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# Consignment in Land Acquisition

Professor Arie S. Hutagalung and Triska Sationo<sup>1</sup>

*This paper provides an overview of land acquisition for public interest projects with a focus on a specific aspect of the process: the consignment of the compensation payment in court when an affected land owner rejects the compensation offered by the government institution that requires the land. Consignment has become a common practice in cases where the government and land owner can not reach a mutual agreement on land compensation during the negotiation time frame established by regulation. The first part of this paper presents some general facts about consignment and how it is regulated in Indonesia. The second part describes some current cases of consignment in land acquisition. The third part clarifies some parts in the current regulation which cause delays to land acquisition and have negative social effects especially related to consignment. The last part of the paper suggests some policies which may facilitate land acquisition in Indonesia.*

**Keywords:** consignment, land acquisition, agrarian law, infrastructure, public interest projects

## I. General View of Consignment and Land Acquisition

### A. Definitions and Regulations of Consignment

In the Indonesian Language Dictionary, the word “consignment”<sup>2</sup> means, first, the delivery of goods to be sold by the receiver of the goods; secondly, money custody. In Blacks Law Dictionary, consignment means the act of consigning goods for custody or sale, also termed (archaically) consignment.<sup>3</sup>

Consignment means a debtor’s delivery of money to an authorized third party after the creditor refuses to accept the payment.<sup>4</sup>

The application of consignment in Indonesian law consists of:

1. Private law

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<sup>2</sup> Kamus Besar Bahasa Indonesia, p. 390, Edisi Ke-2, Departemen Pendidikan Nasional, Balai Pustaka, 2002.

<sup>3</sup> Blacks Law Dictionary p. 327, eight edition, Bryan A Garner, Thomson West 2004.

<sup>4</sup> Ibid.

In Article 1404 Civil Code, consignment is the placement of cash in the custody of District Court by the Creditor after a cash payment offered by the same is rejected by the Debtor. If the Creditor refuses to receive the payment, then the debtor can do an offer of cash payment of the due amount; and if the creditor refuses to accept this, the debtor can put the money or the property in escrow of the Court. Such an offer followed with a deposit (which constitutes as consignment) shall release the debtor and apply as a payment by the debtor, provided that such offer has been made in accordance with the law; whilst the property in the escrow will remain on the creditor's account.

2. Public law

There is no explicit definition of consignment in any regulations regarding agrarian law. Currently consignment is only regulated in the land acquisition regulations.

B. Definitions and Regulations of Land Acquisition

The land acquisition process for public interest projects is regulated by Presidential Regulation Number 36 of 2005 regarding Land Acquisition For The Development of Public Interest ("PR 36/2005"), which was amended by "PR 65/2006". The National Land Agency issued a regulation in order to implement PR 36/2005 and PR 65/2006 (Regulation of the Chairman of the National Land Institutes, Number 3 of 2007 – "RCNLI 3/2007").

Land acquisition is any activity to obtain a plot of land by providing compensation to the parties who transfer or relinquish their land, as well as compensation for the building, plant and other items related to the land (Vide Article 1 PR 65/2006). The land acquisition for public interest purpose is conducted by the Central Government or Local Government and involves the transfer or relinquishment of land rights. When land acquisition is not for public interest projects, it should be carried out through sale and purchase, land exchange, or any other manner agreed upon voluntarily by the related parties (Vide Article 2 PR 65/2006). A project in the public interest is one that benefits most of the community and that is carried out by and owned by the Central or Local Government. Such projects include :

1. roads, highways, railways, mineral water or clean water pipeline, water waste and sanitation pipeline;
2. water reservoir, dam, irrigation dam, and any other water buildings;

3. ports, airports, train stations, terminals;
4. public safety facilities, such as flood control dam, lava control dam, and others;
5. waste management;
6. natural and cultural reserves;
7. power plant, transmissions, and electric power distributions. (Vide Article 5 PR 65/2006)

### C. Consignment in Land Acquisition

Consignment in land acquisition is regulated differently from consignment regulated in Indonesian Civil Law. Generally, in the Indonesian Civil Law, consignment is conducted to clear a debt of a debtor to the Creditor while consignment in land acquisition is conducted to pay the compensation of land without land owner's agreement therefore such land can be used for project of public interest.

