

# The Existence and Implications of Land Bank Regarding The Ruling of The Constitutional Court No. 91/PUU-XVIII/2020 on The Formal Test of The Job Copyright Law

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## ABSTRACT

The existence of a Land Bank is regulated by Article 125 to Article 135 of the Job Creation Law. Subsequently, a formal test was carried out on the Job Creation Law by the Constitutional Court, which in the Constitutional Court Decision No. 91/PUU-XVIII/2020, stated Law no. 11 of 2020 concerning Job Creation was declared formally flawed. In the seventh point of the Constitutional Court Decision No.91/PUU-XVIII/2020 dated 25 November 2021 it explicitly states the suspension of all government actions/policies that are strategic in nature and have broad implications, including the new implementing regulations of the Job Creation Law. The government is ordered to make improvements, within a maximum period of two years and if within that time no improvements are made, the Job Creation Law will become permanently unconstitutional. Even though the Constitutional Court's decision states that the Job Creation Law is still valid, it has no binding force. The method used in this study is a normative juridical approach, namely testing and tracing related to laws and regulations. The purpose of this study is to find out the existence and implications of the Land Bank institution, especially its derivative regulations related to the Constitutional Court Decision No.91/PUU-XVIII/2020 which states conditional unconstitutionality of the Job Creation Law, including the implementation of the Land Bank which is included in the category of strategic policies and has wide-reaching impacts according to the sound Article 4 of Law No. 11 of 2020 and the Constitutional Court's decision.

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## 1. INTRODUCTION

Currently, the institution that the government is trying to acquire for land is through the land banking agency. The function of a land bank agency or institution is to manage resources, which can be carried out through collaboration with other agencies. The relevant agencies in question are the Central Government, Regional Government, state institutions, private parties, and so on. The Land Bank's collaboration with these agencies shows mutually beneficial interactions in providing land for national development in Indonesia. (H. Arnowo, 2021).

The formation of the land bank itself is related to problems in land procurement today due to a shift in the view of land as a strategic commodity. This triggered land liberalization which resulted in land prices soaring due to the games of land speculators so that projects planned by the government to build infrastructure were hampered by land compensation problems (H. Amir, et al., 2014). Especially in urban areas, land has turned into a commodity that is traded in a market that is difficult to control due to the lack of effective strategies and programs in making land policies. Surono made an inventory of problems that often occur regarding land acquisition for the public interest, including problems with nominative data, the amount of compensation, administrative errors in the land procurement stages, intimidation by individuals implementing land acquisition, and indications of the markup on compensation objects.

The passing of the Job Creation Law (UU. No. 11 of 2020) has opened new horizons in land acquisition in Indonesia. In this law there are regulations regarding land banks which are regulated in Articles 125 to Article 135. Article 125 Paragraph 4 regulates the functions of Land Banks which carry out planning, acquisition, procurement, management, utilization and distribution of land. (F. F. Latifah dan F. N. Krisnaningsih, 2021). Land Bank is one of the substances previously regulated in the Land Bill. The provisions regarding Land Banks as regulated in the Land Bill and Job Creation Law have received a lot of attention from civil society.

In addition, there is a tendency to revive the *verklaring* domain system, namely a system originating from the Dutch colonial era which stipulates that land belongs to the state if there is no one or no one who can prove ownership. It is feared that many lands belonging to indigenous peoples will become state property because up to now many indigenous peoples' lands do not have land documents. Apart from that, if you look at the duties and functions of land banks, including providing and distributing land, this has actually been carried out by the Public Service Agency (BLU) of the State Asset Management Institution (LMAN) in under the Ministry of Finance. Initially, LMAN was responsible for managing state-owned assets, but the agency also carried out fund planning tasks, using land reserves and paying compensation in land acquisition. (N. Arrizal dan S. Wulandari, 2021).

This new mandate means that LMAN has a function not only as a treasurer or financing provider, but also as a special land bank for procuring land for development in the public interest and national strategic projects so that there is overlapping authority in terms of providing and distributing land which makes LMAN's existence less effective.

