

PROSIDING

SEMINAR INTERNASIONAL
FAKULTAS HUKUM UNIVERSITAS LAMPUNG

International Conference on Fundamental Rights (I-COFFEES)

Bandar Lampung, 7 September 2018



PENERBIT:

FAKULTAS HUKUM UNIVERSITAS LAMPUNG

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SEMINAR INTERNASIONAL
FAKULTAS HUKUM - UNIVERSITAS LAMPUNG

“International Conference on Fundamental Rights (I-COFFEES)”

Bandar Lampung, 7 September 2018



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Fakultas Hukum - Universitas Lampung

Welcoming Address
The First International Conference on Fundamental Rights

I heartily welcome you for the prestigious occasion of our Faculty. The idea of putting the researchers, academics and practitioners of an educational institution is so inspiring: what was once planted as a sapling is now all grown into a large tree. Here I can see a blend of extraordinary and educated people who have made this day arrive; they have come to us from each and every corner of the city.

This year, I find it to be my pleasure to address you people who are the minds of today and the responsible citizens of tomorrow. I and whole of our dedicated Committee team appreciate the efforts put in by researchers, academics and practitioners to come and presented each of paper that will be published. So, here I feel privileged to extend my warm welcome to all who are constantly extending their support and love to fulfil I-COFFEES.

The committee have received 146 paper proposals and we accepted 128 papers, but unfortunately only 63 papers will be presented during the conference, encompassing 12 themes relating with fundamental rights.

Taking further, I on the behalf of everyone present here, heartily welcome all the presenter and participant, the guest of honour, and all the keynote speaker. I am especially thankful to Prof. Yushiro Kusano, Dr. Kyaw Nyi Nyi, Ph. D., MHRD, MSc., Prof. Dr. M. Idriss Fassasi, LL.M., Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D., and Prof. Muhammad Akib for accepted our request and readily agreed when he looked at today's event and its program. So, I hope for everyone to have an endeavors and life experiences from I-COFFEES.

Bandar Lampung, 7 September 2018
Chef Committee,


Dr. Rudi Natamiharja, S.H., DEA.

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PROCEEDING

THE FIRST INTERNATIONAL CONFERENCE ON FUNDAMENTAL RIGHTS FACULTY OF LAW UNIVERSITY OF LAMPUNG



**September 7th , 2018
LAMPUNG - INDONESIA**

Considering Affected People Rights as a Human Rights in the Land Acquisition for Public Interests

Ade Arif Firmansyah, HS. Tisnanta, and Malicia Evendia

Abstract

Public land acquisition within the relational intersection between the interests of affected people, government, private sectors and communities will be subject to various problems ranging from conflict of indemnity to integration with spatial planning, development and environmental factors. Weak position of affected people often leads to loss in the form of guarantee of sustainable livelihoods after the land acquisition is completed. The existing legal instruments, both the 1945 Constitution and the Law No. 39 of 1999 on Human Rights, do not explicitly recognize the rights of affected people in the land acquisition for public purposes as a human right, so the authors deem it necessary to construct theoretical recognition of the affected people rights explicitly as a part of human rights. This paper used a critical paradigm optics that aimed to build up theoretical arguments to consider the rights of affected people explicitly in the land acquisition for the public interest as part of human rights, so that the position of the affected people will be stronger. Using doctrinal methods in constructing the theoretical arguments to be offered, this paper borrowed several theories as an analytical tool from Philipus M. Hadjon, Satjipto Rahardjo and the concept of hukum pengayoman from Sahardjo.

Keywords: affected people, human rights, land acquisition.

