

**FOUNDATION RIGHTS OF UNDERGROUND BUILDING FROM
HORIZONTAL SEPARATION PRINCIPLE'S PERSPECTIVE****Missariyani**Faculty of Law, Airlangga University
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Telp./Fax: +62-31-5023151 Email: missariyani271178@gmail.com*Submitted: Apr 25, 2019; Reviewed: Mei 10, 2019; Accepted: Jun 29, 2019***Abstract**

This paper discusses the foundation rights of underground buildings from the perspective of horizontal separation principle. The first discussion is about the foundation rights of underground buildings according to the principle of horizontal separation and legal construction in the utilization of the right to use underground space for buildings. Furthermore, it will be discussed more specifically the legal basis of state authority in land use, licensing in the construction of buildings under the basement, building rights as the object of building law, construction of underground use rights law as a new concept in national agrarian law.

Keywords: *Building Rights; Horizontal Separation Principle; Underground Buildings***INTRODUCTION****Background**

In his life, humans will not be separated from all acts of conduct related to land, because land is a place for humans to carry out all of their activities in order to organize their lives. Because that land is needed by every member of the community, and on the one hand the land is very limited. The limitations of the land in question are not balanced with human needs so that it often creates conflict in the midst of society. To reduce conflicts that occur on the land in question, the conditions needed to regulate the relationship between humans and land.

Indonesia as an agricultural country, where nearly 80% (eighty) percent of its people depend on land where it's governed entirely by customary law that grew and developed in Indonesia at that time. The existence of customary law that regulates the relationship between humans and land, makes the land have religious values. Religious values contained in the entire legal system that grow and develop in the intercommunication of human beings, so as to counteract the occurrence of land conflicts at that time. People who uphold customary law as their life guide, including on land ownership, because that belief makes them possible to avoid conflict and

land disputes and to utilize the land at its best for human needs.

Regulations concerning land and all its contents, constitutionally regulated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) states that: "the earth, water, and natural resources contained therein are controlled by the state and used for the greatest possible welfare of the people ". By regulating the earth, water and the wealth in it, it is a mandate for the State to regulate and manage the land in question with full responsibility.

The form of the State's responsibility for the mandate of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia above were manifested on Law No. 5 of 1960 concerning Agrarian Basic Law, hereinafter referred to as UUPA (Undang-Undang Pokok Agraria). The existence of the Agrarian Basic Law, especially Article 4 which states that:

1) Based on the controlling rights of the State as meant in Article 2, there are various types of land rights, which can be given to and owned by people both private and public with other people and legal entities.

- 2) The land rights referred to in paragraph (1) of this article authorize the use of the land in question, as well as the body of the earth and water and the space above it, which is only needed for interests directly related to the use of the land in boundaries according to this law and other higher legal regulations.
- 3) In addition to land rights as referred to in paragraph (1), this article also stipulates rights to water and space.

Referring to the provisions stipulated in Article 4 above, it provides an overview of the legal basis for granting rights to land by the State as the highest organization of society. The Indonesian state as the highest organization delegates its authority to the Government to make more detailed and operational arrangements. Thus, the elaboration of Article 4, the details of land rights that can be controlled or owned by the community, stipulated in Article 16 of the Agrarian Basic Law stated that: (1) Land rights as referred to in Article 4 paragraph (1) a Right of Ownership; b. Cultivation Rights; c. Building Rights; d. Usage Rights; e. Rental Rights; f. Rights to Open Land; g. The Right To Collect Forest Products; h. other rights not included in the rights mentioned above

which will be stipulated by law and other rights which are temporary in nature as referred to in Article 53. (2) rights to water and space as intended in Article 4 paragraph (3) are a. water use rights; b. maintenance and fishing rights; c. space use rights

Massive land use in urban areas encourages development that utilizes underground areas. Building an underground building, in practice has its own functions, and its functions can be several parts:

- 1) For personal purposes, namely the use of the basement for the benefit of the owner of the house and his own family, for example, is the use of basements for private parking lots, warehouses, and other rooms that can be used privately.
- 2) For the purposes of infrastructure development, namely the use of underground space which is usually carried out by the Government through agencies under the supervision of the Government, for example is the planting of cables by the National Electricity Company (PLN) project, installation of water pipes by Regional Water Companies (PDAMs), or for the latest in the construction of underground aisles to develop urban mass

transportation systems such as Mass Rapid Transit (MRT) in Jakarta.

