by the government for public purposes, according to the provisions of Law No. 2 of 2012 on land procurement for the development of public purpose (LN.2012-22.TLN. 5280), Article 1 paragraph 6 determines that "public purposes are the interests of the nation, state, and society which should be realized by the government and used for people's greatest prosperity".

The definition given by Article 1, paragraph 6 of Law No. 2 of 2012 above is still a vague definition (vage normen) (Bruggink, 1999). In the law, it is mentioned that the development in public purposes is with no clear limit in enumerative so that the implementation has divergence of interpretation of what constitutes public purposes (Yusriadi, 2010). Philosophically, land procurement for development is oriented to realize people's prosperity and welfare, not for profit (non-profit-oriented). To achieve people's prosperity and welfare, land procurement and the implementation of development in public purpose must be made by the government, not privates.

This is contrary to the provision of Article 12 paragraph (1) of Law No. 2 of 2012 which allows the government to cooperate with private sectors in the implementation of development in public purpose. Legally, the provision of Article 12 paragraph (1) is a vage norm; the haziness of norm can be seen in the formulation of the norm "the development for public purposes referred to in Article 10 letter b to letter r shall be carried out by the government and can cooperate with State-Owned Companies, Regional-Owned Companies, or Private Entities". In Article 12 paragraph (1) and in the elucidation of the article, there is no restriction on the form and nature of the cooperation between the Government and private entities. It can open up opportunities for development activities in public purposes which are originally owned and implemented by the government will be taken over by privates which are oriented to profit (profit-oriented). The main focus of the research was to explain the legal principles of procurement for the development of public purposes, and to describe the formulation of land procurement regulation for the development of public purposes involving private entities.

2. Research Methodology

This research was a normative legal or doctrinal legal research which is a legal research legal conceptualized law as norm (Soetandiyo Wignyosoebroto, 1991; Soerjono Soekarno & Sri Mamudji, 2004). The approaches used in this research were statute approach, conceptual approach, comparative approach, and historical approach (Petter Mahmud Marzuki, 2005; Jhony Ibrahim, 2011).

The legal materials used in this research included primary, secondary, and tertiary legal materials (Soerjono Soekarno & Sri Mamudji, 2004). The primary legal materials included legislations, the secondary legal materials included books and journals of law, and the tertiary legal materials included dictionaries and encyclopedias of law.

The analysis of the legal materials was made by the method of legal interpretation (Soenaryati Hartono, 2006). The legal interpretation methods used in this research were authentic interpretation, grammatical interpretation, and hermeneutical interpretation.

3. Research Results and Discussion

3.1 Legal Principles of Land Procurement for Public purposes

Legal principle is the heart of the rule of law, and legal principle is the most extensive foundation for the issuance of a rule of law. Besides, legal principle is a bridge of rule of law that connects rule of law to positive law, social ideals and ethical views of society (Sacipto Rahardjo, 2000). Legal principle is not a concrete rule, but it is a common basic thought in nature or the background of concrete regulations contained in and behind every legal system revealed in legislation (Sudikno Mertokusumo, 2003; Bruggink, 2000).

As a foundation or base, legal principle can be used as a tool to resolve if there is a dispute in a legal system. For example, if there is a conflict of norms in a legislation (Imam Koeswahyono, 2012). The legal principles of land procurement for the development of public purposes are intended to protect everyone's rights to land so as not to be violated or harmed when dealing with public purposes (Ahmad Rubai, 2007).

Land procurement for the development of public purposes is conducted under the principles as follows:

a. The principle of humanity.

The elucidation of article 2 letter a of Law No. 2 of 2012 states: "The definition of humanity principle is that land procurement should provide protection and respect for human rights and the dignity of every citizen and resident of Indonesia in proportion."

b. The principle of justice.

The elucidation of Article 2 letter b of Law No. 2 of 2012 states: "The principle of justice means that land procurement should provide a decent compensation guarantee to the parties entitled to land procurement process so as to get the chance to be able to establish a better life". Justice is one of the goals of law that derives from human moral values. Justice is a philosophical concept which implies abstract definition. Purpose of law partially lies in the realization of justice, order, peace, harmony, predictability, and certainty of law (B. Arif Sidhartha, 2007). In land procurement, the principle of justice is positioned as the basis for determining the form and amount of compensation granted to the holders of the right to land taken for public purposes (Ahmad Rubai, 2007).

c. The principle of expediency.

The elucidation of Article 2 letter c states: "The principle of expediency is that the result of land procurement is able to provide widespread benefits for the sake of community, nation, and state. The release of land rights and land revocation in principle should provide benefits to those who need the land and the people whose lands are given or revoked to public purpose ".

d. The principle of certainty.

The elucidation of Article 2 letter d states: "The principle of certainty is to provide legal certainty of land availability in the process of land procurement for development and provide assurance to the parties entitled to obtain adequate compensation". The implementation of land procurement for public purposes must meet the principle of legal certainty, which is performed in a way that is stipulated in legislation whereby all parties can ascertain their rights and obligations of each (Ahmad Rubai, 2007). In addition, legal certainty should also be directed towards the provision of compensation to land owners who have suffered losses from the loss of their land rights due to be taken by the government for development. On the other hand, those who need land must also obtain a certainty to be able to enjoy or cultivate the land without interference from any party (Ahmed Rubai, 2007).

