CONSTITUTIONALISM IN LAND ACQUISITION FOR PUBLIC INTEREST: A COMPARISON BETWEEN INDONESIA, RUSSIA AND SEVERAL OTHER COUNTRIES.

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Abstract: *The most intimate relationship between a state and its citizens is manifested in the acquisition of land for the public interest. This article aims to analyze the comparative constitutional norms governing land acquisition for the public interest. Utilizing a doctrinal writing methodology with a comparative approach, it was discovered that among the five nations whose constitutions were compared, only Indonesia did not explicitly regulate land acquisition for the public interest within its constitution. Russia, America, and China explicitly regulate land acquisition for the public interest within their respective constitutions. South Africa, on the other hand, regulates land acquisition for the public interest both explicitly and elaborately within its constitution. The regulation of land acquisition for the public interest within a constitution is of paramount importance and embodies constitutional values that safeguard, respect, and fulfill citizens' rights concerning their land and property when it is to be utilized for state interests (public interest).*

Keywords: *constitution, land, development, relation, comparison.*

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1. INTRODUCTION

In carrying out development, a country basically does so to accelerate the economy, providing benefits for all levels of society. Accelerating economic development is an important issue that is the focus of government policy worldwide.[1] One form of development is physical/infrastructure development that can be utilized by the general public[2], which certainly requires land as an important element in people's lives, as a location for development. There are at least four interested parties in the land acquisition process: the government, the private sector, the community, and the affected parties. The position of the affected parties as landowners is below, indicating a weakness in their position, which is different from the government's position above with all its authority based on laws and regulations. Land acquisition for public interest in its implementation is prone to conflicts of interest and conflict.[2]

In Indonesia, laws and regulations govern the mechanism of land acquisition for public interest, which can basically be done in two ways as follows: First, land acquisition for public interest can be done by releasing land rights, as regulated in Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interest. Second, by submitting a request for revocation of land rights to the president as regulated in Law Number 20 of 1961 concerning Revocation of Land Rights and Objects on it.

The direction of regulation contained in the two laws governing the method of land acquisition, both the release of rights and even more so the revocation of rights, legitimizes the weak

[1] Ade Arif Firmansyah et all, 2015, "Land Acquisition In Accelerating And Expansion Of Indonesia's Economic Development Program: A Review Of Law, Moral And Politic Relations", South East Asia Journal of Contemporary Business, Economics and Law, Vol. 7, Issue 4 August ISSN 2289-1560, P.18.

position of affected parties in the process of land acquisition for public interest. This makes the land acquisition process sometimes injure the rights holders[2]. The chosen approach tends to be repressive and neglectful of the interests of affected parties as landowners. This regulatory condition makes disputes prone to arise in the land acquisition process.

In 2010, a study conducted by Lieke Lianadevi confirmed the absence of legal protection in voluntary land acquisition.[6] Sufriadi in his study also found systemic aspects involving various parties in the cause of land acquisition disputes,[7] and compensation is one of the most complained about parts in land acquisition.[8]

The current reality, the impact arising from land acquisition for public interest are: 1) Community unrest. 2) Negative perceptions that lead to horizontal conflicts between residents and vertical conflicts between residents and state officials. 3) Economic impacts such as decreased income, shifting livelihoods, decreased wealth levels, and guaranteed education for family members of landowners. 4) Environmental impacts such as decreased air quality, noise, road damage, and decreased river hydrology components.[9]

In several tests of the land acquisition law (Law No. 2 of 2012 against the 1945 Constitution), all decisions of the Indonesian Constitutional Court always rejected the applicants' requests in their entirety. The reality of the rejection of these requests by the Constitutional Court and the various problems in land acquisition for public interest in Indonesia hierarchically from a legal aspect certainly leads to constitutional norms related to land acquisition for public interest. In this regard, it is interesting to compare Indonesia's constitutional norms with those of several other countries to get a good picture as an effort to improve land acquisition law for public interest in Indonesia in the future.