A. Introduction

Development carried out by the state is basically done for the benefit of the nation with the greatest benefit to the welfare of the people. Development has a variety of forms and types, one of which is the construction to meet the public good or the public interest, in the context of the construction is done by building a specific infrastructure that is intended for public use by using a public land acquisition method.¹⁴⁹ Although public land acquisition is currently designed to support economic growth and the nation's competitiveness which become an important issue that is a priority policy of the governments of countries in the world.¹⁵⁰ In the implementation there is a conflict of interest and conflict between the direct affected people, the community and the government and the local government, even it gives the negative impact to indirect affected people due to many factors.¹⁵¹

For the example, one of problem that arises because a process of public land acquisition around the airport is the noise level of airport activity has caused various problems, ranging from decreased hearing levels to rising blood pressure of residents in the area around the airport.¹⁵² Data from BPN as of September 2013, the number of land cases reached 4.223 cases. The number of cases is due to land acquisition under the pretext of public interest; sometimes wounding people, because of the use of land taken by the government is not as originally planned, and even tend to give birth to the former holders of the rights of society's woes.¹⁵³

Until now, the mechanism of land acquisition for public purposes basically can be done in two ways as follows:

1. First, by land right discharge. The land right discharge stipulated in Law No. 2 of 2012 on Land Acquisition to Development for Public Interest refers to the implementation of

¹⁴⁹ Drafting Team, (2010), *Academic Draft Act Number 2 Year 2012 on Land Acquisition to Development for Public Interest*, DPR-RI, Jakarta, P 1.

¹⁵⁰ Ade Arif Firmansyah and HS. Tisnanta, (2015), *Land Acquisition In Accelerating And Expansion Of Indonesia's Economic Development Program: A Review Of Law, Moral And Politic Relations*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 7, Issue 4 August, ISSN 2289-1560, p.18.

¹⁵¹ Ade Arif Firmansyah, Yos Johan Utama and HS Tisnanta, (2017), *The Composition Of Land Saving Model Regulation: Eforts To Reduce Conflict In Land Acquisition For Public Interests*, International Journal of Business, Economics and Law, Vol. 13, Issue 4 (August), p. 101.

¹⁵² Ade Arif Firmansyah, HS. Tisnanta, FX. Sumarja and Fathoni, (2016), *Law Design Of Institutions Coordination As An Efforts To Harmonize, Policy Housing Development Around The Airport In Indonesia*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 11, Issue 4 December, ISSN 2289-1560, p.52-53.

¹⁵³ Ade Arif Firmansyah, (2014), *Legal Protection Pattern Of Indonesia's Land Acquisition Regulation: Towards The Thickest Version Rule Of Law*, International Journal of Business, Economics and Law, Vol. 5, Issue 4 (Dec.), p. 142.

Presidential Decree No. 71 Year 2012 of Implementation of Land Acquisition of Development for Public Interest.

2. Second, by applying the land rights revocation to the president. Land right revocation provisions stipulated in Law No. 20 Year 1961 on Revocation of Land and Property objects that are therein, the Government Regulation No. 39 Year 1973 on Determination of Compensation Events By High Court Relating to Land Right Revocation and Assets objects on it, and the Presidential Instruction No. 9 of 1973 on Guidelines for Land Right Revocation and Assets objects on it.

The problems that arise include one of the reasons because it is still legalized the way to revoke land rights that stipulated in Law No. 20 Year 1961 and the lack of recognition of the rights of the owner or community in terms of land acquisition activities for the public interest as human rights. Weak position of affected people often leads to losses in the form of guarantee of sustainable livelihoods after the land acquisition is completed. The existing legal instruments, both the 1945 Constitution and the Law No. 39 of 1999 on Human Rights, do not explicitly recognize the rights of affected people in the land acquisition for public purposes as a human right, so the authors deem it necessary to construct theoretical recognition of the affected people rights is explicit as a part of human rights to legally strengthen the position of affected people in land acquisition for the public interest.

B. Discussion

The term human rights is a translation of the term *droit's de l'homme* in French which means “human rights”, which in Dutch is called *menselijke rechten*.¹⁵⁴ According to John Locke, human rights are rights that are given directly by God the Creator as a natural right. Thus, human rights are rights that humans have solely because they are human. Mankind has it not because it is given to it by society or based on positive law, but solely based on its dignity as a human.¹⁵⁵

Current developments, modern countries integrate various recognition of human rights into the constitution and further elaborated in the act. The matter is deemed necessary to better guarantee of legal certainty and justice in the fulfillment and enforcement of human rights. In Indonesia, the rights of affected people in land acquisition for the public interest

¹⁵⁴Budiyono and Rudy, (2014), *Konstitusi dan HAM*, Indepth Publishing, p. 57.

