

Juridical Analysis Of The Existence Of Land Bank On The Law About Work Creation

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Abstract.

In 2020, Law Number 11 of 2020 concerning Job Creation was introduced. From this Job Creation Act, a new agency was born, namely the Land Bank Agency, which is a special institution that manages land. Whereas previously there was a National Land Agency in charge of land affairs. With the existence of two institutions that regulate the same thing, it is feared that there will be overlapping powers. After the issuance of the Job Creation Act, in April 2021 the government issued a derivative rule Number 64 of 2021 concerning the Land Bank Agency. However, in November 2021 it turned out that the Constitutional Court issued Decision Number 91/PUU-XVIII/2020. However, despite the issuance of Decision Number 91/PUU-XVIII/2020, the president still issues presidential decrees, namely presidential regulation number 113 of 2021 concerning The Structure and Administration of The Land Bank. This is contrary to the previous decision of the constitutional court. The purpose of this study is to determine the indications of equal authority between the Land Bank Agency and the National Land Agency and how the existence of the Land Bank Agency after the Constitutional Court Decision Number 91/PUU-XVIII/2020 This research uses normative research or commonly referred to as library research. This research approach uses a law approach, a conceptual approach and a philosophical approach. Indications of the same authority between the Land Bank Agency and the National Land Agency are Land Procurement and Land Utilization Control, for the Land Bank Agency itself to obtain Management Rights so that the difference in the task area between the two institutions is visible. However, with the issuance of Presidential Decree Number 113 of 2021, it is a violation and the existence of the Land Bank Agency can be null and void by law.

Keywords: *Existence, Land Bank, the National Land Agency and Management Rights.*

I. INTRODUCTION

Soil is the source of life. Therefore, land and humans have an inseparable relationship. The problem is not only the land itself, but how the state regulates land tenure in order to create prosperity and justice. In Law Number 05 of 1960 or commonly referred to as the Basic Agrarian Law, it is stated that the relationship between the earth and the Indonesian nation is eternal in which all land in Indonesia belongs to the Indonesian nation. The Basic Agrarian Law in its consideration also emphasized that the national agrarian law must provide the possibility for the achievement of the functions of the earth, water and space, in accordance with the interests of the Indonesian people and the development of the times and is the embodiment of the principle of God Almighty, Humanity, Nationality, Democracy.ⁱ The state needs clear rules regarding land management in Indonesia.

These regulations are also expected to help the public interest, social interest, national development interest, economic equity, land consolidation and agrarian reform. Hugo Grotius (de Groot) argues that "law is a rule of moral obliging to that which is". As an expert who understands natural law, Grotius bases his legal understanding on moral provisions, in which the moral rules must serve the purpose of the state. The state is formed from the human mind that has a tendency to live together / in society (*appetitus societatis*).ⁱⁱ The agency in charge of the land sector is the National Land Agency in accordance with the provisions of the legislation. The National Land Agency itself is a Non-Ministerial Government Institution which is under and responsible to the President. The initial National Land Agency was formed in 1988 based on the Decree of the President of the Republic of Indonesia Number 26 of 1988 concerning the National Land Agency.ⁱⁱⁱ However, over time there have been many changes and the latest Presidential Regulation concerning the National Land Agency is regulated in Presidential Regulation Number 48 of 2020.^{iv}

In 2020, Law Number 11 of 2020 concerning Job Creation was introduced. Article 125 of the Job

Creation Law states that:

- 1) Central Government establishes Land Bank Agency
- 2) The Land Bank Agency as referred to in Paragraph (1) is a special agency that manages land.
- 3) The assets of the Land Bank Agency are separated state assets.
- 4) The Land Bank Agency functions to carry out the planning, acquisition, procurement, management, utilization, and distribution of land.

The existence of the Land Bank Agency is one of the government's breakthroughs in providing land for the public interest and the interests of the people who need land.⁹ Prior to the issuance of the Job Creation Act, land was managed by the National Land Agency. With the existence of two institutions that regulate the same thing, it is feared that there will be overlapping powers. In April 2021, the government issued a derivative regulation regarding the Land Bank Agency Number 64 of 2021. However, in November 2021 it turned out that the Constitutional Court issued Decision Number 91/PUU-XVIII/2020. The essence of the contents of the decision is that the legislators must immediately make changes to the Law for the Establishment of Legislation by including the Omnibus method within a period of no later than 2 (two) years after the decision is issued.

