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Research paper

The Legality of Land Lease by the State-Owned Company PT.KAI (Persero)

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Abstract

Indonesia Train Company or PT Kereta Api Indonesia (hereafter referred to as PT. KAI (Persero) is a State Owned Campanyor Badan Usaha Milik Negara (BUMN), which needs resources to carry out its business. To boost its capital, PT.KAI (Persero) leases its unused land located along the railways that have been closed due to ineffectiveness or the decrease in the operation. This lease carried out overeither certified or uncertified land. Although many of the trains in West Sumatra no longer work since independence, PT. KAI (Persero) still leases land. The lease is done in the form of lease quotation document whose format is solely determined by PT.KAI (Persero), similar to a standard contract. In such quotation,the state is leaser and the leaseholder is only obliged to pay for the lease and enjoy / use the land without a balanced agreement. This situation raises the following question: does the arrangement and status of right and lease of land by PT.KAI (Persero) to the public haveany legality / legal validity? The studydraws on socio-legal data, both primary and secondary obtained through library and field research. The research was conducted in Regional Division II of West Sumatra with land tenants / users of lands thatare deemed as assets by PT KAI (Persero). The site was chosen purposively. The results reveal that the leases of PT. KAI (Persero) arein accordancewith the provisions of the Ministerial Decree on State-Owned Company alongwith the Regulation on Railways. However, land leases by PT.KAI (Persero) basedon the Decision Letter from the Ministry of State Owned Company, which is not specifically intended to PT.KAI (Persero), is illigal.

Keywords: *Land Lease; State-Owned Company; and PT Kereta Api Indonesia*

1. Introduction

PT KeretaApi Indonesia (Persero) is a State Owned Company based on the law on State OwnedCompanies No. 19/2003 (UUBUMN) in conjunction with Law No. 23/2007(UUKA). As a company, PTKeretaApi Indonesia (Persero) is also subject to Law No. 40/2007 on Limited Liability Companies (UUPT). Since the company is involved in land lease, is it also subject to the Basis Agrarian Law No. 51960 (UUPA) and Law No. 2/2012 on Land Procurement. in performing their duties and functions, trains, as public transportation means, can not be separated from the land, i.e., for their railways, stations, warehouses, offices and so forth. PT.KAI (Persero), as a public legal entity, depends on land to run its train business (1).

The existence of railways in Indonesia dates as far back as before independent Indonesia (in the Dutch colonial era) and was run as State Enterprise (SS) and Private Company (VS). After Indonesia gained its independence, all Dutch railways were nationalized and gradually improved in management under the control of the state, which currently runs them in the form of a State-Owned Train Company. In Sumatra, especially West Sumatra (regional division II PT.KAI (Persero), the construction of the first railroads began in 1891-1894 and was known as RanahMinang Railways. The construction of the railways was based on StatBad No 163/1887 and lasted 4 years and was expanded gradually (2). The expansion, completed in 1924, included the areas of Bukittinggi-Limbanang, Pariaman-Limau-MuaroKalaban-Muaro River.

The land used for the railroad lines comes from communal lands (*tanahulayat*), collective land (land right status) and state-owned land (domain principle). According to the provisions of both Bijblad 11372 and Bijblad 12476 the size of land used for both sides of the railroads (left and right) in West Sumatra is pproximately 10 meters. Land deriving from collective land rights (eigendom, Opstal, erpach, and other rights) could be procured through purchase by the then Dutch railway companies, both private and public. As for the land originating from tanahulayat (which still exists in West Sumatra), its procurement is based on loan agreements with indigenous and tribal peoples, and infrequently, by force (spoils). Land owned by the then government, Dutch East Indies, on the other hand, is acquired through a specific planning from the government. The operation of trains in West Sumatra is aimed at nothing but commercial profit under the regional economic policy of the Dutch East Indies Government of West Sumatra. This economic policy known as Pilot Project Systemic Linkage should be implemented thoroughly. Likewise the railway line connecting SawahLunto to TelukBayur (*Emmahaven*) was built along 300 km for *Ombilin* Coal Mine (2).

In 1950, shortly after independence, railway companies were managed by the Djawatan Kereta Api (DKA) basedon the Decree No. 2/1950 of the Ministry of Transportation and Public Works of the Republic of Indonesia before they were handed over to the Indonesian government under the name of State Railway Company (PNKA) in 1963 based on the Government Regulation No. 22/1963. In 1971, pursuant to Government Regulation No. 61/1971,the name PNKA changed to Company of Railway Service (PJKA). In 1990 based on Government Regulation No. 57/1990 PJKA shifted to Public Railway Company (PERUMKA).

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In 1992, with enactment of Law No. 13/1992, furthered by the Presidential Decree No. 69/1998 on Railway Infrastructure and Facilities. PERUMKA was replaced by the current name PT. Kereta Api Indonesia (Persero).