When land is acquired for public interest projects, the compensation to the affected landowner can be consigned to the local district court if the following conditions are met :

1. If there is no agreement/consent after 120 days of deliberation between the Panitia Pengadaan Tanah (Land Acquisition Committee-"LAC") and the land owners, the LAC will determine the amount of compensation and consign such compensation to the local district court whose jurisdiction covers the area of related land (vide Article 10 Section 2 PR 65/2006).
2. If there is any ownership dispute regarding the land ownership after land compensation determination, the LAC will consign such compensation to the local district court whose jurisdiction covers the area of related land (vide Article 10 Section 3 PR 65/2006).  
If conditions in item (b) as mentioned above is completed then LAC may conduct consignment as soon as possible. If the conditions in item (a) as mentioned above is completed then the LAC may conduct consignment by completing additional conditions which is mentioned in Article 37 of RCNLI 3/2007 as follows :
  - a. If the location of the project may not be altered as mentioned in Article 19 section 3 RNCLI 3/2007 then the development project should obtained approval from 75% of the land owners who are

inhabited in the project's location and affected by the land acquisition for the project development as mentioned in Article 34.

If such condition is fulfilled therefore the government institution which requires the land will pay the compensation to the land owner who disapprove with the project development and prepare Minutes of Compensation Handover or Minutes of Compensation Offer (Vide Article 37 Section 2 RNCLI 3/2007 ),

- b. If after 120 days from the date of first deliberation invitation then such land owner still reject to receive the compensation offer made by the government institution therefore LAC will prepare Minutes of Compensation Handover (Vide Article 37 Section 3 RNCLI 3/2007) and based on such minutes, LAC will summon the government institution who requires the land to consign the compensation to the local district court which jurisdiction covers the location of the project (Vide Article 37 Section 4 RNCLI 3/2007).

After the requirements of these regulations are fulfilled, the consignment of land compensation can be undertaken. There are also cases which allow consignment to be done as mentioned in paragraph 10 Article 48 RNCLI 3/2007 as follows:

1. The existence of the person who is authorized to receive compensation (land owner) is unknown
2. The land, the structure, the plant or any other asset which are located on the land still in dispute at the local district court and has not reached a final binding verdict
3. The ownership of the land is still in dispute and such dispute has not been settled yet
4. The land, the structure, the plant or any other other asset, which are located on the land, are being attached/seized by the court for the interest of a particular party. ( Vide Article 48 Section 1 RCNLI 3/2007)

After all of these requirements are fulfilled then the government institution which requires the land will submit a request to obtain a court order from the chairman of local district court whose jurisdiction covers the location of the development project regarding consignment of affected land owners' compensation to the local district court. Such request of court order is attached with attaching related documents such as :

1. The name of the authorized party to receive the compensation that is

consigned to the court

2. The receipt of invitation of the compensation's payment in case the compensation is in cash as mentioned in Article 44 section 2 RNCLI 3/2007
3. Other documents as mentioned in Article 48 Section 3 RNCLI 3/2007. Article 48 Section 3 RNCLI 3/2007 and Article 67 Section 1 RNCLI mentions that the execution of physical construction will commence after the relinquishment/release of land title, structure, plant by the affected land owner or the land compensation has been consigned to the Court. In the territory of the special region of the province of DKI Jakarta Area, if the land compensation has been consigned to the local district court, therefore the Governor/Head of Regency/Head of Municipality issue a decree to start the construction of project development (vide Article 67 Section 2). Infact, the process of consignment in land acquisition varies from project to project and the implementation of these regulations is considered unique and brought many issues that will be mentioned in the next chapter.

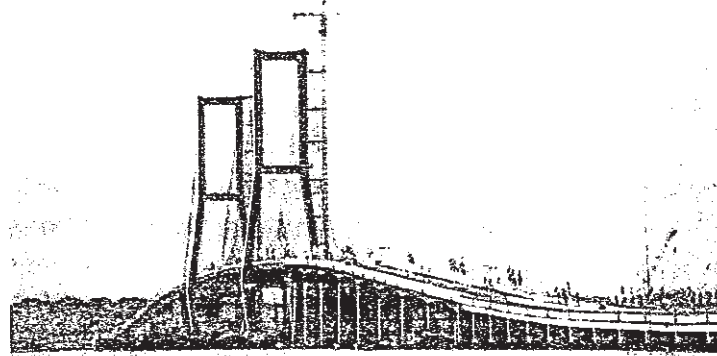
#### I. Current Issues/Cases regarding Consignment

##### A. Surabaya-Madura (Suramadu) Bridge Project

The National Surabaya-Madura Bridge (Indonesian: Jembatan Nasional Surabaya-Madura), also known as the Suramadu Bridge, is a bridge with three cable-stayed sections constructed between Surabaya on the province of East Java and the town of Bangkalan on the island of Madura in Indonesia. The 5.4-km bridge is the longest in Indonesia and the first bridge to cross the Madura Strait. This first toll bridge in Indonesia has two lanes in each direction plus an emergency lane and a dedicated lane for motorcycles. The bridge was built by a consortium of Indonesian companies PT Adhi Karya and PT Waskita Karya in cooperation with China Road and Bridge Corp. and China Harbor Engineering Co. Ltd. The total cost of the project, including connecting roads, has been estimated at 4.5 trillion rupiah (US\$445 million).