According to Boedi Harsono in Oloan Sitrus (2004: 35), the principle of legal certainty in land procurement has the meaning of land tenure and use by anyone for any purpose must have their basis of rights. Everyone (persoon) or legal entity (rechts person) who control the rights to land either Right to Ownership, Right to Use, Right to Use the Building, Right to Apartment Units and other secondary rights acquired in good faith, will get legal protection from other party's interference (Salim HS, 2005).

The eefforts to provide legal protection for every person and legal entity that controls the rights to land with good will can be reached through; (1) a civil law suit in the General Court on the status of land rights; (2) to seek government assistance (Regent/ Mayor) for those who control the land without permission is entitled or proxy; (3) filing their problems in penal to the authorities; (4) filing a law suit to the State Administrative Court as a result of the issuance of the decree of State Administration (KTUN) which adverse their interests (Sujito, 2012).

e. The principle of openness.

The elucidation of Article 2 letter e mentions: "The principle of openness is that the land procurement for the development is carried out by providing access to public to obtain information related to land procurement". Legislation in the field of land procurement for public purposes should be communicated to public so that people

gain knowledge about the contents of these regulations, as well as to plan land procurement for public purposes should be communicated to the landlord about the purpose of land use and the amount of compensation, and the procedures of compensation payment method, and the overall administrative process for the release of land (Ahmad Rubai, 2007). It is meant to be that there are no lies between the parties. Submission of information regarding land procurement plan for public purpose can be done through legal counseling and information media that can be reached by the whole society.

f. The Principle of Agreement.

The elucidation of Article 2 letter f states: "The principle of the agreement means the land procurement process is conducted by consensus of the parties without coercion to obtain a mutual agreement". Each activity in the procurement of land for development in public purpose should be based on the agreement of parties, and the agreement will be held on the basis of need appropriateness of both parties without any coercion, oversight or deception as well as in good faith. This is performed because the relationship between two parties is civil relationship derived from the agreement so that all agreement elements as provided for in Article 1320 of the Civil Code must be met. If there is an element of oversight, oppression or deception in achieving agreement, the agreement can be canceled (M.Yahya Harahap, 1986).

Deception in the release of land rights for public purpose can occur, for example, if the initial purpose of land procurement is for non-commercial public purpose, but in practice it turns out that land earmarked for private interests is commercial in nature, for example, for real estate, plaza, apartments, golf court and others. Coercion can occur if it is performed with physical and non-physical threat to land owner at the time of deliberation (Ahmad Rubai, 2007), or the process of land procurement is held under physical and non-physical influence and/or threats, such as the use of military forces, stigmatization of forbidden organizations, the threat of confinement on charges of obstructing development and so forth (Gunanegara, 2006). The elements of oversight that often occur in practice such as an oversight on the object, which is the land given the compensation is not the land of the land procurement object. With the oversight, there has essentially no agreement between the parties (Ahmad Rubai, 2007). To prove the occurrence of the three (3) elements above, it normatively makes the deliberation ever made can be canceled. Determination of compensation unilaterally by the state constitutes a waiver of negotiation principle which should be essential in deliberation (Ahmad Rubai, 2007).

g. The principle of participation.

The elucidation of Article 2 letter g says: "The principle of participation is a support in the implementation of land procurement through community participation, either directly or indirectly, from planning to development activities". The participation of all parties involved actively in the process of land procurement will lead to a sense of belonging and can minimize the possibility of rejection of development activities in public purpose. Landowners and affected communities are involved in the data collection phase, the resettlement plan, and in project implementation. Communication and consultation with stakeholders conducted intensively and continuously to give each other feedback

h. The principle of welfare.

The elucidation of Article 2 letter h states: "The principle of welfare is that land procurement for development can provide added value to the parties entitled to the continuity of life and society at large". Land procurement for public purposes should be pursued to improve the livelihood of people affected by the development. As a result of the development, public welfare should be increased rather than decreased. Both the event of land acquisition through land procurement by agreement and by means of land right revocation (as an attempt to get land with force if no consensus is reached and it is not possible to acquire land elsewhere). The subject of the rights shall be given financial rewards and replacement facility/ land so that their socio-economic condition does not degenerate/ decline (Imam Koeswahyono, 2012).

i. The principle of sustainability.

The elucidation of article 2 of letter I says: "The principle of sustainability is that development activities can take place continuously, sustainably, to achieve expected goals". The principle of sustainability is intended that the management of natural resources are managed to meet the needs of present generation without losing the function and preservation of environment, so as to meet the needs of future generations (Sujito, 2012). In other words, sustainable development is known as the development with environmental insight (sustainable development), which is a natural resource management strategy which is committed to the preservation of environmental quality and function.

The concept of sustainable development as the effort to optimize the benefits of natural resources and human resources by harmonizing natural resources and human resources with development (Samlaw i Azhari, 1998). Thus, the main idea of sustainable development is a development which is familiar with the environment. In this context, sustainable development ecologically emphasizes the requirement for the relationship between development behavior and environmental conservation aspects so that in the long term the use of natural resources does not cause destructive effects.

j. The principle of harmony.
The elucidation of article 2 letter j says: "The principle of harmony is that land procurement for development can be balanced and in line with the interests of society and the state."