2. PROBLEM

Based on the introduction that has been outlined, this article will answer the problem related to constitutionalism in land acquisition for public interest by looking at its comparison between Indonesia, Russia, America, China and South Africa.

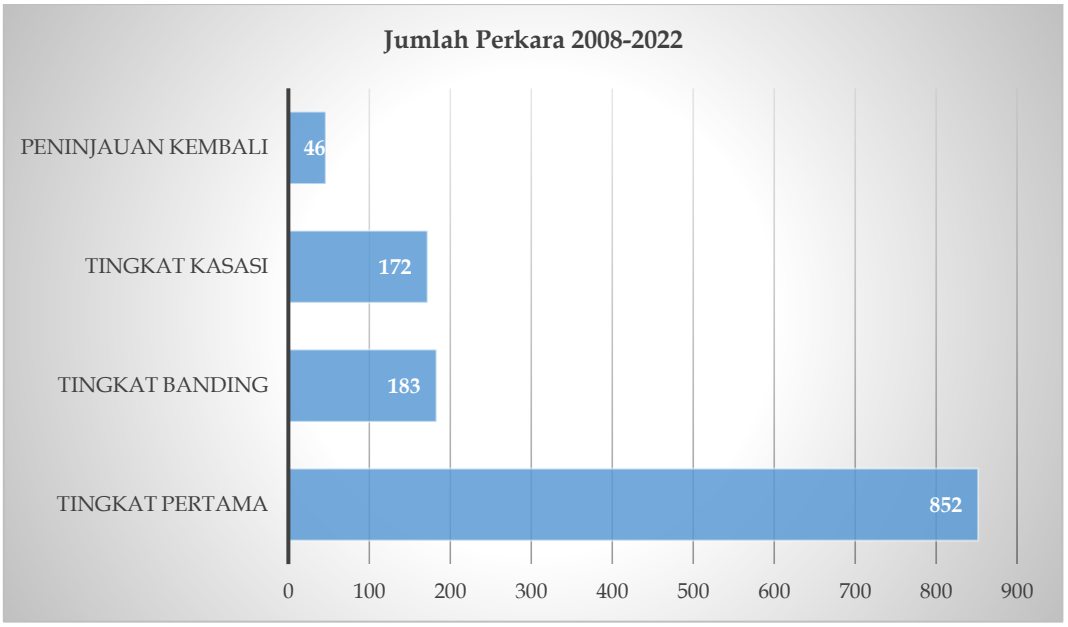
3. RESEARCH METHOD

This article is the result of research conducted within the corridor of normative legal research that uses secondary data. The legal research model is a comprehensive and analytical study of primary legal materials and secondary legal materials with a legislative approach and a conceptual approach. Analysis of data is carried out qualitatively in a prescriptive-analytic manner, namely by examining legal concepts and legal norms related to problems. Analysis of legal materials is carried out by exposing and analyzing the content (structure) of applicable law, systematizing the legal phenomena presented and analyzed, interpreting, and assessing applicable law.

4. Discussion

The provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia give birth to state control rights which are further elaborated by Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles,[10] which regulates that state control rights give the state the authority to regulate and organize the allocation, use, supply and maintenance of land, water and airspace, including land. The provisions of state control rights underlie the juridical side of land acquisition for public interest.[11] Based on the thinking of state control rights and the provisions for the protection of human rights contained in the 1945 Constitution, according to Maria S.W Soemardjono, in land acquisition for public interest, it means that the social function of land will be difficult to describe if it is related to the aspect of "balance" between public interest and individual interests.[12]

However, the social function of land ownership rights is closely related, even often identified with public interest or development interests, even interests that support national interests. [13] In land acquisition, the issue raised is the termination of a previously existing legal relationship between the right holder and his land[14] so that the land in itself stores a social function.[15] The inability of Indonesian legislation to guarantee a balance between public interest and individual interests has resulted in many cases related to land acquisition for public interest within the jurisdiction of the Supreme Court, and several requests for material testing within the jurisdiction of the Constitutional Court. This is as presented in the following diagram.