Construction was started on August 20, 2003 but the work on the bridge halted at the end of 2004 due to lack of funds, but was restarted in November 2005. The main span of the bridge was connected on March 31, 2009, and the bridge was opened to the public in June 10, 2009. To have an objective and effective valuation of compensation, this task was assigned to an independent institution named Sucofindo. However, a number of local residents still dis-

agreed with the offered price. Therefore, given the difficulties of reaching consensus on the compensation, the land acquisition committee consigned the compensation to the District Court of Surabaya.



Land acquisition for construction of this bridge at this time totalled 130.856 m<sup>2</sup> from a total target acquisition area of 131.369 m<sup>2</sup> equivalent to 99.52%. The remaining land, which had not been acquired, was 513 m<sup>2</sup>. This area belonged to six persons. Before consigning the compensation, the LAC had taken many steps to resolve the dispute. They had measured the plots of the six land owners, deliberated the compensation issue in hearings with the participation of the Local Representative Council of Surabaya and the six land owners, organized special meetings with the land owners to try to settle the dispute, and exchange correspondence with the same land owners. Because none of these steps resulted in consensus, all of the members of LAC agreed to consign the compensation offered to the six land owners to the District Court of Surabaya. This was possible because onsignment is allowed under Article 37 RNCLI 3/2007 in cases where the development project has obtained 75% approval from the local community/land owners affected by land acquisition and no agreement/consent is reached with the remaining land owners after 120 days of deliberation between LAC and these land owners.

A day before the eviction of the six land owners was carried out by the Municipality of Surabaya, in cooperation with the Surabaya Police Department, four of the land owners decided to accept the compensation which had

been consigned in the custody of Surabaya District Court. The reasons behind that decision varied from person to person. One of them said that he was tired and lost the strength to defend his land. However, he admitted that he only wanted the local government to provide more transparency on the land acquisition process because he thought the local government's actions were not straightforward. According to the First Assistant of the Municipality Secretary, Sutadi, during the process of transferring land compensation, which was consigned in the District Court of Surabaya, land owners were not charged any fees, nor were any costs imposed. The District Courts only requested a letter of land and/or building ownership at the time of the compensation transfer.<sup>5</sup> The amount of land compensation which is consigned by the LAC as same as the amount offered by the LAC and have been rejected by such land owners.

When the land had to be occupied to construct the project, there were still two land owners who had decided not to accept the compensation package. These land owners, Mustofa and Sundari, remained in disagreement with the compensation offered. On the day of eviction, Mustofa appeared before Surabaya Administrative Court for his claim against the Head of Surabaya Municipality to discuss the application of consignment. In his absence, his family defended the land and refused to move. The Head Unit of Criminal Investigation (Kepala Satuan Reserse Kriminal) of the District Police (Polda) of Surabaya engaged Mustofa's family members in discussion and the Mustofa's family members decided to release the land and all assets on the same.

Meanwhile, Sundari defended her land from being taken and questioned the evidence that proved the Municipal Government of Surabaya owned her land and also questioned the right of the Municipal Government to undertake the eviction. In Sundari's case, she was only offered compensation for the assets on the land because she was unable to show legal evidence of land ownership. Sundari indicated that she had a letter of land ownership which was issued by Provincial Land Office of East Java and she was in the middle of the proceedings to obtain certification of the land which she had inhabited for 40 years. Despite all of these circumstances, her land was taken by the Municipal Government of Surabaya, but she submitted her claim to the District Court of Surabaya regarding the legal evidence of land ownership.

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<sup>5</sup> RAC/BHI, *Terkait Akses Pembangunan Suramadu Silakan Warga Ajukan Upaya Hukum*, <http://bappeda.jatimprov.go.id/web/news.php?view=688>, 16 Januari 2009.