After that, legislators can follow up with changes to laws that use the omnibus method. However, despite the issuance of Decision Number 91/PUU-XVIII/2020, the President still issued a new derivative rule regarding the Land Bank Agency, namely Presidential Regulation Number 113 of 2021 concerning the Structure and Administration of the Land Bank Agency. The issuance of this Presidential Regulation contradicts the Constitutional Court Decision Number 91/PUU-XVIII/2020 which states that: "Declare to suspend all strategic and broad-impact actions/policies, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation". From the description of the background above, there are several problems regarding this Land Bank Agency, therefore it is necessary to have a thorough study of the Land Bank Agency contained in Law Number 11 of 2020 concerning Job Creation against the authority of the National Land Agency and legal conflicts due to its issuance Presidential Regulation which contradicts the Constitutional Court Decision Number 91/PUU-XVIII/2020.

II. METHODS

The analytical techniques selected to normative legal research. This type of research was used because the basis of the issue of legal conflict and legal ambiguity contained in Law Number 11 of 2020 concerning Job Creation on the establishment of the Land Bank Agency. This research approach uses a legal approach, a conceptual approach and a philosophical approach. The technique of collecting legal materials used is a library research technique, the legal materials used are primary legal materials from Law Number 11 of 2020 concerning Job Creation for the Land Bank Agency section, then the derivative rules and regulations relating to the agency are collected. Besides that, it also uses secondary legal materials such as books and journals related to Omnibus Law, State Administration, Land Bank Agency and the decision of the Constitutional Court. After drawing conclusions from the results of processing legal materials. Furthermore, the researchers added descriptive and prescriptions regarding the results of the research regarding the division of task areas between the National Land Agency and the Land Bank Agency and the existence of the Land Bank Agency after the Constitutional Court Decision Number 91/PUU-XVIII/2020.

III. RESULT AND DISCUSSION

Indication of the same authority between the Land Bank Agency and the National Land Agency

Land cannot be separated from human life. Along with the times with the increasing number of human populations, it also affects the economy which must always improve from time to time. Land has a big impact on the economy, especially the issue of business licensing or opening a business. Therefore, land management must be carried out as well as possible for the welfare of the community. In implementing the land management, the government established an institution, namely the National Land Agency which was originally formed based on Presidential Decree No. 26 of 1988 concerning the National Land Agency. Then

over time there was a slight change regarding the legal basis of the National Land Agency. In Presidential Regulation Number 20 of 2015 concerning the National Land Agency, it is stated that the National Land Agency is a Non-Ministerial Government Institution. Based on the above understanding, it can be seen that what distinguishes the definition of BPN based on the Presidential Decree is related to its mention. Along with the times, agrarian reform is increasingly needed. Agrarian reform itself is a restructuring of the structure of control, ownership, use and utilization of land that is more equitable through structuring access for the prosperity of the Indonesian people.^{vi} As previously known, the government in the land sector is assigned to the National Land Agency. However, in 2020, Law Number 11 of 2020 concerning Job Creation was issued. In the Job Creation Act, it is stated that the government will create a new institution, namely the Land Bank Agency. The Land Bank Agency itself is a special agency that manages land. Therefore, it is feared that there will be an overlap of authority between the National Land Agency and the Land Bank Agency. Some of the duties, functions and authorities of the two institutions have similarities based on the laws and regulations governing the two institutions. The following is an indication of the equal authority between the Land Bank Agency and the National Land Agency:

Land Procurement

Land procurement is the activity of providing land by providing appropriate and fair compensation to the entitled party.^{vii} Land procurement aims to provide land for the implementation of development in order to improve the welfare and prosperity of the nation, state and society while still guaranteeing the legal interests of the entitled parties. In the implementation of land acquisition itself is carried out by the government through the Governor. The governor formed a team to conduct a study on objections to the location plan where the development would be held. In carrying out land acquisition, the governor forms a team, one of which is the Head of the Regional Office of the National Land Agency as secretary and concurrently member in accordance with the provisions of Law Number 2 of 2012 concerning Land Procurement for Development in the Public Interest. In addition, the role of the National Land Agency in carrying out Land Procurement is also regulated in Presidential Regulation Number 48 of 2020 in article 3, which states that the National Land Agency carries out the function of problem formulation and implementation of policies in the field of land acquisition and land development.