Furthermore, the Constitutional Court has decided on the case of judicial review of statutory regulations (PUU) related to the formal review of Law no. 11 of 2020 concerning Job Creation against the 1945 Constitution with Constitutional Court Decision No. 91/PUU-XVIII/2020. In its decision regarding formal review, the court addressed one of the points contained in its decision, namely (Zainal Arifin Mochtar, 2022), first, stating that the formation of the Job Creation Law is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it is not interpreted as "no improvements are made within 2 (two) years from the pronouncement of this decision." Second, order the legislators to make improvements within a period of no more than 2 (two) years from the pronouncement of this decision and if improvements are not made within this time period, then Law no. 11 of 2020 concerning Job Creation becomes permanently unconstitutional. Third, stating to suspend all actions/policies that are strategic in nature and have a broad impact, and that it is not justified to issue new implementing regulations related to Law no. 11 of 2020 concerning Job Creation.

At the point of Constitutional Court Decision No. 91/ PUU- as the addressee (addressed party) in the decision of the Constitutional Court, did not comply with the decision of the Constitutional Court and instead issued implementing regulations, in this case Presidential Regulation (Perpres) Number 113 of 2021 concerning the Structure and Implementation of the Land Bank Agency. The Presidential Decree was promulgated on 27 December 2021 after the Constitutional Court's decision prohibited the government from making new implementing regulations relating to the Job Creation Law where the Constitutional Court's decision was read out at a public plenary session on 25 November 2021. (Maria Sw Sumardjono, 2022).

Based on the description above, it is interesting to study the existence and implications of the Land Bank and the status of related derivative regulations after Constitutional Court Decision No. 91/PUU-XVIII/2020. Bearing in mind that the Land Bank is included in the Land Acquisition cluster which is included in the strategic policy category and has a broad impact in accordance with Article 4 of Law No. 11 of 2020 and the ruling of the Constitutional Court itself. As in point seven of the Constitutional Court's decision, strategic policies with broad impacts must be suspended. In fact, it is not justified to issue new implementing regulations relating to Law No.11 of 2020.

## 2. METHODS

The research used in this research process uses a type of normative legal research. (S. Soekanto dan S. Mamudji, 2015). By using library materials or secondary materials that have been collected. Legal research is also a process for determining legal rules, legal principles, and legal doctrines in order to answer the legal issues faced

## 3. FINDINGS AND DISCUSSION

The definition of a land bank has been expressed by various authors. According to Van Dijk (E. Alfansyuri, S. Amri, dan I. Farni, 2020). A land bank is a mechanism for systematic land acquisition activities on a large scale, which will be utilized in the future in implementing land policy. Meanwhile, according to Maria Sumardjono, the definition of a land bank is any government activity in the context of providing land to be allocated for use in the future. Next according to Limbong (B. Limbong, 2012). Land banks are an important resource management tool to increase the productivity of land use with the methods promoted are market control and stabilization of local market land.

The Job Creation Law, which regulates the formation of land banks, or in full, land bank bodies, only refers to them as special bodies that manage land, whose function is to carry out planning, acquisition, procurement, management, utilization and distribution of land. The implementing regulations for the Job Creation Law, namely Government Regulation Number 64 of 2021 concerning Land Bank Agencies (PP Land Bank), which came into effect since it was promulgated on April 29 2021, also do not further regulate the definition of this land bank, except to add that the form This land bank is an Indonesian legal entity, domiciled in the country's capital<sup>14</sup> and has representatives throughout Indonesian (N. Trisna dan I. Sandela, 2021).

The urgency of land banks in development is to minimize land speculators due to economic liberalization which allows land to become a commodity to obtain large profits for investors, making it difficult for the government to procure and distribute land for development (F. al Zahra, 2017). Therefore, there is a need for an institution that manages the availability and procurement of land and distributes it in the future for development purposes or for other matters such as social, governmental, citizen settlement, or other matters stipulated by law.

The use of an institution regulated by the state to manage the procurement and distribution of land in the context of consolidation in the future to make available land allocations for development, is something that has long been done in European countries. According to Jack Damen, (T. Spit, 2018). Belanda telah menerapkan sistem ini sejak 1841 dengan membentuk suatu lembaga di bawah Kementerian Keuangan yang mengurus layanan bidang pertanahan yang mengelola perkembangan

kebijakan pemerintah di bidang pertanahan, pengelolaan tanah milik negara, fasilitasi penggunaan tanah negara, serta penjualan tanah negara.