3.2 Dynamics of Land Procurement Regulation for the Development of Public purpose Involving Privates

3.2.1 Regulation of the Minister of Internal Affairs No. 15 of 1975

The term of land procurement is not known in the Regulation of the Minister of Internal Affairs No. 15 of 1975. The term used by the Regulation of the Minister of Internal Affairs No. 15 1975 is land acquisition interpreted as; "Releasing the legal relationship between the holders of land rights to the land under their control by adequate compensation". In the Regulation of the Minister of Internal Affairs No. 15 of 1975, there is no terminology of public purpose. It is only mentioned in the preamble to the land in development efforts undertaken by government agencies. In this case, public purpose is the interest of the development carried out by the government. In addition to inexistence of firm definition of public purpose, there is no list of activities categorized in public purpose, so that the blurring of the meaning of public purpose by simply stating the interests of development, then this is one of the footings which can cause deviation in land acquisition so that it can be manipulated by private interests. It is also known as the interests of development just because there is involvement of government officials in the conduct of land acquisition.

In practice, land acquisition is likely to be abused, both in terms of acquisition purpose and compensation. The purpose of land acquisition which should be for public purpose can be misused by the executor for other purposes, as well as in the determination of compensation it often occurs coercion. Meanwhile, the desired consensus is only performed in one-way communication.

In order to accommodate the private interests to acquire land, the government re-issued the Regulation of the Minister of Internal Affairs No. 2 of 1976 on Land Acquisition Procedures for the Benefit of Government for the Land Acquisition by Private Parties. The background of the issuance of the Regulation of the Minister of Internal Affairs No. 2 of 1976, i.e.; first, the implementation of development is not solely borne by the government, but the active role of private sectors is expected; second, to stimulate private sectors in the implementation of development, it is necessary to have the support of facilities from the government in the form of services in the liberation of the people's land in order to provide land for the projects that support public purpose or is included in the field of public and social facility development (Gunanegara, 2006).

In Article 1 and 2 of the Regulation of the Minister of Internal Affairs No. 2 of 1976, it is emphasized that the private sector who deals with land acquisition, before the realization of the project, must obtain written permission from the governor, which states that the land acquisition is performed for activities that aim to support the development in public purpose or including in the field of public and social facilities development. The license for land acquisition by private sectors must include the reasons and considerations used by the governor to give permission, for the Governor is obliged to supervise the implementation of land acquisition (Gunanegara, 2006). In addition, under the provisions of Article 11 of the Regulation of the Minister of Internal Affairs No. 15 of 1975, local government has the responsibility of supervising the implementation of land acquisition and compensation in the implementation of land acquisition for private interests.

In the Regulation of the Minister of Internal Affairs No. 2 of 1976, there are no criteria and requirements that must be met to qualify as public purpose, so that in practice the use of the Regulation of the Minister of Internal Affairs No. 2 of 1976 causes more legal problems for landowners. The deviations of land procurement for public purpose which is performed by the private sector initially is allowed only for the purposes that support public purpose, or the development of public facilities/ social facilities as provided for in the Regulation of the Minister of Internal Affairs No. 2 of 1976. In fact, the Minister of Internal Affair permitted to use land procurement agency for the sake of private projects as stated in the Circular Letter No. SJ 10/16/41 dated October 19, 1976 (Gunanegara, 2006).

With the provisions of the Regulation of the Minister of Internal Affairs No. 2 of 1976 above, the government and private sectors can force people to give up their land rights in the name of development. This regulation does not only regulate the acquisition of land for the benefit of the government, but also provide more opportunities to private sectors to acquire land as land acquisition for development purposes (M. Yamin, 2011). Even in practice, it is not uncommon for government intervention through land procurement committee by allowing privates use land procurement procedures similar to that is carried out by the government. They did not hesitate to use government officials and security forces in the acquisition of land for development purposes, so that private sector can acquire land at prices below the average as determined by the land procurement committee (Endang Suhendar, 1996; M Yamin, 2011).

3.2.2 Presidential Decree No. 55 of 1993

The regulation of land procurement for the development of public purpose as provided for in the Regulation of the Minister of Internal Affairs No. 15 of 1975 in fact is not in accordance with the circumstances and the

changing times. Therefore, the government issued Presidential Decree No. 55 of 1993 on Land Procurement for Development of Public purpose. The legal instrument changes due to the implementation of land procurement involving the procurement of land for development in public purpose and the procurement of land for private interests always cause disharmony. The causes of all the problems of land procurement or land acquisition are the factors of rules, deviation in implementation, or the excesses of rule application (Gunanegara, 2006).

The term of land procurement in the Regulation of the Minister of Internal Affairs No. 15 of 1975 was replaced by the term of land procurement in Presidential Decree No. 55 of 1993 because the implementation of land procurement received less positive response from public, with respect to the number of problems arising in land acquisition, as well as to accommodate the aspirations of various groups in society as the reaction to the excesses of land procurement has been done so far (Maria Sumardjono, 2005).

With the enactment of Presidential Decree No. 55 of 1993, it is expressly stated that the Regulation of the Minister of Internal Affairs No. 15 of 1975 does not apply. However, the provisions of Presidential Decree No. 55 of 1993 has not been operational yet, so that Article 25 determines that further provisions necessary for the implementation of the presidential decree are carried out by the Minister of Agriculture/ Head of the National Land Agency. To comply with the provisions of Article 25, it was published the operating rules of land procurement interpreted by the Regulation of the Minister of Agrarian/ Head of the National Land Agency Number 1 of 1994 on the Implementation Provisions of the Presidential Decree No. 55 of 1993 on the implementation of land procurement for the development of public purpose (M. Yamin 2011).

