

Research Article

Quo Vadis: Establishment of a Land Bank after the Decision of the Constitutional Court of the Republic of Indonesia Number 91/PUU-XVIII/2020

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This study aims to examine and analyze the formation of a land bank after the Decision of the Constitutional Court of the Republic of Indonesia, Number 91/PUU-XVIII/2020, which was declared conditionally unconstitutional. The research method used is normative juridical research, which involves examining and inventorying various secondary data, namely library research. Based on the results of the research and discussion, it can be concluded that, first, the existence of a land bank, which is included in the cluster of Law Number 11 of 2020 concerning Job Creation, makes it relatively difficult to carry out its duties and authorities because, as the Constitutional Court stated in Decision Number 91/PUU-XVIII/2020, it was declared conditionally unconstitutional, so the government was prohibited from enacting implementing regulations or derivative regulations from a quo. Second, the government should comply with the decision of the Constitutional Court of the Republic of Indonesia as a check and balance; therefore, the DPR and the President must first improve the Job Creation Law so that land banks can carry out their functions and authorities.

Keywords: constitutional court, land, land bank

1. Introduction

God Almighty gave humans the gift of land, which they might use as a strategic capital in their daily life. Cosmologically, humans can discover a way to support themselves by owning land, as is the case with farming and raising livestock. In addition, a house built on land might serve as a shelter of security for the owner. To meet their needs, even humans can benefit from many kinds of natural resources that are present on the land.[1] The Republic of Indonesia's 1945 Constitution (UUD NRI 1945), states in Article 33 paragraph 3 that: "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". After then, Law Number 5 of 1969 respecting Basic Agrarian Principles (hereafter referred to as

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UUPA) was enacted as a practical realization of Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia.

With a concept known as the State's right to control (HMN) over agrarian resources, the UUPA, when considered from a legal and political perspective, has granted the state extensive powers. Although it was initially intended to eliminate the *verklaring* domain, the concept was exploited during the Dutch colonial era during the occupation of the archipelago to take by force or grab land governed by the community in general and the community of customary law in particular.[2] A unique formulation is therefore required to be able to ensure the supply of land given the significance of land for society. The government, which is the competent authority to regulate further, should set up a body or institution to handle the management, use, and distribution of land.

The government, in this case, the state, attempts to be present to address the demand for management, utilization, and distribution of land by establishing a land bank. This is done in accordance with Law Number 11 of 2020 about Job Creation (hereafter referred to as the UU Cipta Kerja). But the existence of land banks covered by or grouped under the Job Creation Act, as stipulated in Articles 125 to 135, has drawn particular attention in various circles, both by practitioners and academics.

It is rather challenging for these entities to exercise their powers and perform their duties because of the existence of land banks that are a part of or grouped in the Job Creation Law. This is so that the House of Representatives of the Republic of Indonesia (DPR RI) and the President can immediately make improvements within an estimated time of 2 (two) years, as the Constitutional Court of the Republic of Indonesia determined in its decision that a quo is declared conditionally unconstitutional. The prior Law shall be applied again during that time period, as indicated in the Constitutional Court Decision Number 91/PUU-XVIII/2020 in the request for a formal review. Additionally, the decision forbids the government from issuing regulations that implement or derive from Law Number 11 of 2020 regarding job creation (Government Regulations or Presidential Regulations). However, in reality, the government—in this case, the President—has issued Presidential Regulation Number 113 of 2021 regarding the Organization and Management of the Land Bank (PP Number 113 of 2021).

The previous research that had been done before included: first, Meiliyana Sultio (2020) finding that legal politics in the field of government is expected to be able to answer questions about the goals to be achieved and what to do with existing land as the means used. In addition, land law politics is a policy carried out by the government intending to enact the Land Law and Implementing Regulations so that land security and allotment can improve welfare for the community and encourage economic activity.[3]

Second, what was done by Natanel Lainsamputty, Ronny Soplantila, and Yosia Het-harie (2020) found that the Job Creation Law uses the concept of the Omnibus Law, which is a strategy for overcoming regulatory problems in the land sector. It is undeniable that problems related to regulatory arrangements due to overlapping regulations in the land sector are believed to be resolved effectively and efficiently by using the concept of the Omnibus Law as used in the Job Creation Law.[4]

If a comparison is made with two previous studies, there are similarities in discussing land, the Job Creation Law, and the development of public interests. However, the difference with this research is in the existence of a land bank after the Constitutional Court Decision Number 91/PUU-XVIII/2020, which was declared conditionally unconstitutional, because the establishment of a land bank is included in the Job Creation Law.