Juridically, the regulation of land banks in Indonesia began with the issuance of the Job Creation Law which was passed on October 5 2020. The regulations regarding land banks in this Law are contained in 10 articles, starting with Article 125 which contains an explanation and functions that will be carried out by land banks, then Article 26 which explains the nature of land banks which guarantee the availability of land for the community, followed by Article 27 which outlines the implementation of land bank duties which are transparent, accountable and non-profit oriented, as well as Articles 128-129 which contain provisions on land bank assets, management of land rights and land bank organizations, while Articles 130-135 contain explanations of each organization in the land bank. With the enactment of the articles regarding land banks, it is hoped that they will be effective in regulating land in the country (W. B. M. Setiawan dan N. C. Dahani, 2020).

From a legal aspect, the effectiveness of implementing a land bank will also be determined by the regulations that govern it, for example the institutional form, objectives and various implementation mechanisms. In general, the implementation of regulations regarding land banks still requires government regulations accompanied by other implementing regulations at the ministerial level to strengthen the implementation process in accordance with the mandate of the Job Creation Law so that implementation is in accordance with the philosophical and juridical ideals contained therein. Apart from the Job Creation Law, implementing regulations regarding land banks are currently regulated in the Land Bank PP. The legal consequence of establishing a land bank through the ratification of the Job Creation Law is the formation of a new agency that specifically manages land. This has increased the government's authority in the land sector, which was initially a regulator in the land sector through the National Land Agency which was formed based on Presidential Regulation Number 20 of 2015, supplemented by the provisions of Article 125 paragraph 2 of the Job Creation Law concerning the establishment of a land bank which functions as a land manager.

From an institutional perspective, the government as the implementer of land acquisition through land banks must be able to maintain a balance between the increasing need for land and permanent land resources. Apart from this land bank, institutionally there is also an institution that manages land, namely, the National Land Agency (BPN). With two institutions dealing with the same basic matters, namely land, it is feared that there will be overlapping authority, especially regarding land acquisition issues. On the one hand, BPN, in the provisions of Article 3 letter e of Presidential Regulation Number 20 of 2015, carries out the function of formulating and implementing policies in the field of land acquisition, on the other hand, through the provisions of Article 125 paragraph 4 of the Job Creation Law, land banks function to carry out planning, acquisition, procurement, management, utilization and distribution of land. On the other hand, the existence of a land bank has opened up new authority in the form of management rights by the state which are granted by law-level regulations based on the provisions of Article 129 paragraph 1 of the Job Creation Law, which was not previously regulated in the Agrarian Principles Law. On the other hand, this Law only regulates HMN based on the provisions of Article 2. Therefore, through these two legal instruments, if they are not separated or divided equally, it is feared that there will be overlapping of various policies in the field of land acquisition (D. Sanjaya dan B. Djaja, 2021).

According to Urip Santoso (U. Santoso, 2019). There are differences of opinion regarding the position of management rights in national land law among land law experts. Some legal experts are of the opinion that management rights are the state's right to control land and on the other hand, there are also those who are of the opinion that management rights are land rights. This difference of opinion is caused by the existence of management rights which are not regulated in the Basic Agrarian Law, but are regulated in the Regulation of the Minister of Agrarian Affairs. The provisions governing land management rights by the state are only regulated in Minister of Agrarian Affairs Regulation Number 9 of 1965 concerning Implementation of Conversion of Controlling Rights over State Land and continued with the provisions of Article 2 paragraph 3 letter f of Law Number 21 of 1997 concerning

Fees for Acquisition of Land Rights. Meanwhile, other regulations regarding land management rights by the state are also regulated in Article 1 number 3 of the Regulation of the Minister of State for Agrarian Affairs/Head of BPN Number 9 of 1999 concerning Procedures for Granting and Cancellation of Land and Management Rights, where it is explained that management rights are the right to control the state. the authority to implement it is partly delegated to the holder. With the Job Creation Law which explicitly states the authority for land management rights by the state through land banks, a new legal norm has been created regarding land management rights by the state which reaffirms the existence of the state not only in terms of the state's right to control land, but also regarding domestic land management.