¹⁵⁵Jack Donnely, (2000), *Universal Human Rights in Theory and Practice*, Cornell University Press, Itacha and London, P.7-12, in *Ibid...*p. 58.

need to be included in the category of human rights, this is one of the main causes due to the legalization of the way to revoke land rights in land acquisition for the public interest which the aspect of legal protection is weak.

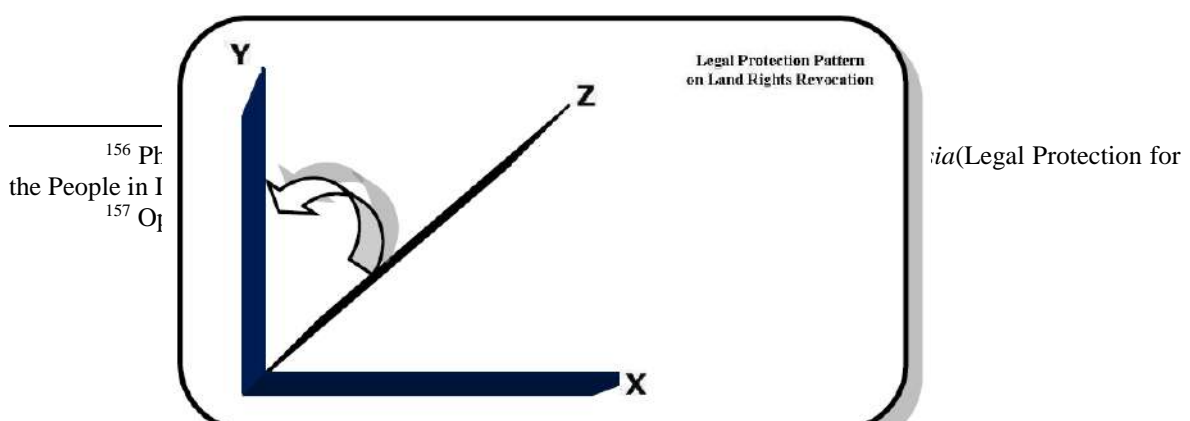
According to Philipus M. Hadjon, with "acts of government" as a central point, (associated with legal protection for the people), distinguished two kinds of legal protection, namely: preventive legal protection and repressive legal protection. In preventive legal protection, the people are given the opportunity to object (*inspraak*) or her opinion before a decision is the definitive form of government gets. Thus preventive legal protection aims to prevent disputes whereas the repressive legal protection aimed to resolving the dispute.¹⁵⁶

Land rights revocation that stipulated in Law no. 20 of 1961 did not provide the legal protection that is preventive, because the regulation did not provide access for people to express opinions or objections in the process of land acquisition. However, the way the revocation of land rights provides legal protection that are repressive to appeal to the high court that his territory lay of the land and includes a place/object if it is not willing to accept the compensation provided for in the decree of the President as deemed less worthy numbers. The high court decides the matter in the first and the last.

Requests may appeal to the High Court not later than within one month from the date of the Decree of the President submitted to the concerned. No later than within one month after receipt of the appeal request, the case should have been checked by the concerned high court. Examination and judgment rendered in the shortest possible time. High court decision notified to the parties concern, it is not later than one month after the court judgment.

Legal protection regulation in the land rights revocation, if plotted on a picture to symbolize the X axis as a preventive legal protection and the Y axis as a repressive legal protection. Z axis as a legal protection can only be shifted toward the Y axis because it does not provide a preventive legal protection form. The picture of the shift towards the Y-axis, Z-axis are presented in picture one.