The First Assistant mentioned above indicated that the land take can proceed even in cases where there are land owners who do not accept the terms of compensation. This is due to the fact that land compensation issues can delay project implementation for extended periods of time. In this case, the access road to Suramadu would have been postponed, altering the scheduled timeline. As long as there are no court summons, the occupation of the land and the eviction of the occupants can proceed. Land acquisition for the access road was finalized in December 2008 despite the disagreements and bridge construction work was successfully completed in June of 2009.<sup>6</sup>

### **B. Trans Java Highway Project**



The Trans Java Highway Project is a tollway project connecting West Java to East Java. This tollway consists of 11 segments: Cikopo-Palimanan, Palimanan-Kanci, Kanci-Pejagan, Pejagan-Pemalang, Pemalang-Batang, Batang-Semarang, Semarang-Solo, Solo-Mantingan, Mantingan-Ngawi-Kertosono, Kertosono-Mojokerto and Mojokerto-Surabaya. The construction of this toll project was partly finished with the use of consignment in several sections as a mechanism to expedite land acquisition. The consignment process undertaken in the Kanci-Pejagan and Semarang-Solo segments demonstrate good cases to highlight issues within the consignment process. For both the Kanci-Pejagan and Semarang-Solo segments, which process was followed

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<sup>6</sup> Ibid.

due to the fact that 1) the highway project had obtained the necessary 75% (seventy five percent) approval from the local community/land owners who were directly affected by land acquisition and 2) 120 (one hundred twenty) days of deliberation had passed between the LAC and the land owners affected by the tollway project. Thus, both criteria for utilizing the consignment process were fulfilled.

Kanci-Pejagan segment was the fastest section to be completed in Trans Java Highway Project. The process of land acquisition began in January 2007 and in July 2009 construction work started. After the 120 day period of deliberation passed, there were seven people remaining who disagreed with the compensation package. The process of consignment was considered, but ultimately was not utilized. The LAC, the local government and the public institution who needed the land were able to reach a settlement with the seven landowners after they offered compensation that was a bit higher than that offered to the rest of landowners. Offering a higher compensation to some landowners is allowed by the existing laws and regulations as a step for obtaining their consent; however these agreements were unfair for the vast majority of other land owners. This could have caused social unrest, but it didn't happen in this case. This section of this tollway was inaugurated by the President of Indonesian Republic on 26 January 2010.

Semarang-Solo segment utilized consignment in the Semarang-Ungaran section. By the end of the 120 days of deliberation period, the LAC had acquired 95.6% of the required land, but there were 31 land owners who disagreed with the compensation offered. The 31 land owners indicated that the LAC pushed them to accept an unreasonable price. In one example, there was one land owner whose assets included a house with a store attached thereon, and yet was offered compensation for the main building and the land only. The compensation was insufficient due to the fact that no economic value was assigned to the store from which the owner derived livelihood. Despite the disagreements and claims of the land owners, the LAC and Provincial Government of Semarang decided to go ahead with the consignment.

In general, the consignment process in this segment is conducted with steps as follows:

1. If, after 120 days of deliberation, the land owner meets the conditions as mentioned in the Article 37 Section 4 RNCLI 3/2007, the LAC will make the compensation payment or compensation payment offering

- also the minutes of the events mentioned before.
2. Consignment is often used in cases where the land owner is unable to provide any evidence of land ownership. Land ownership evidence is really important because the same shows that a plot of land is legally owned by a land owner however not all land owners in Indonesia aware of such matter especially people who lives in remote area. This case is not included in the Article 48 Section 1 RNCLI 3/2007 and the compensation for this case cannot be consigned. This case is not mentioned in Indonesian land acquisition regulations and as a result, it made confusion for the people who practice such regulations and force them to be creative in implementing the regulations.
  3. After the step above, the head of the LAC issues the Decree regarding the "Determination of the Type and Amount of Partial Compensation for Land, Structures, and Plants". This decree was issued for the development of Semarang-Solo Tollway in Sidomulyo Village, East Ungaran Subdistrict. The Semarang Regency and Nominative List which contains land owners who eligible for compensation and location of each parcel of affected land.
  4. If a land owner continued to disagree with the Decree of the LAC, then the LAC writes a letter to the Land Acquisition Team (established for projects carried out by the Ministry of Public Works "LAT") to instruct them to enter into the process of consignment for that parcel of land.
  5. The LAT submits an application for issuing consignment order to the local district court whose jurisdiction covers the area of related land.
  6. The chairman of local district court whose jurisdiction covers the area of related land issues a consignment order that among other states whether the land owner still disagrees and refuses to accept the land compensation. If it occurs, the chairman may consign the compensation to the treasury of the local district court registrar. The compensation is kept in the treasury until the land owner withdraws such compensation. In order to withdraw the compensation, the land owner must present a valid evidence of ownership with a cover letter from the local government. The amount of compensation given in the court is as same as the amount which is offered by LAC and already rejected by the land owner. The land owner only comes to court to withdraw the compensation and there is no further discussion regarding the amount of the compensation.