However, in Government Regulation Number 64 of 2021 concerning Land Bank Agency Article 3 Paragraph (1) which reads, Land bank has the following functions:

1. Planning;
2. Land Acquisition;
3. Land Procurement;
4. Land Management;
5. Utilization of land; And
6. Land Distribution.

It is stated that one of the functions of the Land Bank is to carry out land acquisition through the mechanism of land acquisition stages for development in the public interest or direct land acquisition. In addition, if you look at Government Regulation Number 64 of 2021, Article 23 also states that the Land Bank has the authority to carry out land acquisition. It's just that the Government Regulation concerning the Land Bank Agency only mentions its functions and authorities. There is no more in-depth explanation of how the implementation mechanism will be, especially since it was previously known that prior to the emergence of the Job Creation Act, the National Land Agency had this authority function first. Furthermore, in terms of land acquisition, it can refer to Government Regulation Number 19 of 2021 concerning Implementation of Land Procurement for Development in the Public Interest. This Government Regulation will show the division of tasks between the Land Bank Agency and the National Land Agency. It is stated that the Land Bank Agency is one of the agencies that requires the object of land acquisition, this is contained in Government Regulation Number 19 of 2021 Article 1 which reads: "Institutions that require land are state institutions, ministries, non-ministerial government institutions, provincial governments, district/city governments, land bank agencies and state-owned legal entities, state-owned enterprises/regional-owned

enterprises that have received special assignments from the central government/regional government or Business Entities that get power of attorney based on agreements from state institutions, ministries, non-ministerial government agencies, provincial governments, district or city governments, state-owned legal entities, state-owned enterprises that receive special assignments from the Central Government or Local Governments in the context of providing infrastructure for the public interest. "In addition, the Land Bank Agency can also be the rightful party if the Land Bank Agency controls or owns the object of land acquisition. This is in accordance with the provisions of Law Number 19 of 2021 concerning the Implementation of Land Procurement for Development in the Public Interest Article 18 Paragraph (1) which reads

"Eligible Parties as referred to in Article 17 include individuals, legal entities, social entities, religious bodies, Central Government, Regional Governments, village governments, Land Banks, state-owned enterprises, regionally-owned enterprises, and village-owned enterprises that have or control the Land Procurement Object in accordance with the provisions of the legislation."

Meanwhile, the task of the National Land Agency in the field of land acquisition is that if there is an agency that requires the land, the agency can coordinate with the ministry/institution that carries out government affairs in the land sector or can be called the National Land Agency to get a general description of the location of the land and its area. the required land, the status of the land, as well as the estimated timeframe for the implementation of land acquisition and the estimated operational and support costs as well as the cost of certification. In the implementation of land acquisition itself, the governor forms a preparatory team consisting of regents or mayors, agencies that require land, government agencies that carry out affairs in the land sector or the National Land Agency and if deemed necessary, other relevant agencies can be involved. If the Land Bank Agency is a government agency that requires land, the Land Bank Agency is also included in the implementing team for the land acquisition.

Land Use Control

Land use control is a method of land management that is needed to ensure whether land use is in accordance with the spatial plan that has been determined. What is meant by space here is a container that includes land space, sea space, and air space including space within the earth as a unitary area, where humans and other living things carry out their activities and survive. Meanwhile, spatial planning is a form of spatial structure and spatial pattern. So the spatial plan is the result of spatial planning which is a process to determine the spatial structure and spatial pattern which includes the preparation and determination of the spatial plan, this is explained in Law Number 26 of 2007. However, the arrangement in spatial planning is revoked and regulated by Law Number 11 of 2020 concerning Job Creation. In Indonesia there are many abandoned lands, one of which is in the area of South Kalimantan. There are 2,589.46 hectares of Abandoned Land Cultivation Rights in South Kalimantan Province.