Source: Supreme Court Decision Directory.

Based on the number of decisions within the jurisdiction of the Supreme Court regarding land acquisition for public interest from 2008 to 2022, there were a total of 1,253 decisions, with details of 852 first-level decisions, 183 appeal-level decisions, 172 cassation decisions and 46 review decisions.[16] If examined on average quantitatively at the first level decision, it means that in the last 14 years (2008-2022) there have been 61 cases of land acquisition for public interest every year or 6 cases every month.

In addition, in several tests of the land acquisition law for public interest (Law No. 2 of 2012 against the 1945 Constitution), so far there have been three Constitutional Court Decisions regarding material testing with the following details: Decision Number 50/PUU-X/2012 ("testing Article 9 paragraph (1), Article 10 letter b and letter d, Article 14 paragraph (1), Article 21 paragraph (1), Article 23 paragraph (1), Article 40, and Article 42 of Law No. 2 of 2012 against the 1945 Constitution"); Decision Number 42/PUU-XII/2014 ("testing Article 1 number 10, Article 9 paragraph (2), Article 31, Article 27 paragraph (2) and paragraph (4) of Law No. 2 of 2012 against the 1945 Constitution"); and Decision Number 88/PUU-XII/2014 ("testing Article 19 paragraph (1), Article 21 paragraph (6) of Law No. 2 of 2012 against the 1945 Constitution"); The verdicts of all three decisions are to reject the applicants' requests in their entirety. From the many cases, it is certainly important to examine the balance between public and individual interests in regulating land acquisition for public interest.

In addition to balancing public and individual interests, the land acquisition process is basically a way that is also necessary to harmonize state control rights over natural resources[17] (the government's obligation to carry out development) while guaranteeing and protecting human rights[18]. These three instruments are regulated in the 1945 Constitution of the Republic of Indonesia, so as a tool to understand the harmonization process, Francois Venter's view will be used in his writing entitled Utilizing Constitutional Values In Constitutional Comparison discussing utilizing constitutional values in constitutional comparison. According to Venter, in the process of identifying values or sets of values that will be used as comparative references, comparators can hope to find out whether the system being considered for comparison is indeed a good candidate for comparison.[19]

Comparability does not always depend on whether the systems involved share exactly the same values; comparison may also involve contrasting different systems. It may also be that systems share certain values, but they are interpreted and applied differently due to different histories and conditions in which they apply. In the context of land acquisition for public interest, the value of protecting affected parties will be compared with constitutions in several countries to see the urgency of the value being compared. Using Francois Venter's Constitutional Value Theory in Constitutional Comparison, that the deepest layer of understanding a constitutional system is in the form of philosophical precepts that determine the principles and doctrines that apply in that system. However, what is meant by "constitutional value" in the current context, the term "value" certainly does not contain material value connotations. As an abstract concept, it indicates a standard or measure of goodness.[20]

Humanity value is chosen as a comparative issue in placing the constitutions of the five countries in this paper. The existence of this value ideally will be visible in constitutional norms, so that value comparison can also be done by looking at its constitutional norms. The comparison will see whether the humanity value embodied in favoring landowners in land acquisition is accommodated in the Constitutions of Indonesia, Russia, the United States, China, and South Africa. Comparing the content of the constitution in the context of humanity values related to the constitution's favoritism towards landowners/affected parties is important to clarify the position of the constitution in providing legal protection that will underlie the legislation below it and become a test stone when there is a request for material testing against related legislation products. The comparison as presented in table one below will specifically capture with regard to the content of constitutional articles that directly relate to favoritism towards affected parties in land acquisition for public interest.