7. When all land compensation has been consigned, the governor/head of municipality/head of regency issues a decree to start the construction of the project.

In the case of the Semarang-Solo Tollway after the compensation was consigned, the Head of the Municipality issued a letter authorized the commencement of construction work. In all actuality, such a letter has no legal basis due to the facts that the land owners The LAC and the local government had not acquired the affected land owners' approval to release the land to the agency implementing the highway project therefore there is no relinquishment of land title.

Based on the basic principles of land law, before one can possess the land, the one must conduct transfer of land title of such land from previous land owner according to customary law which are:

- a. Transparent
- b. The land conveyance has to be conducted by and before chief of customary law (kepala adat) or head of the village.
- c. Cash
- d. The transfer of the land title from the previous land owner to the party who needs the land executed simultaneously with the payment of land price from the buyer to the seller even only with partial payment.

The weakness of the current regulations of land acquisition is there is no article that mentions once the compensation have been consigned then the ownership of the land is legally transferred to the LAC and government institution who require the land. In the case of land acquisition, if the affected land owner does not want to release the land and does not agree or take the compensation which is consigned in the court then there is no transfer of land title. If the government institution use the land and certificate of such land then such usage and possession may be regarded illegal because it violates the basic principles of land law which states the possession and use of the land by any person for any purpose must be based on land title pursuant to Law Number 5 of 1960 regarding Basic Agrarian Law ("UUPA") and the possession and use of land without legal basis is prohibited and will be imposed by penal sanction.

In the case of the Semarang-Solo Tollway, the land owners who refused the land compensation consigned in the local district court remained on their

property and when their property was cleared for construction and the land owners, who disagreed with consignment of their compensation, claimed the leader of LAC under Article 406 of Indonesian Penal Code regarding destruction of private property. Although the Land Acquisition Committee was acting under the instruction of the head of the municipality, the LAC still became the target of this lawsuit.

## **II. Current Regulations Related to Consignation which Give Negative Social Effect to the Community, the Project, and also Delay the Land Acquisition**

From the cases described above, it seems that that current regulations related to consignation can have adverse impacts on communities if compensation is not adequate. Also, consignation does not lead automatically to timely land acquisition, since the land owners can still delay land acquisition by fighting the procedure through the courts. In the future, the government should overcome these issue to make land acquisition process is prompt and protect the interest of the parties affected in such process.

The parts of current regulations which cause negative social effects and sometimes delay land acquisition are as follows:

### **A. Current regulations on consignment are not sufficient in regulating compensation**

The most important issue regarding land acquisition and the process of consignment lies in the amount of land compensation. The LAC, the local government, and the institution who seeks to acquire the land must provide compensation which is fair, reasonable, and sufficient for the people who are affected by the land acquisition and must effectively relocate. Compensation, as regulated the Article 13 PR 65/2006 can consist of cash, land, resettlement or a combination from two or more types of these compensation methods. Other forms of compensation may be agreed upon by the parties, if necessary. In most development projects, compensation is paid in cash. The LAC rarely offers land owners compensation in kind, such as replacement land. Current regulations allow compensation in kind as long as it is agreed upon by the parties involved. The loss of income sources or livelihoods of the affected people is rarely appraised and thus are not considering when calculating the compensation. This also may be caused by regulations that do not mandate compensation for all losses related to the land taking. People affected by land acquisition

often feel that they are treated unfairly because of the lack of transparency in the determination of compensation.

**B. Current regulations on consignment can force land owners to accept unfair compensation.**

Article 10 PR Section 2 PR 65/2006 allows the consignment of land compensation in the local district courts if after 120 days;

1. there is no agreement of the land owners between the LAC and the land owners and
2. the land owners continue to reject the compensation from the government institution since the date of the first deliberation invitation until the consignment is ready to be conducted (vide Article 37 Section 4 RNCLI 3/2007).

These regulations can be used to threat and forces people affected by land acquisition to accept the price offered by the LAC and the government, even in cases where the compensation is not adequate. Another regulation that could be used to force land owners to accept the compensation offer is Article 37, Section 2, RNCLI 3/2007, which states that consignment can proceed in any project in the public interest whose location cannot be altered, as long as the project has obtained approval from 75% of the affected land owners. (article 19 section 3 RCNLI).