Data Of Abandoned Land Cultivation Rights In South Kalimantan Province

No.	Name and Address of Rightsholder	Land location	Abandoned Land Area (Ha)
1.	PT. Windu Utama	Tanah Laut, Pagatan Besar, Takisung	49 , 40
2.	PT. Senta Windu Tabanio	Tanah Laut, Pagatan Besar, Takisung	92
3.	PT. Sarana Bubur	Tanah Laut, Kandangan Lama, Panyipatan	621.48
4.	PT. Gunung Meranti Raya	Tanah Laut, Asam-Asam, Jorong Jorong	1402.58
5.	PT. Asri Lestari	Tapin, hangui, Bungur	424
Amount			2589.46

Data Source : National Land Agency of South Kalimantan Province

NO	ACQUISITION	AREA (Ha)
1	The decision to grant Management Rights to the Land Bank from the release of part of HGB 4/Kaplas in the name of PT. Delimas Suryakana, located in Asahan Regency	30,0000
2	The decision to grant management rights to the Land Bank from the release of a portion of HGB 1/Sei Raja on behalf of PT. Delimas Suryakana, located in Tanjung Balai City	10,0000
3	Decree of the Minister of ATR/Head of BPN No. 3/PPPTN/KEM-	4,346,0500

	ATR/BPN/III/2022 dated 18 March 2022 concerning Determination of Utilization of State Public Reserve Land located in Riko Village, Pantai Lango, Jenebora, and Gersik Village, Panajam District, Maridan Village, Sapuku District, North Panajam Paser Regency , East Kalimantan Province	
4	Decree Number 2/PPTN/KEM-ATR/BPN/III/2022 Date. March 18, 2022 concerning Stipulation of State Land Utilization Appropriations Originating from Relinquishment of Building Use Rights Numbers 00.173, 00119, 00117, 00124, 00.163, 00430, 00118, 00184, 00171, 00222, 00433, 00335, and 00185/Beraban Village on behalf of PT. Desa Beraban. Tanahlot Permai Valley is located in Beraban Village, Kediri District, Tabanan Regency, Bali Province	4.6725
5	Decree of the Minister of ATR/Head of BPN No. 1/PPPTN/KEM-ATR/BPN/III/2022 Concerning the Determination of Utilization of State Land of Former Land Indications of Abandoned Originating from the Transfer of Partial Building Use Rights Numbers 17, 18 and 19/ West Penenang on behalf of PT. Grahawita Santika is located in West Penenang Village (now Maluku Village), Tanjung District (now Pemenang District), North Lombok Regency, West Nusa Tenggara Province	1.2594
	Amount	4,391,9819

Data Source : Websites and Seminars from Iskandar Syah

Planned to target the Land Bank Agency, namely 2,000 hectares of clear and clean certified land originating from a government decree in 2002, the ministry of ATR/BPN in this case the Directorate General of Control and Control Land and Space with the support of the Regional Office of the Provincial National Land Agency and the Land Office, has allocated land to be managed as an asset of the Land Bank Agency covering an area of 4,392,0179 Ha (or about 219.60% of the target), with details of 40 Ha which has been granted rights. Management to the Land Bank Agency, while for the rest will be immediately applied for Management Rights by the Land Bank Agency. Based on the description above, it can be seen that there are differences in the task areas between the Land Bank Agency and the National Land Agency. The Land Bank Agency acts as a Land Manager while the National Land Agency acts as a regulator. This is different when it comes to forest management in Indonesia, where the Ministry of Environment and Forestry functions as a regulator as well as forestry manager in Indonesia.^{viii} This is because the Land Bank Agency is granted Management Rights. The Land Bank Agency also obtains assets not only from the state but can also obtain land assets from other parties. From other parties, this means through the process of purchasing, receiving grants/donations or the like, exchanging, relinquishing rights, and obtaining other legal forms.^{ix}

The Existence of the Land Bank Agency After the Decision of the Constitutional Court Number 91/PUU-XVIII/2020

The 1945 Constitution of the Republic of Indonesia Article 24C Paragraphs (1) and (2) states that:

- “1) The Constitutional Court has the authority to adjudicate at the first and last levels whose decisions are final to examine laws against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties and decide disputes regarding the results general election;
- 2) The Constitutional Court is obliged to give a decision on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.”