- 3) For commercial purposes namely the use of underground space which is used to add to one's economy both individually and in groups. Underground vertical buildings have been established in various countries both as shopping centers and entertainment centers. One example in Indonesia is the Karebosi Mall which is built under the Makassar Karebosi Field.

With regard to the use of basements which are a basic necessity in several major cities of Indonesia, especially DKI Jakarta, and several cities outside Jakarta, for example the City of Makassar¹. The existence of underground building construction, regulated in Law Number 28 of 2002 concerning Building, and Government Regulation Number 36 of 2005 concerning Implementation Regulations of Law Number 28 of 2002 concerning Con-

¹ Karebosi Field has been built under the surface of an international-standard shopping building that was built and operated by a private company, namely PT. Tosan Permai. PT Tosan Permai has obtained management permits for underground buildings, with a period of 30 years. The most basic issue is the permit to build a building under the Karebosi field, not yet a land management right from the Central Agency because the area is more than 50,000 meters, but the building has already been completed. Karebosi management with the decision of the Supreme Court. Number 336/K//PDT/2010.

struction of Buildings. The provisions in Article 1 number 1 of Law Number 28 of 2002 explain that the building is a physical form of the work of construction that is united with a place where it is partially or wholly located above and or underground.

If the building stands on land that is subject to customary law (known as customary land rights), the customary law applies to the principle of horizontal separation (*horizontale scheidings*) between the land and the building standing on it. In customary law, the principle that the constructing party is applied owner of the building.

The availability of increasingly limited land is a polemic for the community, especially in densely populated areas. Building construction in a vertical direction is an alternative². The construction of the building in a vertical direction does not require such extensive land as in the construction of flats, apartments, condominiums and business premises.

Another alternative is to build buildings for the public interest, especially those that are non-residential (for offices and/or shops) by utilizing the basement

(body of the earth). The building in the basement can be divided into 2 (two) types, namely:

- 1) A building which is part and related to the building above it (the main building that stands on the ground);
- 2) A stand-alone building on which there are no other buildings but in the form of roads or other public facilities.

Problem

On the basis of this background the author wants to raise the issue as follows:

1. Are the foundation rights of the underground building in accordance with the principle of horizontal separation?
2. What is the legal construction in utilizing the right to use underground space for buildings?

DISCUSSION

LEGAL CONSTRUCTION OF USU-FRUCTUARY RIGHTS OF UNDERGROUND BUILDINGS

Legal Basis of State Authority in Land Use

The state as the highest organization of society in a nation as the incarnation of the people has sovereign rights over the

² Oloan Sitorus dan Nomadyawati, *Hak Atas Tanah dan Kondominium*, Dasamedia Utama, Jakarta, 1995, h., 109 (Oloan Sitorus and Nomadyawati, *Land Rights and Condos*, Dasamedia Utama, Jakarta, 1995, page. 109.)
Translated by Author

country concerned. The participation of the State in regulating land in Indonesia, as a stakeholder in manifesting the objectives of the State. The state in manifest its objectives are carried out by the government as an extension of the State to manifest the State goals mandated in Article 33 paragraph (3) of the 1945 Constitution.