**C. Current regulations on consignment are in conflict with legislation that protects human rights.**

Article 36, Section 2, Law Number 39 of 1999, regarding Basic Human Rights (Law 39/1999), states that no person's property may be taken over in a manner that is tyrannical and unlawful. Based on this article, the land owner should not be forced to release their land and accept the compensation offer. Article 71 of Law 39/1999 also states that the government is obliged and responsible to respect, protect, enforce and develop the basic human rights regulated in Law 39/1999, in addition to other prevailing laws and regulations, and international laws regarding human rights accepted by the Republic of Indonesia. Thus, both Article 37 Section 4 RNCLI 3/2007 and Article 10 PR Section 2 PR 65/2006 cause negative effects because they both neglect the basic rights of affected local communities/land owners based on Law 39/1999 and may raise people's anger for the reason they are forced to give their land and accept the price offered by the LAC and the local government.

D. Current regulations on consignment are not sufficient to resolve disagreements on compensation.

Consignment is only allowed if the location of project development can't be changed/replaced and if 75% of the total land owners affected by the project development give their approval towards the project development or b) 75% of the total land needed for the project development had been acquired. If the LAC hasn't acquired 75% approval from land owners or 75% of total land needed, the LAC may not consign the compensation and land acquisition stops altogether. If this occurs, current regulations provide only two ways to solve the problem. First, the LAC can continue deliberation (negotiation) with the land-owners; however, there is no expiration period for the deliberation and this deliberation is useless if land owners continue to refuse the compensation offer. Second, the LAC can chose to expropriate the land, which is an option permitted under Law 21/1960. However, this law is has only been applied once, in the case of the Senen Project for Hotel Ping Noy construction. Expropriation allows unchecked authority for the government to implement land clearing without negotiations with the land owners. Therefore equitable compensation cannot be guaranteed and as a result expropriation may provoke community anxiety and anger towards the government.

E. The current regulations on consignment violate existing laws

According to Article 67 RNCLI 3/2007, after the compensation is consigned, construction work may proceed. After the consignment, the LAC can carry out the eviction of the occupants of the property, based on the decree issued by the head of municipality/regency or the governor. However the land must be promptly possessed by the State and this arrangement is not stipulated in the current regulations of land acquisition. If the LAC does the land clearing to permit construction work, these actions would violate Article 28 H Indonesian Constitution Law of 1945, which guarantees that the right of ownership cannot be taken over haphazardly by anyone, including the State. The action of land clearing/evacuation by the LAC after the the compensation has been consigned also violates Article 5 of Law Number 20 of 1961 regarding Expropriation of Land Title and Other Objects Above the Land ("Law 20/1961"). This law states that each land owner has full rights over the property and the assets on the land until a Presidential Decree regarding land title expropriation is enacted. In addition, the consignment of the compensation is not a legal reason to annul a land title. According to articles 27, 34 and 40 of the Basic Agrarian Law

(Law Number 5 of 1960, "Law 5/1960"), land titles may be terminated in the following cases: the land is damaged, the term of the land title has expired, legal obligations of land title holder according to prevailing law and regulations have not been fulfilled, the land title holder voluntarily relinquishes the title, land has been lawfully expropriated for public interest purpose, land has been left in idle conditions by the title holder, and particularly for Right to Own (Hak Milik), Right of Cultivation (Hak Guna Usaha) and Right of Building (HGB).

In light of the above, land owners whose compensation has been consigned may submit a letter of objection to the court regarding land clearing, which is carried out by the LAC. In such cases, the position of government or LAC is very weak because, under the Basic Agrarian Law, any land which is under dispute is frozen, which means that any and all activity related to the land must cease until such dispute is settled. Therefore, the landowners objections, based on the provisions of the Basic Agrarian Law, could lead to a delays in project implementation. The land owners also have the right to pursue legal action against the LAC according to Article 406 of the Indonesian Criminal Code claiming destruction of private property without permission of the owner.