Most of West Sumatra railways have not been functional or used since the 1950s because the line are no longer in use, or are considered unprofitable when in use. Under these conditions, the then railway companies, i.e., DKA, PNKA, PJKA began to lease the lands along side railway lines to the community. However, from 1970 to 1998, the lease process did not run well or was voided as lands used by railways were occupied by residents who filed ownership rights to the State through the National Land Agency (formerly known as Agrarian Directorate). Some of the residents have been granted with the Right to Use (HakPakai) for a period of 5-10 years by issuing a Right to Use Land Certificate on the former railway lands (proof of land rights).

From 1998 up to the present, PT. KAI (Persero) has initiated the re-inventory of the former railways, which it considers as its assets. Under the Railway Law and some other decrees of the minister of State-Owned Company then PT.KAI (Persero) declared itself entitled to use the land any profitable way it deems fit including lease and raising the price of land. The lease does not look like a real lease, yet it is seen as a quote of rent by the state. Those who wanted neither to leave the premises or pay the rent saw their buildings/houses demolished by force. According to PT. KAI (Persero) the legal basics for land leasing are UUBUMN, UUKA, Circular Letter of the Ministery of State-Owned Company No.SE-09 / BU / 2008, Ministerial Decree No.SE- 03 / MBU / 2009, Ministerial Decree, Minister Decree No. PER-09 / MBU / 2014 and PT.KAI (Persero) Board of Directors Instruction No.18 / JB-310 / KA 2010, both on certified and non-certified land.

In West Sumatra, railways were also inventoried, including those that have not been in use for a long time recorded in the *groundkar* (Dutch railway land maps), Among the land claimed is *tanahulayat* also known as *ulayatkaum*, *UlayatSuku* and *UlayatNagari*. Tanah Ulayat is regulated in the Basic Agrarian Law (Article 3) and in West Sumatera Regional Regulation No. 6/2008 on the Utilization of Tanah Ulayat referred therein as UlayatRajo. Ulayat Land is not included in the Government Regulation No. 10/1961, as well as in Government Regulation No. 24/1997 as a land that can be registered.

B. Problem Formulation

Are the regulations, the status of land rights, and land leasing of PT.KAI (Persero) in accordance with the principle of legality that has been established?

2. Results and Discussion

2.1. Land Tenure for State -Owned Enterprise PT.KAI (Persero)

Under the Indonesian Law, the principle of land is controlled by the state as the highest organization, authorized to regulate, designate, use, provide, maintain the land, determine legal relationships and legal acts relating to land. But the State does not own land. The purpose of land ownership and control by the state is intended for the welfare of the people, including the provision of land for public legal entities such as BUMN, government and other institutions.

The designation of land is distinguished for the subject of private law, and public law. For the subject of public law / public legal entities including State-Owned Enterprise (BUMN) granted with unlimited special use rights free of charge without paying anything into the state, only a government planning suffices (Articles 2, 4, 14, 41, 42 of the Basic Agrarian Law). Such planning shall be promoted to the public, and when faced with land already entitled by private individuals and legal entities, it shall first be acquired into state-controlled land, compensating the rights holder. If the holder of the original right is not willing to release, and the site can not be transferred, the right must be canceled (Article 18 UU-PA jo UU no.20 of 1961).

Since the enactment of UUPA, the provisions on the revocation of land rights (Article 18 UUPA) have hardly been enforced, and to meet the needs of land procurement for development in the public interest, some provisions are enacted i.e., Minister of Home Affairs (Permendagri) regulations No. 5/1975, No. 6/1976, No. 2/1982, the Presidential decrees (Kepres) No. 55/1993, No. 36/2005, No. 65/2006, and Law No. 2/2012 on Land Procurement. The enactment of all these regulations and laws is to meet the needs of land for public interest, including for the public interest of rail transportation, by making a planning in accordance with the spatial arrangement of regions / districts,

For Procurement of land for PT.KAI (Persero), a program was conducted program by PT.KAI (Persero) based on UUKA, UUPA through Land Acquisition Law for railway public transpostation. Through the procurement of the land, PT.KAI (Persero) is granted special use rights, as long as it is used for the purposes of railway transportation (Article 41-jo 43 UUPA, Article 50 Paragraph (2) UUPA). After the issuance of Government Regulation No. 40/1996, management rights ws given to PT.KAI (Persero) providedit is devoted to rail transpostation (see Articles 39-58).

The procurement of land, as defined in Article 1 paragraph 2 of Law No. 2/2012, is the provision land by giving proper and fair compensation to the party entitled. Land acquisition is a public legal act, so the procurement of land is principally intended for the public interest. Public interest hasbeen wronged when it come to railway transportation. It is determined in Article 2 paragraph 2 of Government Regulation No. 65/2006 that public procurement of land in government projects can only be done if it has been established in the Regional Spatial Plan. For the procurement of land for public interest, railway should be done by planning based on the Section 82-86 of UUKA, with appropriate compensation for the conditions experienced by the original holder due to the procurement of land for the railway.