As is known, the existence of the Land Bank concept is also expected to be able to answer problems that arise. Judging from its function, the Land Bank has six functions that are useful for those who implement the Land Bank. These six functions include: (A. K. Hari Candra, 2020). a) land keeper, as a land collector, namely inventory and development of land databases, administration and provision of land information systems; b) land warrantee, as land security, namely guaranteeing the provision of land for development, guaranteeing land value and fair land market efficiency, and securing optimal land use; c) land purchaser, as land controller, namely control of land, determining land prices related to the perception of equal land and building tax values; d) land valuer, as a land appraiser, namely carrying out objective land assessments in creating a value system in determining land value that applies to various purposes; e) land distributor, as a land distributor, namely ensuring fair and fair distribution of land based on the unity of land value, securing planning, provision and distribution of land; f) land management, as a land manager, namely carrying out land management which is part of and managing assets as a whole, carrying out analysis, determining strategies and managing implementation related to land.

In general, the concept of land banks and conventional banks has similarities and differences. Limbong as quoted by Ganindha (R. Ganindha, 2016). states that there are similarities and differences in terms of function, implementation and operationalization. In terms of function, both institutions can have the function of storing assets, helping stabilize the secondary market, and holding capital branches. Meanwhile, the difference is that land banks store and manage land, while conventional banks store and manage money and valuables and other securities. In terms of implementation, both institutions can be implemented by the government or private sector, while the difference is that land banks focus on environmental and community stabilization and land use while conventional banks focus on national and international markets. In terms of operationalization, both institutions operate within a regulatory framework, while the difference is that land banks are non-profit oriented and conventional banks are profit oriented.

The land bank itself is an agrarian policy in which institutions are given authority by the state to acquire land that is not in use or land that has problems, whether land that has not yet been developed and needs to be developed or land that is considered to have potential in the short and long term. Apart from that, the land bank is responsible for managing and regulating the land as long as the land is not yet in use. Furthermore, the land bank can redistribute the land in the public interest based on ideas created by the government, especially in long-term programs. On the other hand, as an institution that manages land procurement and distribution, land banks in their operations are subject to the regulations of the Agrarian Principles Law and the Land Acquisition Law. The Job Creation Law only mentions the establishment of an institutional land bank, while land issues in particular are fully regulated by the two regulations mentioned above . (Alfansyuri, S. Amri, dan I. Farni, 2020).

The granting of the request for formal review regarding the Job Creation Law by the Constitutional Court is a good precedent for the life of constitutional democracy in the future. In a first in history, the Constitutional Court finally granted the request for a formal review of a law against the Constitution. Researchers summarize at least several points that the Court considered as to why the Job Creation Law was categorized as a formally flawed law. Firstly, the legislators in the name of accelerating investment and expanding employment opportunities in Indonesia overruled the applicable standard

procedures or guidelines because in principle objectives and means cannot be separated in strengthening the principles of a constitutional democratic rule of law. Second, the procedures for establishing the Job Creation Law are not based on definite, standard and standard methods and methods, as well as systematic law formation. Third, there have been several changes to the writing of several substances after joint approval by the DPR and the President, so this is contrary to the principles of forming statutory regulations. Fourth, where legal facts have been obtained that the procedures for establishing the Job Creation Law do not fulfill the principle of clarity of purpose and the principle of clarity of formulation. Fifth, the legislators in terms of the principle of openness, the trial revealed the fact that the legislators did not provide maximum space for participation by the public.

In fact, legislators sometimes go in the opposite direction to what the Constitutional Court ordered through its decisions. The Constitutional Court in Decision Number 91/PUU-XVIII/2020 in the case of Formal Review of Law No. 11 of 2020 concerning Job Creation against the 1945 Constitution. In one of its decisions the Constitutional Court instructed legislators to suspend all actions or policies that are strategic in nature and have a broad impact, and are not justified in issuing new implementing regulations related to the Creation Law Work. several important points that must be implemented by legislators, namely: a) Lawmakers are prohibited from issuing actions that are strategic in nature and have a broad impact; b) Lawmakers are prohibited from issuing policies that are strategic in nature and have a broad impact; and c) Lawmakers are prohibited from issuing new implementing regulations related to the Job Creation Law.