Table 1. Comparison of Constitutional Content related to Land Acquisition for Public Interest

No.	Country	Article of Constitution
1.	Indonesia	Article 28H paragraph (4) of the Constitution of the Republic of Indonesia of 1945 states that every person has the right to own private property, and such property rights shall not be arbitrarily taken away by anyone.
2.	Russia	"Article 35: (1). The right of private property shall be protected by law. (2). Everyone shall have the right to have property, possess, use and dispose of it both personally and jointly with other people. (3). No one may be deprived of property otherwise than by a court decision. Forced confiscation of property for state needs may be carried out only on the proviso of preliminary and complete compensation. (4). The right of inheritance shall be guaranteed".
3.	Amerika	"Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".
4.	China	"Article 13: Citizens' lawful private property is inviolable. The State, in accordance with law, protects the rights of citizens to private property and to its inheritance. The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and make compensation for the private property expropriated or requisitioned."
5.	Afrika Selatan	"Article 25: (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivationo f property. (2) Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affectid or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (e) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and

		beneficia1 capital improvement of the property; and (e) the purpose of the expropriation".

Source: Constitutions of Indonesia, Russia, America, China and South Africa

From Table 1, it is evident that the norm related to land acquisition for public purposes in Indonesia, which pertains to the protection of landowners' rights, is regulated in Article 28H(4) of the 1945 Constitution. However, there is no explicit norm in the Indonesian Constitution regarding land acquisition for public purposes. Therefore, it can be understood that the 1945 Constitution only provides an abstract regulation, namely "everyone has the right to own private property, and such property rights cannot be taken arbitrarily by anyone." In contrast, the constitutions of Russia (Article 35), the United States (Fifth Amendment), and China (Article 13) explicitly state that private ownership of property (land and buildings) can be used by the state for public purposes by providing compensation. This provision is significant as the highest legal basis in the three countries that legitimizes the mechanism of land acquisition for public purposes, where the relationship between the state and landowners will be very close due to the process.

The norm of land acquisition for public purposes in the Russian Constitution does not diminish the essence that most of the state's land is state-owned.[21] Although the protection of the rights and interests of indigenous peoples is also essential, and there are efforts to accommodate these interests in Russia.[22] Meanwhile, in America, the norm of land acquisition for public purposes in its Constitution is interpreted as part of the discourse on the fulfillment of human rights[23]. There are even ten resettlement action plan (RAP) components that must be met, from project impact identification to monitoring and evaluation in America.[24] In China, the norm of land acquisition for public purposes in its Constitution is also the basis for mandatory land acquisition by the government by transferring ownership of land from common ownership to state ownership.[25] Land acquisition is the primary way used by the government to meet the increasing demand for land driven by rapid economic and urban growth in China.[26] Additionally, China also specifically regulates that agricultural land is only owned by the state or rural collectives.[27]

The norm for land acquisition for public purposes in the Constitution of South Africa is considered the most comprehensive and elaborate because it provides clear criteria regarding compensation. This includes the amount of compensation, as well as the time and manner of payment, which must be fair and equitable, reflecting a balanced approach between public interest and the interests of those affected, while taking into account all relevant circumstances, including: (a) the current use of the property; (b) the history of acquisition and use of the property; (c) the market value of the property; (d) the level of direct investment by the state and subsidies in the acquisition and improvement of the property; and (e) the purpose of the acquisition. The clarity of this constitutional norm is crucial in legitimizing the protection of landowners/affected parties in land acquisition for public purposes.

5. CONCLUSION

Of the five countries whose constitutions are compared regarding constitutionalism in land acquisition for public purposes, it is known that Indonesia does not explicitly regulate land acquisition for public purposes in its constitution. Russia, the United States, and China explicitly regulate land acquisition for public purposes in their constitutions. Meanwhile, South Africa elaborately regulates land acquisition for public purposes in its constitution. The regulation of land acquisition for public purposes in the constitution is an important matter and a realization of constitutional values that protect, respect, and fulfill the rights of citizens related to their rights to land and property when they will be used for the country's interests.

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