Picture 1: Legal Protection Pattern on Land Rights Revocation¹⁵⁷



The weak position of the affected party in the revocation of the rights to land coupled with the condition of not explicitly regulating the rights of affected people as human rights. 1945 Constitution of Indonesia and the Law No. 39 of 1999 on Human Rights implicitly stipulate the rights of affected people in land acquisition for the public interest. Supposedly, due to the conditions of existing and applicable land procurement regulations that still allow the use of inhumane revocation of land rights, it is urgent to make the explicit rights of affected people as one type of human rights recognized and regulated in the constitution or act. Jimly Asshiddiqie divides the formulation of Human Rights in the 1945 Constitution Amendment Results in several groups of material as follows:¹⁵⁸

¹⁵⁸ Jimly Asshiddiqie, (2008), *Pokok-Pokok Hukum Tata Negara Indonesia: Pasca Reformasi*, Jakarta: PT Bhuna Ilmu Populer. In Ibid, Budiyono..... P. 101-103.

Table 1. Formulation of Human Rights in the 1945 Constitution

The Type of Human Rights		
Civil Rights	Political, Economic, Social and Cultural Rights	Special Rights and Rights to Development
<ul style="list-style-type: none"> ➤ Everyone has the right to live, maintain his life and life; ➤ Everyone has the right to be free from torture, cruel, inhuman and degrading treatment or punishment; ➤ Everyone has the right to be free from all forms of slavery; ➤ Every person is free to embrace religion and worship according to his religion; ➤ Everyone has the right to be free to have the confidence of the mind and conscience; ➤ Everyone has the right to be recognized as a person before the law; ➤ Everyone has the right to equal treatment before the law and government; ➤ Everyone has the right not to be prosecuted for retroactive laws; ➤ Everyone has the right to form a family and continue the descent through a legal marriage; ➤ Everyone has the right to get citizenship status ➤ Everyone has the right to be free to live in the territory of his country, leave and 	<ul style="list-style-type: none"> ➤ Every citizen has the right to associate, gather and express his opinion peacefully; ➤ Every citizen has the right to choose and choose within the framework of the people's representative institution; ➤ Every citizen can be appointed to public positions; ➤ Everyone has the right to obtain and choose legitimate and appropriate work for humanity; ➤ Everyone has the right to work, get rewarded, and get proper treatment in a fair working relationship; ➤ Everyone has the right to own private property; ➤ Every citizen has the right to social security that is needed to live properly and enable the development of himself as a dignified human being; ➤ Everyone has the right to communicate and obtain information; ➤ Every person obtains and chooses education and teaching; ➤ Every person has the right to develop and benefit from science and technology, art and culture to improve the quality of life and welfare of humanity; ➤ The state guarantees respect for cultural education and the rights of local communities in harmony with the times and levels of national civilization; ➤ The state recognizes every culture as part of national culture; ➤ The state upholds humanitarian ethics and moral values taught by every religion, and guarantee the independence of every citizen to embrace and live the teachings of his religion. 	<ul style="list-style-type: none"> ➤ Every citizen who has social problems, including isolated groups and who lives in a remote environment, has the right to get special facilities and treatment to obtain equal opportunities; ➤ Women's rights are guaranteed and protected to achieve gender equality in national life; ➤ Special rights inherent in women which are due to the guarantee function guaranteed and protected by law; ➤ Every child has the right to love, attention and protection of parents, family, community and country for their physical and mental growth and personal development; ➤ Every citizen has the right to participate in management and enjoy the benefits derived from the management of natural wealth; ➤ Everyone has the right to have a clean and healthy environment; ➤ Temporary policies, treatments or special actions that are set forth in legal legislation that are intended to equalize the level of development of certain groups that have experienced discrimination with other groups in society, and special treatment.

<p>return to his country;</p> <ul style="list-style-type: none"> ➤ Everyone has the right to obtain political asylum; ➤ Everyone has the right to be free from all forms of discriminatory treatment and has the right to obtain legal protection from such discriminatory treatment. 		
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From table one above, there is no recognition of the affected party as part of human rights, whereas according to FAO research the constitutions of many countries provide for both the protection of private property rights and the power of the government to acquire land without the willing consent of the owner. There is, however, great variation. Some countries have broadly defined provisions for compulsory acquisition, while those of other countries are more specific.¹⁵⁹

Article 4 of Law No. 39 of 1999 on human rights regulate the kind of human rights as follows: the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted on the basis of a retroactive law is human rights that cannot be reduced under any circumstances and by anyone.