Then the legislator, in this case, is the President who has stipulated Presidential Regulation (Perpres) no. 113 of 2021 concerning the Structure and Implementation of Land Bank Agencies. This Presidential Decree itself is an implementing regulation of the Job Creation Law and Government Regulation (PP) Number 64 of 2021 concerning Land Bank Agencies. This Government Regulation is not fully operational, because there are several things that must be regulated by the Presidential Decree, such as regarding committees, supervisory boards and implementing bodies of the Land Bank. Presidential Regulations (Perpres) themselves are Legislative Regulations stipulated by the President to carry out the orders of higher Legislative Regulations or to exercise government power. In the explanation section, the function of the Presidential Decree is to carry out further regulations regarding the order of Laws or Government Regulations which expressly or indirectly mandate its formation.

Other irregularities have arisen regarding this Presidential Decree, one of which is related to the public's difficulty in accessing the Presidential Decree. Zainal Arifin Mochtar also expressed the same thing, who admitted that this Presidential Decree could not be accessed by the public. Zainal wondered whether this could happen, in fact he thought that conditions like this would damage the principle of openness and at the same time gave rise to signals from a number of groups that there was a big interest agenda behind all this. Professor of Agrarian Law, Maria Sumardjono agrees that there are difficulties in accessing the Presidential Decree, but the Land Bank Agency officials have been announced. Maria added that to eliminate the confusion over the Presidential Decree and at the same time increase public trust, it would be better for the President as the authority to form the Presidential Decree to immediately revoke Presidential Decree no. 113 of 2021 concerning the Structure and Implementation of Land Banking Bodies and states that the Presidential Decree is no longer valid.

A number of things that need to be corrected in the Job Creation Law and its derivative regulations regarding violations of the conception of Law No. 5 of 1960 include the granting of Business Use Rights (HGU) over Management Rights (HPL); granting Ownership Rights to Flats (HMRS) to foreign nationals whose land status is with Building Use Rights (HGB); determination of HPL for customary law communities. Then the granting of rights and extension or extension and renewal of rights without being limited by the provisions that the registration of rights is carried out in stages. Maria Sumardjono, (Ady Thea DA, 2021) also suggested reconsidering the idea of a Land Bank which was problematic in the first place. It is better to focus on the goal of achieving a socially just economy. The implementation of PP No. 64 of 2021 concerning Land Bank Agencies must be postponed and no new Presidential Decree regarding Land Bank Agencies is issued in accordance with the ruling of the Constitutional

Court. He suggested that now is the right time to rethink the position and function of HPL with all its legal implications in accordance with Law No. 5 of 1960. It is necessary to explore the possibility of making land rights into only two groups, namely ownership rights and use rights as previously proposed in Bill on Agrarian Resources 2004.

#### 4. CONCLUSION

In order to create a constitutional rule of law state, one of the prerequisites that must be realized is to comply with the constitution, including complying with the decision of the Constitutional Court, because after all the decision of the Constitutional Court is the embodiment of the constitution. There are several things that must be done to create constitutional awareness. One of them is by building collective constitutional awareness of all components of the nation, especially between state institutions, by realizing that the decisions of the Constitutional Court are the embodiment of the spirit of the constitution. The land bank supervision mechanism in the Job Creation Law will provide preventive steps to minimize authority over land banks which will be misused in the future. The institutional and supervisory authority of land banks through the supervisory board, as intended in the Job Creation Law, is expected to encourage the performance and operationalization of land banks in accordance with their roles and functions. However, the connection between the land bank and the supervisory board with organs and supervision in the land and banking sector which also exist in other institutions or bodies, especially those which have been ongoing so far, namely BPN and OJK, also requires further clarity regarding their authority and mechanisms. In this way, the implementation of the Land Bank's functions can be carried out well. Considering that initially the government was very enthusiastic about establishing this Land Bank institution.

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