The procurement of land should also be adjusted to the spatial plan (Law No. 26 of 2007). The land acquisition process is conducted with the formation of land procurement committee which consists of the Secretary of the region, officials of the regional apparatus element at echelon II level as the vice chairman, the head of the district and municipal office as the secretary, the head of Office / Agency in the Regency / City who are associated with the implementation of land procurement The location should be determined based on the spatial plan of the region / region, after which the type of land rights investigation is carried out. If there is a land of property rights, tenure, use rights and privileges, ulayat rights, then the right must be released into state land. Only after this can the land be registered to become a right to use or the right of management in accordance with the planning land allotment.

The right to use the land is the right to manage and / or collect the proceeds of land directly controlled by the State or the property of another person, giving the authority and duties specified in the decision ofgrant by the competent authority or in agreement with the landowner, which is not a lease agreement or landmanagement agreement provided it does not conflict with the spirit and provisions of UUPA. PT.KAI (Persero) is granted special Use Rights.

The second possibility of land rights for state-owned PT.KAI (Persero) is the right of management, although this right is not specified in the Basis Agrarian Law, it is referred to in the Government Regulation 40/1996 whose Article 1 paragraph 2 says that management right is the State's right to control can partly be delegated to the holder. The management right isalso regulatedby the Presidential Decree No. 24/1997, and the certificate is issued as a legal proof of right. Furthermore, Article 67 of the Nagari Regulation No. 9/1999 stipulates that management right can be allocated to a State-Owned Companyin accordance with its main duties and functions. The purpose of use rights and management rights granted to PT.KAI (Persero) is only for transportation.

Besides the Basis Agrarian Law and its organic provisions, the procurement of land for railwaysis also regulated by Article 84

paragraph 1 of UUKA which says that the procurement of land for railway infrastructure development shall be carried out in accordance with the railway master plan. While Article 85 paragraph 1of the same law emphazises that if an agreement is not reached and the construction site can not be moved, then the land rights should revoked in accordance with the Agrarian Law. Article 86 of UUKAstates that land controlled by the state, in the framework of railway infrastructure development, is certified in accordance with the provisions of the laws and regulations in the field of land. Although the railway management is also regulatedby the Company Law No. 40/2007 (UUPT), which distinguishes a public company from a private company. As State-Owned Campony, a railway company is considered as a public company. Under the Company Law, a private Limited Liability Company may have land rights in the form of Use Right for Business or Hak Guna Usaha (HGU), Use Righ for Building or Hak Guna Bangunan (HGB), Use Right or Hak Pakai (HP) and Management Right. PT.KAI (Persero), as a State-Owned Company (BUMN), is entitledto a special management right. While companiesin general, as private legal entities can only transfer rights to land, pledge rights to land and other legal acts. PT. KAI (Persero) can not only perform the legal act of transferring the right to land eitherpermanently or temporary but also tie the right to the land as a guarantee of debt.

2.2. Land Leasing by PT. KAI (Persero) Division II West Sumatra

The research revealed that in West Sumatera, some of the lands used by PT.KAI (Persero) have land use and land management certicates while others do not. PT. KAI (Persero) is not only involvedin transportation but it also leases land to individuals. The use for transportation is only for the line Padang-Pasriaman with bad quality trains that are not properly used. And according to the Regional Padang Division II of PT.KAI (Persero), this train traffic isnot unprofitable but also dangerous as frequent accidents occur that claim the lives of many people. No wonder most trains in West Sumatra are no longer operational.This has resulted in the leasing of many of these lands used for train traffic by PT.KAI (Persero) PT.KAI (Persero) claims that the lands are its assets since theywere used for transportation during the Dutch East Indies Era. Therefore PT KAI (Persero) feels entitled to lease the landsto both individuals and business entities.

Because the railways no longer operate, land certificates, either use rights or management rights were leased to individuals to improve the profit of PT.KAI (Persero) thesefirst include the Right to Build or Hak Guna Bangunan for a certain period of time after whichthe land returns to its original status i.e., management rights of PT.KAI (Persero), then the user of the building is imposed a lease for land management right by PT. KAI (Persero), which unilaterally determines of the price of the lease.