The author was then interested in researching and analyzing the topic Quo Vadis The Establishment of a Land Bank after the Decision of the Constitutional Court of the Republic of Indonesia Number 91/PUU-XVIII/2020 based on the summary provided above with the following formulations: What is the Urgency of Bank Establishment? and How Has the Land Bank Been Established Since the Constitutional Court of the Republic of Indonesia Decision Number 91/PUU-XVIII/2020?

2. Method

The research method employed is normative juridical research, which involves reviewing and making an inventory of diverse secondary sources, especially literature studies (review of literature), to find legal regulations, legal principles, and legal doctrines in order to address legal issues faced.[5]

3. Results and Discussion

3.1. The Urgency for the Establishment of a Land Bank

The land bank itself comes from 2 (two) terms, namely lands bank and land banking. The "land banking" when translated into Indonesian is "bank tanah". This is utilized to conduct operations involving land banks. While the phrase "land bank" can be used to describe the existence of organizations or partnerships between organizations engaged in land acquisition. When viewed in terms of comprehension, it is supposed that "land

banks are governments or non-profit entities that assemble, temporarily manage, and dispose of vacant land”.[6]

Various authors and experts have revealed Land Bank terminology. Among them, Jack Damen explained that “land banking is the structural acquisition and temporary management of land in rural areas by an impartial State agency, with the purpose to redistribute and/or lease out this land with a view to improve the agricultural structure and /or to relocate the land for other purposes with a general public interest”.[7] According to Maria SW Soemardjono, land bank institutions are generally intended to be used by all government initiatives to provide land, the use of which will be decided upon at a later time. The two categories of land bank institutions—general land banking institutions and special land banking institutions—can be separated based on their functions (special or project land banking).[8] Van Dijk added that the land bank is a mechanism for systematic land acquisition activities in a wide area, which would be used in the future in the context of putting land policy into practice. [9]

The existence of a land bank is a concept or idea from the government to deal with and respond to various land problems, including ensuring the availability of land for public interest and for those who need land. With the existence of a land bank, the government can acquire and own land in the future. Therefore, it eases the government to develop facilities and infrastructure needed by the community in order to improve the economy, such as roads, airports, railways, health services, government offices, and so on.

According to Article 125 paragraphs 2 and 4, a land bank is a special agency that manages the land. Its responsibilities include planning, acquiring, procuring, managing, utilizing, and distributing land. Himawan Arief Sugoto, a Secretary General of the National Land Agency (ATR/BPN) and the Minister of Agrarian Affairs and Spatial Planning, stated that the Land Bank’s role as a land manager will enable it to create land management strategies that will enable the development of optimal usage.[10]

When viewed conceptually, land banks can provide renewal or even reform in land governance, including both physically and administratively, such as the right land certificate for the sold land, the controlled land prices, land speculators eradication, and sustainable development support through land management administration (spatial planning and land use management) as well as for various other purposes.[11]

It is undeniable that the establishment of a land bank can actually reduce land speculation, which is a result of economic liberalization, which makes it possible for investors to profit greatly from the sale of land as a commodity, putting pressure on the government to be strict regarding the acquisition and distribution of land that

is still under construction. If this special organization or agency is run appropriately, the establishment of a land bank is also intended to lessen cases or conflicts from objections to the value of land compensation. Because the two statuses will have different implications, it must be clear whether the land bank will become a legal subject or not.