Article 1 point 1 of Presidential Decree No. 55 of 1993 states that the definition of land procurement is any activity to acquire land by providing compensation to those entitled to land. Based on this formula, it can be seen that the term of land procurement is appeared because of limited supply of land for development; so as to obtain it, it is necessary to provide compensation to those entitled. In the preamble of Presidential Decree No. 55 of 1993, it states that the implementation of land procurement is performed by taking into account the roles of land in human life and the principle of respect to the legal rights to land (Oloan Sitorus & Daya Limbong, 2004). That means, in the procurement of land, on the one hand, the social function of land must be considered; but on the other hand, the interests of the parties who have legal relationship with land must also be respected.

According to Presidential Decree No. 55 of 1993, land procurement for the development of public purpose can only be performed by the government, and private sectors cannot be involved in it. The provisions of this decree is different from the previous provisions (the Regulation of the Minister of Internal Affairs No. 15 of 1975) which provides the opportunities for private sectors to implement procurement of land for the implementation of development in public purpose with the help of land procurement committee, which should be a facility for the procurement of land by government agencies (Oloan Sitorus & Daya Limbong, 2004). Thus, private sectors cannot take advantage of this Presidential Decree to be involved in land procurement.

Presidential Decree No 55 of 1993 defined the concept of public purpose clearly, that is, the interests of all segments of society with 3 criteria, i.e.: owned by the government, controlled by the government, and non-profit. With these restrictions, then private sectors basically cannot get involved in land procurement, and the land procurement performed by private sectors can only be done through the usual way, namely selling and buying, exchange, or other means agreed upon by the parties.

Implementation of land procurement is conducted by deliberation to determine the compensation between the holders of land rights, land procurement committee and government agencies that need the land. The compensation in order to procure land is given to; the rights to land; building; plant; and other objects related to the land. The form of compensation can be in the form of; money, replacement land, resettlement, a combination of two or more forms of compensation above, or any other form agreed upon by the parties concerned (Article 12-13). When the holders of right to land do not accept the decision of the Land Procurement Committee about the form and amount of compensation, they may appeal to governor, and next, governor will seek the resolution of the form and amount of compensation to consider the opinions and wishes of the parties. Furthermore, governor will decide on the form and size of compensation. If the holders of land rights continue to reject the governor's decision regarding compensation, governor proposes land revocation to the President. President decides land revocation after hearing the consideration of the Minister of Justice and Human Rights, the Minister of Internal Affairs and the Minister of the institution that require land (Article 20-21).

Presidential Decree No. 55 of 1993 also establishes the possibility of acquiring land by means of selling and buying, exchange between landowners and the government agencies that require land (Muhadar, 2003). It is explicitly described in Article 23 of Presidential Decree No. 55 of 1993 which states that the implementation of development for public purpose requiring the land area of less than 1 (one) hectare, can be done directly by government agencies that require the land and the holders of land rights by means of selling and buying, exchange or other agreed ways.

3.2.3 Presidential Decree No. 36 of 2005 in conjunction with Presidential Regulation No. 65 of 2006

The regulation of land procurement in Presidential Decree No. 55 of 1993 in its development is considered to

have some weaknesses. Some weaknesses of Presidential Decree No. 55 of 1993 according to Gunanegara (2006: 164), i.e.:

1. Not being able to cope with brokering (mafia) to the land which has been designated as a development site. It leads to expensive development costs, and as a result, the development is even stopped.
2. The spirit of its regulation is still centralized in nature and implemented in authoritarian way, whereas on the current state of government pattern it has changed in the direction of decentralization which is run democratically.
3. After the liberation, many people of land owners are degraded in their socioeconomic life.
4. The structure or composition of the land procurement committee who are all of the government officials in the implementation cannot eliminate the bias to the state, compared to the people of land owners, for example, in the determination of compensation, coercion occurs to compensation to be based on the value of tax (NJOP), not based on the real value of land; deliberation run is not as it should be, but is directed as a medium of socialization or indoctrination.

Based on the above weaknesses, the Government issued Presidential Decree No. 36 of 2005 on land procurement for the development of public purpose. The basic consideration of the issuance of Presidential Decree No. 36 of 2005, i.e.: first, the increasing development in public purpose that requires lands, then the procurement needs to be done quickly and transparently by regarding to the principle of respect for the rights to land; second, land procurement for the development of public purpose as defined in the Presidential Decree No. 55 of 1993 is considered no longer compatible with the legal basis for land procurement for public purposes.

Procurement of land for development in public purpose according to Presidential Decree No. 36 of 2005 is implemented in two ways, i.e.: (1). Waiver of rights to land; (2). Land revocation. Meanwhile, in addition to the implementation of land procurement for the development of public purpose is performed by selling and buying, exchange, or other means agreed upon by the parties. Thus, privates cannot do the procurement of land by means of waiver, nor can do right revocation, but rather by means of selling and buying, exchange or other means agreed upon by the parties.

The concept of public purpose in Presidential Decree No. 36 of 2005 is defined as "interests of most society". In addition to the Presidential Decree, there is no restrictions on the criteria of public purpose owned and dominated by the government and is not intended for profit. This differs from the definition of public purpose, and its restrictions by Presidential Decree No. 55 of 1993. Thus, the concept of public purpose in Presidential Decree No. 36 of 2005 is the concept of bias, vague and raises multi-interpretation. This can cause problems in practice, because what is considered as public purpose by one party, the other party may not consider the same.

The fformulation of public purpose in Presidential Decree No. 55 of 1993 is firmer when compared to the formulation of public purpose in Presidential Decree No. 36 of 2005. Such definition opens the opportunities for expansion to certain fields which do not actually come in the category of public purpose, and then by government, it is engineered and qualified as public purpose. The provision opens the opportunity for private sectors to borrow the hands of the government to conduct land procurement, henceforth granted to private sector, such as toll roads, shopping places (malls), places of entertainment which are oriented to gain profit (profit-oriented) (Muhadar, 2003).