The land lease of PT. KAI (Persero) in the erea of Lima Puluh Kota, Payakumbuh-limbanang district was once revoked. In an interview, the tenants saidthat in the early 70's, the lease money was paid to the railway company, namely PT. KAI (Persero) which stopped collects rents from that time on, probably because it deems the railway business no longer profitable, as most of its lines were shut down, or it may for fear that the land would return to the State and therefore not longer entitled to it because there is no more train. From 1965 to 1970most tenants of the land formally used by the railways filed land rights applications to the State through the the Land Agency, which approved the applications and granted 5 to 10 years land Use Rights certificates to every applicant. The community considers these certificates of Use Rights as proof of right to land they occupied, without realizing that the rightswere renewable after 10 years of use. The use right would be terminated and the land would return to the State, should the tenants fail to renew the right. This did not happen and to this day, the occupants of these lands still consider them as their property.

From2000 to this day, PT. KAI (Persero) has actively re-inventoriedall its assets, including overdue land leases. After a physical tracing the land used for former railways, PT.KAI (Persero) concluded that it was only leased to those occupy it, and that it still was its asset. Not only did PT.KAI (Persero) re-inventory the leases but it also increased their price up to 500% as of the year 2015. Price adjustment was the justification put forward by PT.KAI (Persero). It also claimed that such leases were based on existing laws such as the Company Law No. 40/2007, the Law No. 1/2004, the Presidential Decree No. 66/2006, the Decree of the Ministryof State-Owned Company No. 3/2009 on the Management and Security of State-Owned Company Assets, the Ministerial Decree No. 9/2009 on the Arrangement, Control and Management of Company assets, Ministerial Decree No. 6/2011 along with Ministerial Decree No. 13/2014concerning the Guidelines for the Utilization of State-OwnedCompany Assets. Based on these provisions, PT.KAI (Persero) feels entitled to lease its assets in the form of land.

Of the laws and regulations related to the operation of trains, there are no provisions that allowa railway companyto rent out land toa third party. Although the land used by the railway company has or does not have a certificate of use rightor managementright, it ceases to be the property of the railway company and become that of the State as it is no longer used for the purpose specified by the law, i.e., public transpotation. State land is used based planning and system of usage concerned with the environment. Under no circumstances the country's state-PT.KAI (Persero) is not allowed to lease land. The State is not allowed to lease land under no circumstances.

As argued earlier, though land leasing to the public or to other parties by PT. KAI (Persero), is conducted in written, it does not actually meet the elements and requirements prescribed by the Civil Code relatedto lease agreement. According to the Civil Code, the subject of land leasing right should be clearly defined, and the type of land rights shall be a private property right. In the case of PT. KAI (Persero),it does not have property right over the land, only the use rights and management right,which are public, not private. The Civil Code also specifies that Land Lease should also include an agreement between the tenant and the leaser at a specific price and a specific time. The leases of PT.KAI (Persero) is not in equilibrium consent of the parties, because everything is determined by PT. KAI (Persero). Article 1320of the Civil Law an agreement is valid if the following requirements are met: 1. Consent of the parties, 2. Capacity of the parties, 3. specific object, and 4. Not prohibited by Religion(halal). The leases conducted by PT. KAI (Persero) hardly meet any of the requirements set forth in this provision. The leasesare object to private property right and PT. KAI (Persero) only has use and management rights for public transportation purpose. Therefore, there leases conducted by PT.KAI (Persero) are null and void.

The basic Agrarian Law provides mechanism for the lease of lands that have private ownership certificates by individual (only Indonesian Citizens). Legal entities are not nexcluded from land ownership, but they also not allowed to lease the land according to Article 16 paragraph 1and Article 20 of the Basic Agrarian Law. The lease right is not a right over land and that is why it is not registered and certified. It only concernsthe over buildings, the lease period and price. This lease right instead of land rights is not registered and are not given the right to lease certificate. Articles 1548-1560 of the Civil Code refers to the lease right specified in the Basic Agrian Law a mere lease agreement whereby one party is to make concessionto allow the other party the enjoyment of the goods during a specified period for a certain price.

3. Conclusion

In light of what has been discussed above, the policy of the land controlled by PT.Kereta Api (Persero) can be summarized as follow:

a. Land of PT.KAI (Persero) is the proof of ownership in the form of *Grondkart* recognized as the State assets and controlled by PT.KAI (Persero), but itis not an evidence of land ownership, but as the initial evidence that the land is required for railway operations.
b. Land acquisition of PT.KAI (Persero) for the benefit of public transport is given the right to use and special management right under the name of state-owned company.
c. PT. KAI (Persero) is a special legal entity that operates for the common good, so therefore land used for this purpose is regulated by public law and is not subject to private ownership
d. Land lease by PT. KAI (Persero) is contradictionwith several laws and regulations, i.e., the Basic Agrarian Law,the Law on State-Owned Company, the law on railways and the Civil Code.
e. Land right granted to PT. KAI (Persero) can not be transferedand used as guarantee. The acquisition of land use and management rights by PT. KAI (Persero) is for public purposes, and it is wrong for the State, as the supreme authority to lease land to its own people. So the act of leasing land by PT KAI (Persero) is a violation of the law.

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