Undeniably, the establishment of a land bank is both a pressing necessity that has existed for a long time and a mandate from the 1945 Constitution of the Republic of Indonesia, which states in Article 33 paragraph 3 and is further firmly and explicitly embodied in Article 2 paragraph 2 Basic Agrarian Law that the state has the following authority[11]:

1. Controlling and managing the allocation, utilization, supply, or maintenance of land.
2. Establishing and governing the ownership rights that can be held over the land, water, and space.
3. Determining and governing legal relationships among people as well as legal activities pertaining to the earth, water, and space in order to ensure that everyone lives in a just and prosperous society.

When viewed from an empirical perspective, land banks can reflect and simultaneously address a number of urgent and complex issues that have frequently overshadowed government efforts to build infrastructure. These issues include the lack of available land for development, the need to save APBN and APBD funds, conflicts that frequently arise during the acquisition of land, and the negative effects of land mafia practices that frequently involve price speculation.[11] As a result, it is anticipated that the Land Bank will be able to overcome a number of obstacles to providing land for infrastructure development, including overcoming the strict land acquisition process, a lack of competence, and a shortage of land sector officials at the central and regional levels. Even though government funding is limited and land prices are rising, Indonesia needs a quick and efficient way to acquire land.

If later the establishment of a land bank proceeds as expected, a number of government infrastructure projects are impeded because of limitations in the land acquisition process, including government projects that are impeded by land acquisition, such as the South Sulawesi railway project,[12] the Jakarta-Bandung high-speed rail project,[13] the Yogyakarta-Solo toll road project which has only reached 10% (per cent),[14] and many other projects.

When viewed from an institutional perspective, the government, which has the right to acquire land through the Land Bank, must be able to strike a balance between the

fixed supply of land and the rising demand for it. The government, as the initiator of the establishment of this special agency, will face challenges when establishing the Land Bank. These challenges include[15]:

1. Which interests in the provision and distribution of land will take precedence over investment interests or equitable economic interests;
2. There is overlapping authority between the Land Bank and the Minister in the land sector or the Head of the Land Office/Head of the Land Regional Office.

Certainly, there is a great deal of hope that the establishment of a land bank will, in the future, be able to resolve and lessen the burdens of court cases resulting from consignment (objection to compensation) for land acquisition for the public interest, which must be maximized.

3.2. The existence of the Land Bank after the Decision of the Constitutional Court of the Republic of Indonesia Number 91/PUU-XVIII/2020

According to Law Number 11 of 2020 Concerning Job Creation, the Land Bank is a special institution with the mandate to manage land. Because more specific arrangements can be governed in regulations under the law, including in government regulations and presidential regulations, the a quo is not clearly explained as a state institution, State-Owned Enterprise (BUMN), Public Service Agency, or in other forms. This status is extremely important because it affects implementation, authority, employee status, and third-party legal protection.[15]

There are worries that the government's establishment of a land bank may be utilized by those in positions of power to revive the domain verklaring, a system that dates back to the Dutch colonial era and involves taking land forcibly or confiscating it (government or local government). If a person or organization, even someone who cannot establish their ownership, relies on the government (or state) to determine or legitimize their land occupation, it is therefore very likely that many lands owned by indigenous peoples in particular or other parties generally have the potential to be acquired by the state, which will later result in land disputes. This is because, up until now, relatively many lands of indigenous peoples do not have land ownership.[9]

Based on the description of Maria SW Sumardjono, an expert in the agrarian field, it is stated that the government has clearly violated the Constitutional Court's decision, particularly the decision of point 7 (seven) with the issuance of Presidential Regulation

Number 113 of 2021 concerning the Structure and Operation of the Land Bank.[16] According to constitutional law expert Zainal Arifin Mochtar, The violation of Presidential Regulation Number 113 is not a legal concept, but rather the principles of drafting laws and regulations. Therefore, since the Constitutional Court's decision is final, binding, and erga omnes, the government would be better off following it. In the meantime, the government has broken the law if it refuses to follow a ruling that has binding legal effect.[17] Even the Consortium for Agrarian Reform (KPA) expressed critical notes about the Land Bank's establishment as a government-style land speculator institution after the job creation bill was introduced. These critical notes included[18]:

1. (a)
 - i. The Land Bank adopted the domain verklaring (land stabilization) principle and abused the state's right of control;
 - ii. Liberalization of the land market and the easiness with which foreign business entities control land;
 - iii. Exacerbating inequality, agrarian conflicts, and community land grabbing;
 - iv. Facilitating land grabbing in the name of land acquisition for the benefit of investors;
 - v. The Land Bank's objectives dispute with the both agrarian reform objectives and the orientation of the public's ideology;
 - vi. In terms of land regulation and land acquisition, the Land Bank produces dualism, overlap, and conflicts of interest with the Ministry of ATR/BPN;
 - vii. Land Bank, an ideal location for corrupt and sneaky agrarian practices;
 - viii. The Job Creation Act is not legally associated to the Land Bank.

The establishment of a land bank, which is part of Law Number 11 of 2020 concerning job creation, was later ruled to be conditionally unconstitutional by the Constitutional Court of the Republic of Indonesia in a formal test application. As a result, it becomes more difficult for this special agency to carry out its duties and functions. By releasing Presidential Regulation Number 113 of 2021 about the Structure and Operation of the Land Bank, the government, however, acknowledged the Constitutional Court's decision in Number 91/PUU-XVIII/2020 and maintained the a quo law. But in order to implement a law that has already been enacted, an implementing regulation—either government regulation or a presidential regulation, is required. Further investigation reveals that PP No. 113 of 2021 was stipulated on December 27, 2021, after the Constitutional Court's Decision which was pronounced on November 2021.

The struggle is unavoidable among professionals, academics, and even lawmakers (DPR with the President's approval). A quo law cannot be applied without first being

revised; however, it may be used while the amendment to the law is being carried out, provided that it is unrelated to a national strategic program with a duration of 2 (two) years. However, based on his analysis, the author, in this case, believes that Law Number 11 of 2020 concerning Job Creation cannot be employed as a legal foundation or put into practice. Because, in accordance with the Constitutional Court's decision, the Job Creation Act was enacted in violation of the Republic of Indonesia's 1945 Constitution and will no longer have conditionally binding legal effect if it is not amended within 2 (two) years after the decision's pronouncement.[19] Additionally, the government's goal to attract investors from both local and foreign markets to invest, including strategic programs that have been decided by the government itself, is what led to the implementation of Law Number 11 of 2020 concerning Job Creation. It is clearly obvious that the spiritual context in which Law Number 11 of 2020 concerning Job Creation was drafted was to implement and simultaneously finance national strategic initiatives, therefore a quo law cannot serve as a basis for regulation.

The Constitutional Court was established as a method of control, supervision, and balancing (checks and balances) against other branches of power (legislative and executive), eliminating abuse of power and sectoral ego. This is one of the key ways that administrative practice is anchored. Because there is a supervisory effort when it comes to controlling, whereas when it comes to balance, it can be said, as in addition to institutions, that tasks and authority must be implemented in a way that is in line with the boundaries of power.[20] As a result, there is no choice but for the President and the DPR to follow the Constitutional Court's decision as it should.

4. Conclusion

The existence of the Land Bank is a government initiative to address a variety of land issues, including ensuring that there is land available for the public benefit and the interests of those who need it. Additionally, it can reduce land speculation, which is a result of economic liberalization, which makes it possible for investors to benefit greatly from the sale of land and makes it challenging for the government to acquire and distribute land for development. Certainly, there is an urgent need for a land bank to be established. It is based on Article 33 paragraph 3 of the Republic of Indonesia's 1945 Constitution, as well as being further clarified and expanded upon in Article 2 paragraph 2 of the Basic Agrarian Law.

The existence of the Land Bank is in a tough position because of the inclusion of a land bank in the part or cluster of Law Number 11 of 2020 concerning Job Creation. This

is because the Constitutional Court ruled that the Job Creation Law was against the 1945 Constitution of the Republic of Indonesia and that it lacked conditionally binding legal force if no repairs were made within 2 (two) years of the decision's pronouncement and if within that time it was not completed. If neither of those conditions was met, the previous law would then resume applying.

5. Conflict of Interest

The authors declare that there is no conflict of interest in this writing or publication.

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