The expansion of the definition of public purpose seems to be based on the difficulty of quantifying the meaning of "the interests of the whole society", thus the makers of the Presidential Decree No. 36 of 2005 chose to give a sense of public purpose as "the interests of the majority of people". However, we need to realize and to anticipate that in practice in the field the use of terminology “most of society” can become blurred and multi interpretation (Muhadar, 2003). Therefore, to prevent the occurrence of multiple interpretations, the definition of public purpose should remain based and not be separated from the concept of the State's rights and social functions to land, which is intended solely for the greatest prosperity of the people and not allowed to make a profit.

Deliberations to determine the amount of compensation in land procurement are made by the committee on land procurement, government agencies that require lands and land right holders. Deliberations to determine the compensation are limited to a period of 90 calendar days from the first invitation (Article 10). When land right holders do not receive compensation set by the land procurement committee, they are given the right to apply to the Regent/ Mayor or Governor or Minister of the Internal Affairs. Furthermore, Regent / Mayor or Governor attempts to solve the problem of the form and amount of compensation by considering the opinions and wishes of the holders of land rights. After hearing the opinions and judgments of the holders of rights to land, Regent/ Mayor, Governor or Minister of Internal Affairs issues a decision regarding the form and amount of compensation. If the settlement efforts undertaken by the Regent / Mayor, Governor or Minister of Internal Affairs are not accepted by the holders of rights to land, then Regent / Mayor, Governor or Minister of Internal Affairs proposes land revocation to the President in accordance with the provisions of Law No. 20 of 1961 on Revocation of Rights to Land and Existing Objects On It.

Presidential Decree No. 36 of 2005 is regarded by experts as highly repressive law because the emergence of regulation is based on the background by the ideology of capitalistic development and more concerned to the owners of capital, both domestic and foreign in an effort to support the achievement of economic growth (Musthofa & Suratman, 2013: 201). When viewed from the substance of the regulation which is dominated by the interests of employers and capital owners, it can be seen from the meaning of public purpose which is simply defined as the interests of the majority of public without restrictions. Some provisions of Presidential Decree No. 36 of 2005 which are repressive are (Musthofa & Suratman, 2013: 213;

"First, regarding compensation arrangements, it should not only be assessed in terms of material. This regulation only assesses damages for the land value, not mention the compensation to the plants growing on it or the value of buildings on the land, there is no provision that the compensation guarantees the people who lost their lands to have a better life.

Second, the land procurement process, a period of 90 days for negotiations set out in this regulation, does not allow the holders of land rights to determine other options, unless forced to accept the compensation specified.

Third, the land procurement committee, in this regulation, only represents the government. This land procurement committee will certainly not neutral and objective in negotiating the procurement of land. There is no guarantee that the persons in the land procurement committee are not in a conspiracy with the investors who provide capital for land acquisition."

On the basis of the foregoing, then the Presidential Decree No. 36 of 2005 was revised by Presidential Decree No. 65 of 2006 on the Amendment of Presidential Decree No. 36 of 2005 on Land Procurement for Development in Public purposes. Some of the Articles were modified by Presidential Decree No. 65 of 2006, i.e.; Article 1, paragraph 3; Article 2, paragraph 1; Article 3, paragraph 2; Article 5; Article 6; Article 7; Article 10; Article 13; Article 15; and Article 18.

3.2.4 Law No. 2 of 2012

Presidential Decree No. 65 of 2006 on the Amendment of Presidential Decree No. 36 of 2005 on land procurement for the development of public purposes, when viewed from the legal form, is not in accordance with Law No. 12 of 2011 on the Establishment of Legislation (LN.2011- 82, TLN.5234). The materials contained in the Presidential Decree should have been included in the form of legislation, not in the form of Presidential Decree. In addition, previous legislation is considered not to provide justice to those who lost their land rights. On that reasons, then the government issued Law No. 2 of 2012 on Land Procurement for the development of public purposes (LN.2012-22, TLN.5280).

The General Explanation of Law No. 2 of 2012 states:

"In order to realize a fair and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia, the Government needs to conduct development. One of the development efforts within the framework of national development organized by the Government is the development for public purposes. Development for public purpose requires the procurement of land held by the principles contained in the 1945 Constitution of the Republic of Indonesia and the national land law, among other, the principles of humanity, justice, expediency, certainty, transparency, agreement, participation, welfare, sustainability, and harmony in accordance with the values of national and state affairs "

The verification this Law shows the government's focus on encouraging the development of infrastructure. This Law is aimed to remove the biggest obstacle in the development of infrastructure in Indonesia, and the biggest obstacle in the development of infrastructure is in the process of procuring land. According to Antara News, quoted Roosdiono in 2011, the Indonesian government offered 79 infrastructure projects to investors under public private partnership scheme (Roosdiono,tt: 1).