From further elaboration of these rights, there is absolutely nothing that regulates the rights of affected people in land acquisition for the public interest explicitly. That is, as legislation under the 1945 constitution, which details the types of human rights, law number 39 of 1999 concerning human rights has not completely elaborated the types of human rights.

Therefore, a progressive legal breakthrough is needed to protect the affected people in land acquisition for the public interest by regulating the rights of the affected people as human rights. This right is in line with the idea of progressive law and the concept of protection in Indonesian law.

¹⁵⁹ FAO Team, (2009), *FAO Land Tenure Studies*, FAO, p. 7.

Likewise with the idea of progressive law, according to Satjipto Rahardjo¹⁶⁰ the idea of progressive law starts from the basic philosophical assumption that law is for man, not vice versa. Thus the existence of law is to serve and protect human beings, not the other way around. Law is regarded as an institution aimed at bringing people to a just, prosperous and happy life. Progressive law embraces a pro-justice legal ideology and a pro-people law.¹⁶¹ The progressive legal character that requires the presence of law is associated with empowerment as its social goal, causing progressive law also close to the social engineering of Roscoe Pound.¹⁶²

According to Arief Sidharta, Pancasila as a legal goal to manifest pengayoman,¹⁶³ to protect people passively by preventing arbitrary acts and actively by creating a human condition that allows human society to take place fairly so that every human being gets the opportunity broad and equal to develop the full potential of his humanity.¹⁶⁴ By being categorized as part of human rights, it is hoped that the affected people will be guaranteed more rights in land acquisition for the public interest, so that inhumane ways such as revocation of land rights are not taken by the government.

¹⁶⁰ The idea of progressive law first appeared in 2002 through an article written by Satjipto Rahardjo on the Kompas newspaper entitled "Indonesia Requires Progressive Law Enforcement, June 15, 2002.

¹⁶¹ Satjipto Rahardjo, (2009), *Hukum Progresif sebuah Sintesa Hukum Indonesia* (Progressive Law, an Indonesian Law Synthesis), Genta Publishing, Yogyakarta, p. 6.

¹⁶² Roscoe Pound dalam dalam Bernard L. Tanya et al, (2010), *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi* (The Law Theory of People's Ordered Strategy across Space and Generation), Declare that to achieve justice it is necessary to do progressive step, that is function of law to arrange change, Genta Publishing, Yogyakarta, p. 155.

¹⁶³ The word pengayoman was first introduced in the field of law by Sahardjo. According to Daniel S. Lev, in 1960 Sahardjo was replaced the blindfolded lady with scales by a stylized Banyan tree as Indonesia's symbol of justice, that inscribed with the Javanese word Pengajoman-protection and succor. It also represented a quickening of the process of transformation of the heritage of Dutch colonial law into Indonesian law. Daniel S. Lev, (1965), *The Lady and the Banyan Tree: Civil-Law Change in Indonesia*, *The American Journal of Comparative Law*, Vol. 14. No. 2 (spring). p. 282.

¹⁶⁴ Bernard Arief Sidharta, (2013), *Ilmu Hukum Indonesia, Upaya Pengembangan Ilmu Hukum Sistematis Yang Responsif Terhadap Perubahan Masyarakat* (Indonesian Jurisprudence, Efforts of Systematic Jurisprudence Development towards Responsive to Community Change), Genta Publishing, Yogyakarta, p. 105.

C. Conclusion

Affected people rights in the land acquisition for public interests is very urgent and needs to be considered to be categorized as a human rights due to the urgency of the conditions caused by the acquisition of land for public interest which can lead to disruption of the sustainability of the affected people life.

The government and the House of Representatives need to review law number 39 of 1999 concerning human rights and insert the rights of affected people as one type of human rights to guarantee legal protection for the affected people in land acquisition for the public interest.

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