Based on the 1945 Constitution, the Constitutional Court is given the authority to examine laws, this is the basis for a formal review of Law Number 11 of 2020 concerning Job Creation by the Constitutional Court.

The decision of the Constitutional Court Number 91/PUU-XVIII/2020 can be outlined as follows.

1. Stating that the establishment of Law Number 11 of 2020 concerning Job Creation is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as it is not interpreted as "no correction is made within 2 (two) years since this decision is pronounced";

2. To declare that Law Number 11 of 2020 concerning Job Creation is still valid until the formation is corrected in accordance with the grace period as determined in this decision;

3. Instructs the legislators to make improvements within a maximum period of 2 (two) years after this decision is pronounced and if within that time limit no amendments are made then Law Number 11 of 2020 concerning Job Creation becomes permanently unconstitutional;

4. To state that if within a period of 2 (two) years the legislators are unable to complete the revision of Law Number 11 of 2020 concerning Job Creation, the law or articles or material content of the law which has been revoked or amended by the Act Law Number 11 of 2020 concerning Job Creation is declared to be re-applicable;

5. Declaring to suspend all strategic and broad-impact actions/policies, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation. But in fact the legislators, one of which is the president, still issues Presidential Regulation Number 113 of 2021 concerning the Structure and Administration of the Land Bank Agency. As previously known, the Constitutional Court's Decision was issued on November 25, 2021, while the Presidential Decision Number 113 of 2021 was issued on December 27, 2021.

If we refer to the decision above, it is stated that the suspension of all strategic and broad-impact actions or policies and the issuance of new implementing regulations relating to the Job Creation Act is not justified. Referring to this point, it is very clear that the president's action in issuing Presidential Regulation Number 113 of 2021 is a violation. This presidential regulation is the implementing regulation of the Job Creation Act, which is Article 134 which reads: "Further provisions regarding the committee, the Supervisory Board, and the Implementing Body are regulated in a Presidential Regulation" Government Regulation Number 64 of 2021 also mentions several times regarding Presidential Regulations such as the procedures for capital participation, provisions regarding the procedures for determining committees, provisions regarding the selection, determination, appointment, and dismissal, duties, authorities, obligations, tenure, and procedures. supervisory board and implementing body. In addition, it is also stated that the procedure for preparing the Land Bank Agency's annual report will be contained in a Presidential Regulation.

Maria Farida Indrati interprets the function of the Presidential Regulation into three things:^x

1. Organizing general arrangements in the context of administering government power.
2. Carrying out further regulation of the provisions in the Government Regulation which expressly mentions it.
3. Carrying out further regulation of other provisions in Government Regulations, although not explicitly mentioning them.

In addition to criminal law, state administrative law and state administrative law also recognize the principle of legality. This principle is known as *wetmatigheid van het bestuur*, which means that every government action must have a legal basis. The principle of legality means that the administration of government puts forward the legal basis of a decision/or action made by a government agency/or official.^{xi} Even though it is clear that the Constitutional Court has suspended the act of making new implementations related to the Job Creation Law, the President still issues Presidential Regulation Number 113 of 2021. This is a discrepancy between the president's actions and the principle of legality. The decision of the Constitutional Court is final and binding. However, violations of the Constitutional Court Decisions still occur. This is due to the fact that the Constitutional Court does not have an instrument or executor in charge of ensuring the implementation of the decisions of the Constitutional Court which are final and binding.^{xii} Although the decision of the Constitutional Court becomes a law, there is no punishment there. The Constitutional Court also does not have the authority to be involved in the process of implementing its own decisions so that the Constitutional Court can be seen as the weakest branch of power in the state administrative structure among other branches of state power (the least dangerous power, with no purse nor sword).^{xiii} Because of this weakness, the Constitutional Court's decision seems easy to violate even though it results in a loss of public trust in the government because the government does not comply with the 1945 Constitution which states that Indonesia is a State of Law.