**F. Consignment, as regulated in Article 1404 and 1405 of the Indonesian Civil Code, is not related to land acquisition**

Article 1404 and 1405 of Indonesian Civil Code refer to debts and receivables; those articles do not refer to the compensation payment in the event of land acquisition. Also, consignment of land compensation occurs without a written agreement. According to Maria Soemardjono, S.H., MCL., MPA, the offer of a payment, which is followed by the consignment of such payment to the local district court which regulated in Article 1404 Indonesian Civil Code is not relevant to be stipulated into PR 36/2005 jo PR 65/2006 and RNCLI 3/2007. The reason of that argument is land acquisition is the sole privilege of the Government/Local Government as stipulated by the Administration Law while the institution of payment offering in Article 1404 Indonesian Civil Code regulates civil law relationship between citizens/individuals. The application of consignment in the land acquisition would be an err to apply because it mixes private law concept into administrative law area which is categorized as public law and has the impression of forcing one 's interest which is prohibited by the Law 39/1999 as mentioned in item 1 of this chapter.

**G Compensation which is consigned may not be final solution**

The consignment of land compensation sometimes cannot give prompt ef-



fect to the land owners who affected by the project development because the procedures/bureaucration in the court to get the compensation itself is very complicated. The compensation which is received sometimes may not be necessarily be equal to the amount which was offered and promised by the LAC to the land owner. In view thereof, there remains the possibility that the land owners go back to their land if they have run out of money, and also have the right to sue the LAC and/or the local government or the party who needs to acquire the land for not giving a just compensation, thereby delegitimizing the process of consignment.

In the event that the affected land owners refuse to take the land compensation that has been consigned, they can submit a lawsuit after the land acquisition is completed. However, this action is not likely to stop the land taking because Article 72, section 2 RNCLI 3/2007 states that matters which appear after the end of land acquisition may not prevent the commencement of construction work. The bargaining position of the affected land owners is weakened by the fact that the land has already become part of the development project. The issue to be settled in court is not the land take, but the compensation amount. For these reasons, the land owners are likely to feel disempowered and forced to take what is offered instead of what they consider fair compensation. This may also cause discord within the community and between the project owners, local government and the LAC.

Item 2 of the General Elucidation of Law 20/1961 states that in the consideration by the local government, as a respond of expropriation application by the party who needs to acquire the land, such consideration may determine temporary shelter for the people who affected by the land expropriation should they lose their permanent residence or livelihoods. However this provision never be executed since expropriation has very complex effects and procedures.

H. Current regulation of consignment does not protect the affected land owners in the aspect of determination of compensation and procedures of taking the compensation in the court

The decision on the amount and type of compensation in the case of consignment is based on Nominative List which is determined by the LAC and the Local Government then made into court stipulation. If this action applies to the affected land owners who are not agree with the amount and/or type of compensation therefore this action constitutes as the denial of essential point in amicable settlement mechanism which is obliged a whole consensus/agreement.<sup>7</sup>

The existing regulations especially in the process of taking payment which is consigned only focus more on the project development and the land acquisition itself but less on the protection of the land owners affected by the project development, who have the right to receive a reasonable, prompt and effective compensation.

This event mentioned above also violates Article 37 Law 39/1999, which mandates the provision of reasonable and prompt compensation in cases where land is expropriated and/or structures are demolished to build for public projects. Based on this article, compensation must be reasonable and fair because basic human rights must be respected.

- I. Current regulation of land acquisition do not include local leaders which in actual can be a key for successful land acquisition process and prevent consignment

Public hearings are an important component of land acquisition process because they provide an opportunity to deliver information on the rights and obligations of the affected land owners. Under the current regulations, public hearings and information disseminations involve the LAC and the public institution that requires the land; however, they normally take place without the participation of traditional local leaders, who can help the land acquisition process runs smoothly because they know local conditions well. With their knowledge, the LAC is likely to plan more effective public hearings, which can prevent unnecessary conflicts with the affected land owners. By bringing in key local leaders and indigenous elders, the LAC can also form good relationship with the Head of Village, who can play an important role in successful land acquisition. For example, in the Trans Java Project, the Head of Village helped the LAC in disseminating information about the project to the affected land owners and assisted in preparing land ownership evidence. Current regulations, however, do not give a clear role to the Head of Village.

- J. Current regulation makes impression that appraisal only asses the land and not all the things upon the land that may become component of valuation

In order to determine the compensation to be provided to affected land owners, the LAC relies on the valuation carried out by an "appraisal institution" or an "appraisal team". Appraisal institutions are licensed by the Land Agency

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<sup>7</sup> Gunanegara SH., *Rakyat & Negara Dalam Pengadaan Tanah Untuk Pembangunan*, hlm. 226.

and apply international valuation standards. Appraisal teams are formed by the local government and tend to use the Sale Value of the Tax Object (the values declared for tax purposes) as the basis for negotiations. The current regulations use the term "land appraisal", which gives the impression that the appraisal only assesses the land value but does not take the assets on the land into account. Current regulations still use the Sale Value of the Tax Object as a benchmark for land valuation and the market/real value (as appraised by appraisal institutions) is used only as "guidance" and not disclosed to the affected landowners. In fact, in many neighbouring countries, the market value is used as a basis for the calculation of compensation. If this practice were adopted in Indonesia, the affected land owners and the institution requiring the land would be more likely to agree on a compensation payment acceptable to both parties. The negotiations would be more likely to succeed, which would contribute to faster land acquisition and project completion.