Land procurement in this Law is defined "the activities to provide land by giving proper and fair compensation to the parties entitled". Public purpose is defined: "the interests of the nation, state, and society which should be realized by the government and used for the greatest prosperity of the people". The meaning of public purpose in this Law is a vague norm (vage normen), so as not to cause a variety of interpretations, it must be written clearly, such as, what the activities are, and how it should be implemented. It seems that Law No. 2 of 2012 on land procurement for the development of public purpose can be said identical with the Regulation of the Minister of Internal Affairs No. 15 of 1975 and the Regulation of the Minister of Internal Affairs No. 2 of 1976 which emphasizes the vague definition of public purpose (Imam Koeswahyono, 2012). In this law, there is no limit and criteria on public purpose, which is owned and controlled by the government, and non-profit, so it can lead to different interpretation of the meaning and areas of public purposes. Even Article 11 paragraph (2) describes; "In the case of the institutions that require land procurement for public purposes as referred to in Article 10 paragraph (1) are State-Owned Enterprises, the land belongs to the State Owned Enterprises", and Article 12 paragraph (1) explains; "the development in public purpose referred to in Article 10 letter b to letter r shall be held by the government can cooperate with the State-Owned Enterprises, Region-Owned Enterprises, or

privately owned companies".

The formulations of Article 10 paragraph (1) and Article 12 paragraph (1) above is actually deny the concept of public purpose, namely the development which is subsequently controlled and owned by the government, and non-profit oriented. It appears that this Law has been co-opted by the interests of big capital owners with the real nature of profit-oriented on behalf of public purpose. The mechanism of land procurement for private interests should be through buying and selling, not hijacking the government to carry out land procurement (Imam Koeswahyono, 2012). When it is studied in depth, the interest of private capital is very apparent in this legislation. It can be seen in Article 13 letter a, which includes "toll road, and telecommunication channels", in the category of public purpose, whereas the toll road and telecommunication channels are owned by private investors and not included in the category of public purpose because the goal is obviously profit-oriented (Imam Koeswahyono, 2012).

Land procurement for the development in public purpose requires discussions to determine the amount of compensation, and deliberations are made by the holders of rights to land with the Land Institute within 30 (thirty) working days. The agreement in deliberations provides the basis of compensation to the parties entitled which is included in the minutes (Article 37). If there is no agreement about the form and amount of compensation, the parties entitled may appeal to the local Court within a period of 14 (fourteen) working days after the deliberation to determine compensation is completed (Article 38 paragraph 2). Based on the filing of objection from the parties entitled, District Court decide the form and / or the amount of compensation within a period of 30 (thirty) working days from the receipt of the petition of objection (Article 38 paragraph 3). If the parties entitled are still objected to the decision of the District Court, within 14 (fourteen) days they were given the right to appeal to the Supreme Court, and then the Supreme Court shall make a decision within a maximum period of 30 (thirty) working days from the appeal accepted by the Supreme Court. The Supreme Court verdict with fixed legal force remains the basis of compensation payments to the parties who filed an objection (Article 38 paragraph 4).

If the parties refuse the form and amount of compensation, but not appeal to the District Court or submit but not in accordance with the predetermined time, because of the law, the parties entitled are deemed to have received the form and amount of compensation (Article 39). In this Law, it also determines the institute of consignment (entrusting compensation in the District Court), namely:

a. In the event that the parties entitled refuse the form and amount of compensation based on the deliberation or decision of the court;
b. The existence of the parties entitled is unknown;
c. The objects of land procurement become the object of a court, the ownership is still disputed, they are put in a confiscation by the relevant authority, and become the collateral in a bank (Article 42).

The application of the concept of consignment stipulated in this Law actually adopts the concept of consignment included in Article 1404 of the Civil Code. But according to Maria SW. Sumardjono, she interpret that the consignment concept in Article 42 paragraph (1) of Law No. 2 of 2012 with the concept of consignment under Article 1404 of the Civil Code is not quite right. In this case, Maria SW. Sumardjono (2012: 297) states:

"In the concept, the use of the consignment institutions for compensation in the District Court is erroneous. Article 1404 of the Civil Code regulates the institute of payment offers followed by consignment in the District Court which is based on the civil relationship between the parties started from the relationship of debts. Land procurement is a legal Law of the government to acquire land from land rights holders with compensation. It is clear that the relationship between the government and the holders of land rights is not a debt relationship which is civil in nature. When the land right holders refuse the compensation offered by the government agency requiring the land, then the action to deposit the compensation money in the district court is a unilateral action. By depositing the compensation money, as if it were an agreement to receive such compensation and the responsibility to pay compensation is deemed to have been implemented, and thus it provides legitimacy for the agencies that require land to be able to start the physical activity of development"

If studied extensively, Law No. 2 of 2012 has some drawbacks. According to Maria SW. Sumardjono (2012: 18-25), some weaknesses of Law No. 2 of 2012 include:

a. Law No. 2 of 2012 breaks the law as a system. The legislations prior to Law No. 2 of 2012 (Presidential Decree No. 55 of 1993 and No. 36 of 2005 in conjunction with Presidential Decree No. 65 of 2006) distinguish between the concept of land procurement and land revocation concept, but Law No. 2 of 2012 leaves this conception by not mentioning at all the procedures on land revocation when the deliberation to reach consensus on development sites and the granting of compensation fails while the location cannot be changed. All objections/ rejection of the land holders are settled by the judiciary by totally denying the procedure of land right revocation.
b. Law No. 2 of 2012 violates Law No. 26 of 2007 on Spatial Planning. Article 7 (2) states; "In the case of land procurement for the infrastructures of oil, gas and geothermal, the procurement is organized by the Strategic Plan and Working Plan of the Agencies that require the land as referred to in paragraph (1) letter a and d.