So that in the end the existence of this Constitutional Court Decision requires high legal awareness for legislators if they comply. The Presidential Regulation Number 113 of 2021 concerning the Structure and Administration of the Land Bank Agency and its impact on the decision of the Constitutional Court Number 91/PUU-XVIII/2020 has the potential to be tested before the Supreme Court. According to Zainal Artifin Mochtar, a presidential regulation that is not in accordance with the authority can be null and void, but it requires a determination whether the government itself revokes the regulation or through the courts. It is better if the government itself revokes the Presidential Regulation. If through the court, the material can be tested to the Supreme Court.^{xiv} But the fact is that until now Presidential Regulation No. 113 of 2021 is still valid and can be accessed. There is also no judicial review of the Supreme Court. That means blatant violations like this are still being carried out. Professor of FH UGM, Prof. Maria SW Sumardjono, believes that the government's attitude of not complying with the Constitutional Court's decision has a negative impact on many things. "How does the government want to ask people to obey the law if the government doesn't obey the Constitutional Court's decision?" He considered that a government that did not respect the Constitutional Court's decision would be under the spotlight of the international community. This is related to the confidence of other countries in government policies. "Countries that were previously interested have become hesitant to invest." Based on the study of researchers, the sustainability of the Land Bank Agency is currently unclear whether it is still running or whether it is disbanded. So that this ambiguity is not in accordance with one of the characteristics of the Land Bank Agency, namely transparency. If reviewed from a normative perspective, the Land Bank Agency can be implemented if Law Number 11 of 2020 concerning Job Creation is declared to be in full force.

IV. CONCLUSION

In land procurement activities, the difference in the task area between the Land Bank Agency and the National Land Agency is that the Land Bank Agency can be the party entitled to compensation if the land object is an asset of the Land Bank Agency and the Land Bank Agency can also be a party that requires land. Meanwhile, the National Land Agency's role is to provide an overview of the location of the land and the required land area, the status of the land, as well as the estimated timeframe for the implementation of land procurement and the estimated operational and support costs as well as the cost of certification. Meanwhile, in controlling land use, the division of task areas between the Land Bank Agency and the National Land Agency is on the Management Rights granted to the Land Bank Agency. In controlling the use of land, especially abandoned land, Land Bank Agency obtains Management Rights on abandoned land. So that the Land Bank Agency can take a role in controlling land use. The task of the National Land Agency is as a regulator and administrator where the Land Office can make reports or information on the results of monitoring and evaluation of land rights and the basis of land tenure. The Land Bank Agency as Land Manager due to the existence of Management Rights must prioritize the interests of a just society and it is hoped that the existence of this institution will not be used as a business that is very detrimental to the community.

The appearance of the Land Bank Agency from Law Number 11 of 2020 concerning Job Creation through a violation due to the issuance of Presidential Regulation Number 113 of 2021 concerning the Structure and Administration of the Land Bank Agency after the decision of the Constitutional Court Number 91/PUU-XVIII/2020 which one of the the decision is to suspend all strategic and broad-impact actions/policies, and it is also not permissible to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation. This means that the president continues to issue the Presidential Regulation in violation of the legality principle in the Constitutional Law. Before running the Land Bank Agency, the government should have obeyed the decision of the Constitutional Court first. If the revision requested by the Constitutional Court has been implemented and the Job Creation Law is declared to be in full force, then a derivative rule regarding the Land Bank Agency, such as a Presidential Regulation, will be made. Due to the issuance of Presidential Regulation Number 113 of 2021 concerning the Structure and Operation of the Land Bank Agency during the suspension of the Job Creation Act, the government is expected to take steps against the Land Bank Agency because normatively the appearance of this institution

was through a process of a violation. If necessary, the government itself must declare that the presence of the Land Bank Agency is null and void by law.

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