**K. Court order cannot be used to expropriate or relinquish rights of land and/or assets**

Article 67 RNCLI 3/2007 states that construction work can begin after the land owner has relinquished his property rights (rights to land and objects on the land) and his land title has been transferred to the government institution requiring the land. However in the last part of the same article, if the compensation is consigned, construction work can start after the issuance of a court order authorizing construction. This article is conflicted with the Law 5/1960 (Basic Agrarian Law) and its supplement regulations, as mentioned in Item 3. According to this Law, a court order is not a valid procedure to expropriate or relinquish rights of land and/or assets instead of legally binding court verdict.

**L. Current regulations of land acquisition do not provide reasonable sanctions for violations to the regulations land acquisition**

There are violations conducted by parties attached in the land acquisition, for example, members of the LAC often become land speculators, court staff sometimes may deduct the amount of compensation which is consigned. Current regulations do not provide sanctions for those parties who violate the regulations or who exploit the system. This might cause affected people or people in general to become distrustful of the land acquisition process in our country and surely this will inhibit funding for infrastructure projects in Indonesia due to the absence of legal certainty on the land acquisition process.

### **III. Proposal for Legislative Changes**

The followings are proposals that can be made by the government for the new legislation and hopefully these proposals may overcome the problems in the land acquisition especially in the process of consignment.

**A. Government must make Land Acquisition Law with consignment as the part of such law**

Land acquisition and its implementation sometimes affects property rights. Due to the sensitive nature of the process, it should be properly legislated, as part of a law, and not just as part of a regulation. Current regulations on consignment can be construed as the State's right to "confiscate". Given that private property is protected by laws, consignment rules must also be part of a law. The procedures must be carefully drafted to ensure consistency with legislation of higher or equal levels. Consignment procedures need to be clearly described in the Land Acquisition Law, which should specify the institutions involved and the land owners whose compensation is consigned.

**B. Landowners should be able to withdraw the compensation consigned in the court without giving up their right for fair compensation**

The land owners who do not accept the compensation offered to them during deliberations should be able to withdraw the amount consigned. This would enable the affected landowner to use the amount that is consigned to acquire a replacement property while her/his case is resolved through arbitration (see recommendation 4) by the court, which would have to decide if the landowner is entitled to an additional payment.

**C. Establish agrarian courts to deal with agrarian land disputes**

The government should consider establishing an agrarian court since land cases are abundant and adjudicating on such cases needs special knowledge of agrarian law. Arbitration on land cases, including the case mentioned above, may become precedence that indirectly regulates the modalities of consignment and completes positive Law.

**D. Establish a process to resolve disagreements about compensation after consignment**

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<sup>8</sup> Prof. Arie Hutagalung, *Perspektif Hukum Serta Instrumen Penyelesaian Sengketa Disampaikan Dalam Acara Pelatihan Unit Khusus Penyelesaian Aset Bank Indonesia*, Selasa 24 Maret 2009

The new Land Acquisition Law should establish the process that should be followed to determine if the land owners should receive an additional payment, in addition to the amount consigned to the local district court. Such a process is missing in current regulations of land acquisition and skips directly to the process of land confiscation once the compensation has been consigned to the local district court.

**E. Develop procedures to resolve disputes on compensation through mediation**

Disputes on the amount and the form of compensation can be solved through mediation, which can take place before the compensation is consigned in the district court. Mediation can help the party who needs the land and the land owner to reach a settlement quickly. Mediation is less costly than court cases and has many other advantages.<sup>8</sup> If mediation fails to produce a settlement, or one of the parties fails to participate in the mediation, the compensation offered by the institution requiring the land would be consigned in the district court. This court, or an agrarian court, would decide if the landowner is entitled to an additional payment, based on the professional appraisal of the value of the losses suffered by the landowner. Regardless of the court's decision, any party that disagrees with it would have the right to appeal to a higher court. The government agency requiring the land would be able to take possession of it, after consigning the compensation payment in the district court.

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