There are two things to notice in relation with the formulation of Article 7 and its impacts; first, Article 7 paragraph (2) excludes the provision of the land for oil and gas and geothermal infrastructures from the obligation to comply with the Spatial Plan and the national/ regional development plans. This exemption can, thus, be interpreted to violate the provisions of Law No. 26 of 2007 because the obligation to obey the spatial plan, even a breach of this obligation, may result in criminal sanctions. Second, if the characteristics of oil and gas and geothermal activities are considered to have specificity, the solution is not to undermine the system of spatial planning by formulating the exemption in Article 7 (2). However, it can be operated using the reconsideration instrument to the spatial plan which is possible through Article 16 of Law No. 26 of 2007 and stipulated further in the Government Regulation No. 15 of 2010 on the Implementation of Spatial Planning.

Based on the description above, there are two things that need to be associated with the presence of Law No. 2 of 2012; first, such law needs to be revised again. It means that it returns to a system of acquiring land rights that exists. For example, if a consensus is reached, the mechanism is through land procurement. However, if a consensus is not reached, it is then through the revocation of land. if it is not in such a way, Article 18 of the Basic Agrarian Law and Law No. 20 of 1961, on the revocation of land right and the objects on it, should be repealed. Second, the consignment institute is provided in certain cases only, i.e. if the existence of land owner is unknown, the object of land procurement becomes a dispute in court, a confiscation is placed, and it is secured with a mortgage (Maria Sumardjono, 2012; Sudjito, 2012; Musthofa, 2013).

3.3 The Regulation Formulation on Private Enterprise Involvement in Land Procurement for Public purpose

The legal basis as the basis of government cooperation with private entities in the implementation of development for public purpose is Article 12 paragraph 1 of Law No. 2 of 2012 on Land Procurement for Development in Public purpose.

Article 12 states;

1. *The Development for public purpose as referred to in Article 10 letter b shall be organized by the Government and can cooperate with State-Owned Enterprises, Regional-Owned Enterprises, or Private Entities.*
2. *In the case of the development of national defense and security, as referred to in Article 10 letter a, the development is conducted in accordance with the provisions of law.*

Article 12 paragraph (1) as described previously by the writer is a vague norm (vage normen) in respect of the clause " to cooperate with state-owned companies, regional-owned enterprises, or private entities". The form and model of cooperation in the development of public purpose that can result in public welfare are not described in Article 12 of Law No. 2 of 2012. Even, in the explanation, it is stated as "clear enough".

When studied from the historical background, the emergence of Article 12 above was motivated by the government's desire to accelerate infrastructure development in Indonesia, whereas the funds owned by the government was not enough to build infrastructures. To overcome these problems, privates sector should be involved in the implementation of development in public purposes. The mechanism of private involvement in the implementation of development in public purpose is commonly known as the Public Private Partnership (PPP). Basically, the government's role in organizing the development is for the welfare of society. The development relating to public purposes at first was only the roles and responsibilities of the government, but in the best practices occurred in several countries that have succeeded in the development of infrastructures, the government invited private sector's role which is known as the public private partnership. Public Private Partnership (PPP) is a form of public private partnership, or otherwise, privates invite the cooperation with the government to carry out the development. The agreement between the government and private sectors substantially adheres to the principle of freedom of contract (Academic Paper to the Draft of Law No. 2 of 2012, 51).

Ratio legis of the emergence of Article 12 paragraph (1) of Law No. 2 of 2012 is as follows (Academic Paper of the Draft of Law No. 2 of 2012, 51):

"The positive law after Indonesian independence had no legislation governing land procurement by privates for their interests. It is now perceived to have control and ownership by private sectors which are no proportional or relevant in the extent to their businesses. In addition, the reality of land possession by privates which currently exist is partially neglected. The indication was about 6.1 million hectares. The width is the same as dozens of times the width of the land areas of neighboring countries. This is very detrimental to the people, the nation, and the state. Besides, when land procurement has no role of the state, there is no supervision of the state, nor any control of the state, there is massive privatization by private sectors which in the end the state has no more legal corridor to perform its role properly. Meanwhile, the government does not have valid and reliable data on the width of the lands controlled/ owned privately acquired through land procurement. This happens because of the legal vacuum on the absence of obligation for private sectors to report their lands. Started from the ratio legis mentioned above, the government needs to carry out the role of control, supervisory role, and the

role of regulation on land procurements conducted by privates for their interests under laws".

Land procurement for private interests is initially mentioned explicitly in Article 4, 11, and 12 of the Draft of Law on Land Procurement for Development. Article 4 of the Draft of Law on land procurement for the development determines: "Land procurement for development includes; (a) Land procurement for public purposes; and (b) Land procurement for private business interests". Furthermore, Article 11 of the Draft of Law specifies: "Land procurement for the benefit of private businesses is conducted in accordance with regional spatial plans or the plans of national and regional development". Furthermore, Article 12 determines; "Land procurement for the benefit of private businesses is conducted directly and voluntarily by private parties who need the lands by the parties entitled to".

In its development after the draft was passed into a law, the formulation of Article 4, 11, and 12 did not show up. Therefore, the one agreed by the House of Representatives and the Government is the formulation as contained in Article 12 paragraph (1) of Law No. 2 of 2012 which reads: "The development in public purpose referred to in Article 10 letter b shall be convened by the Government and can cooperate with State Owned Enterprises, Regional Owned Enterprises, or Private Sectors".

Land procurement for public purpose developed in the EU countries is not only carried out by the government alone but also collaborates with private entities in the public private partnership schemes (PPP). Although public private partnership (PPP) is not the only way (miracle way) of successful implementation in land procurement for development, it has more opportunities if all the roles are carried out by the government. The lesson learned practiced internationally is attempted to be in Indonesia. Thus, there are three patterns in the implementation of land procurement for development, namely: (1) the procurement of land by the government; (2) The procurement of land by the government in cooperation with private sectors; (3) the procurement of land by privates for public purposes or for the benefit of privates (Academic Paper of the Draft of Law No 2 of 2012, 61).

Public Private Partnership (PPP) is defined by Wiiliam J. Paren from *USAID Environmental Services Program* as: *"an agreement or contract, between a public entity and private party, under which: (a) private party undertakes government function for specified period of time; (b) the private party receives compensation for performing the function, directly or indirectly, (c) the private party is liable for the risks arising form performing the function and, (d) public facilities, land or other resources may be transferred or made available to the private party"*. (Sie Infokum, page:1).

The other definition of Public Private Partnership (PPP) is *"partnership between public sector and the private sector for the purposes of designing, planning, financing, constructing and/or operating project which would be regarded traditionally as falling within the remit of public sector"*. (Maniam Kalianam, 2008:208).

Public Private Partnership (PPP) can also be interpreted as a partnership between the Government and private sectors based on the capacity of each party to meet shared goals agreed in the field of public needs to consider the appropriateness of risk resource allocation, and rewards. (Bachtiar Rifai, 2011). In another sense, public private partnership is an agreement between two or more parties that allows them to cooperate with each other to achieve shared goal in which each party acts based on the level of responsibility and authority, the level of investment of resources, the level of risk potency and mutual benefit (Bachtiar Rifai, 2011).

Public Private Partnership (PPP) can also be viewed as a partnership between the government and private sectors in the provision of infrastructure, which were previously carried out entirely by the government. Each party involved in the partnership gets the benefit in relative to others according to their performance in certain sectors. The combination of benefit levels between partners and between sectors of activities directly affects the success of the implementation of Public Private Partnership (Bachtiar Rifai, 2011: 5). In a Public Private Partnership scheme (PPP), there are three parties which have their respective roles, i.e. the government or local government as regulator (policy makers); banking as funders; and the parties of private/ state/ local enterprises as special purpose companies which are responsible for the implementation of a project from design, construction, maintenance and operation (Dwinta Main, 2010; 146).

Public Private Partnership (PPP) is a tool to increase efficiency and improve the quality of products and public service. The shared goals to be achieved by using PPP scheme, among others, are to improve the effectiveness and efficiency in implementation, to improve the quality of products and public services, and the distribution of capital, risk, and competence or expertise in human resources together. On the other side, PPP is not only viewed from the public and private aspects, but also a triangle synergy between government, business, and communities. (Bambang Susanto & M Ali Berawi, 2012: 94).

Public Private Partnership (PPP) has been implemented in several countries, such as USA, UK, South Korea, India, Thailand, Philippines, and South Africa. Typically, in some countries, the infrastructure development activities such as trains, roads, energy, electricity power, and clean water are fully owned, conducted and financed by the Government. But in its development, not every country has sufficient capacities in the provision of infrastructure, especially in the aspect of financing. On the other hand, some infrastructure activities are managed by State Owned Enterprises (SOEs), and the national firms do not show optimal

performance. To accommodate the limitations of the financing of infrastructure development as well as encouraging the optimization of performance, Public Private Partnership (PPP) has been developed in several countries since the early 1990s (Bambang Susanto & M Ali Berawi, 2012).

Some factors that make the government needs to involve private parties in the implementation of development for public purpose are; (1) the lack of government funding; (2) The existing infrastructure is inadequate in terms of both quantity and quality; (3) the expertise of private sectors (Irwan Prasetyo, 2009: 1). Dwinanta Utama (2011:149) stated similar opinion, that is, the application of Public Private Partnership (PPP) will be increasingly important in the future caused by; limited government resources, increasing demand, efficiency in service, quality and quantity of services are low, mastering in technology, eliminating monopolies and bureaucracy.

Public Private Partnership (PPP) projects are initiated to invite more private participation and initiative in accelerating infrastructure development in Indonesia, while the funds provided by the Government is certainly not able to cover the entire costs. By cooperating with private sectors, funding needs are expected to be fulfilled. The government gives a guarantee that priority PPP projects are built by private parties and secured enough to pay back the investment referred to as the risk of return on investment. The government will also provide guarantees against political risk. When, during the concession period, the government makes changes in regulations resulted in the project is deemed not to be able to recover the investment in accordance with the agreement, the government will provide compensation to the organizer of the project (Aid for Development, 2012).

4. Conclusion

Based on the above, the writer can take the following conclusions:

Legal principles in the procurement of land for development in public purpose, namely the principles of humanity, justice, expediency, certainty, transparency, agreement, participation, welfare, sustainability, and harmony are in accordance with the values of the nation and state.

The dynamics of land procurement regulation in public purpose that involve private sectors in the legislation varies. In the Regulation of the Minister of Internal Affairs No. 15 of 1975, private sector can be involved in the procurement of land. In the Presidential Decree No. 55 of 1993, Presidential Decree No. 36 of 2005, in conjunction with Presidential Decree No. 65 of 2006 state that private sector cannot be involved in the procurement of land. In Law No. 2 of 2012, private sector can be involved in the procurement of land through the mechanism of public private partnership in the implementation of development.

The formulation of the regulation on the involvement of private enterprises in the procurement of land for public purposes is through Public Private Partnership models (PPP). In this cooperation, the government provides land, and the government carries out land procurement, while private sectors implement the development for public purposes in accordance with the agreement.

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