The elaboration of Article 33 paragraph (33) above, followed up by Article 2 of the Agrarian Basic Law as the basis of the state controlling land in Indonesia. Provisions in the explanation of Article 2 paragraph (4) of Agrarian Basic Law stated that: "The right to control the aforementioned State can be authorized to the regions and customary law communities, only needed and not in conflict with national interests, according to the provisions of Government Regulations" According to **Muhammad Bakri** that³: "So according to Article 2 paragraph (4) and the explanation of Article 2 paragraph (4) the authority of the State which is based on the right to control land by the State is held by the Central Government, so it is centralized. The Regional Government can have that authority if there is a delegation of authority from the Central Gov-

³ Muhammad Bakri, *Hak Menguasai Oleh Negara (Paradigma Baru Untuk Reformasi Agraria)*, Yogyakarta, 2007, h. 62 (Muhammad Bakri, Right to Mastery by the State (New Paradigm for Agrarian Reform), Yogyakarta, 2007, page. 62) Translated by Author

ernment to the Regional Government (assistance task/*medebewind*)".

Licensing in Construction of Underground Buildings

The government in organizing government affairs has the authority to regulate all activities that occur in its territory. The government's action to regulate everything related to the development activities in its area in administrative law is called a one-sided government action. One form of government activity is one-sided, namely the existence of a decree in the form of "permission". The Indonesian Dictionary defines permits as a requirement to grant (not forbid, etc.), consent allows⁴. In practice, permission is often given a supplementary word, so that the sentence becomes a permit, which is related to approval. Permission in the Dutch language, *Beschikking*, is a decision issued by a government organ aimed at a person or party to be able to carry out a certain activity, without which certain activities are prohibited, with the intention of causing certain legal consequences. Permission as a decision is regulated in Article 1 point 3 of Law Number 5 of 1986 concerning State Administrative Courts which states that: "A written stipu-

⁴ Kamus Besar Bahasa Indonesia halaman 391 (The Indonesian Dictionary page 391) Translated by Author.

lation issued by a State Administration Court, which contains state administrative legal actions, which are based on statutory regulations applicable laws, which are concrete, individual and final, which give rise to legal consequences for a person or a private legal entity".

In connection with the definition of a permit as a state administrative decision or an authorized official, then when associated with the construction of buildings under the ground, it is included in this sense. Because, before carrying out the construction of an underground building, it must first obtain a location permit from the local government. One of the standards in licensing construction of buildings, including underground buildings, namely administrative requirements and technical requirements. Provisions in Article 7 paragraph (1), paragraph (2), paragraph (3), and paragraph (4) of Law Number 28 of 2002 state that:

- (1) Every building must meet administrative requirements and technical requirements in accordance with the functions of the building.
- (2) Administrative requirements for buildings as referred to in paragraph (1) include requirements for land status, ownership status of the building, and building permits.

(3) The technical requirements of the building as referred to in paragraph (1) include building layout requirements and building reliability requirements.

(4) The use of space above and/or below ground and/or water for buildings must have a building permit in accordance with applicable regulations.

Administrative requirements refer to the provisions stipulated in Article 8 of Law No. 28 of 2002 which states that every legal subject who will build a building must fulfill administrative requirements as a required, which is related to personal compliance to carry out an activity. Administrative requirements in the form of a status of land rights, ownership status of buildings, building permits are indicators of one's personal obedience relating to his personal activities. Provisions regarding administrative requirements are further clarified in Government Regulation Number 36 of 2005 concerning Implementation Regulations of Law Number 28 of 2002 concerning Construction of Buildings.

The Foundation Rights of Building as the Object of Building Law

The basis of the right to the construction of a building is a legal basis that

becomes the benchmark of the owner or control of land rights, especially underground buildings, which in practice must have certain requirements. Certain requirements relating to administrative requirements and technical requirements. The two requirements in question are requirements that should not be ignored because they will affect the acceptance or rejection of the application to build an underground building. The provisions in Article 14 of Law Number 28 of 2002 stated that:

- (1) Every person who will build a building is required to have a building permit.
- (2) Permits to establish building structures as referred to in paragraph (1) are given by regional governments, except buildings that have special functions by the Government, through the process of applying for building permits.
- (3) The regional government is obliged to provide a statement of the regency/city plan for the location concerned to each person who will apply for a building permit.
- (4) A statement of the regency/city plan as referred to in paragraph (3) is a provision that applies to the location concerned and contains: a.

the function of a building that can be built in the location concerned; b. the maximum height of a building that is permitted; c. the number of floors/layers of buildings under the ground and the Building Height coefficient permitted; d. borderline and distance of the minimum permitted building; e. Building Base Coefficients allowed; f. Permitted Building Floor Coefficients; g. Required Residential Basic Coefficient; h. Coefficient of Building Land that is permitted; and i. utility network.

- (5) In the statement of the regency/city plan as referred to in paragraph (4), specific provisions that apply to the location concerned may also be included.
- (6) The description of the regency/city plan as referred to in paragraph (4) and paragraph (5), is used as the basis for preparing the technical plan of the building.

In line with the provision of building permits, both on the surface and underground, it is further clarified in Article 11 of Government Regulation Number 36 of 2005 concerning Implementation of Law Number 28 of 2002 concerning Construction of Building, stated that:

- (1) Every building must be erected on land whose ownership status is clear, both on its own and the property of another party.
- (2) In the case of land owned by another party, a building can only be established with a land use permit from the holder of land rights or landowners in the form of a written agreement between the holder of land rights or the landowner with the building owner.
- (3) The written agreement as referred to in paragraph (2) contains at least the rights and obligations of the parties, the area, location and boundaries of the land, as well as the functions of the building and the period of land use.

The provisions stipulated in Article 11 of Government Regulation No. 36 of 2005, provide an illustration that the building that will be built on a land location must have clear land ownership status and can only be established with the existence of land use permits from holders of land rights in the form of written agreements with building owners, and clearly regulates the rights and obligations of the parties regarding the land, as well as the period of utilization.

Regarding administrative requirements related to the ownership status of the building in question the provisions in Article 12 of Government Regulation Number 36 of 2005 stated that:

- (1) Every ownership of a building is proven by proof of ownership of a building issued by the Regional Government, except for a special function building by the Government, based on the results of the data collection activity.
- (2) Ownership of the building can be transferred to other parties.
- (3) In the event that the building owner is not the owner of the land, the transfer of rights as referred to in paragraph (2) must be approved by the landowner.
- (4) Further provisions regarding the requirements for proof of ownership of buildings are governed by Government Regulations.

In line with the provisions relating to the construction of buildings, both above ground level, as well as the construction of buildings under the ground, and/or water, it is obligated for every legal subject on having a "Building Permit". The expected goal is that each legal subject can fulfill requirements that are related to the activities of building construc-

tion related to the interests of his business. The provisions in Article 8 of the Minister of Public Works and Public Housing Regulation Number 05/PRT/M/2016 concerning Building Permits are stated that: "Requirements for applications for the issuance of building permits include: a. administrative requirements; and b. technical requirements. Both requirements must be fulfilled if a legal subject will build a building, both above the ground, and below, and/or water.

Construction of the Usufructuary Rights of Underground Building as a New Concept in National Agrarian Law

The concept of agrarian law is a legal concept that was born and developed in Indonesia before the Dutch Colonial presence. Agrarian law that grows and develops, becomes a law that is believed by the people in Indonesia who believe that the land has a magical-religious nature. But along with the rapid development in Indonesia has brought consequences to the philosophy of agrarian law from magical-religious to an economic concept. Land as a concept of economic assets because land is now starting to become one of the triggers of economic growth in a region. Land as a major factor

in human life by Sri Hajati, et al. Said that⁵:

"Land is a very important factor in people's lives, especially in the Indonesian community where most of the population depend on the land. The land is a basic human need since birth humans need land for various needs, both for housing, agricultural business, and others. In the framework of national development to realize a just and prosperous society based on Pancasila and the 1945 Constitution, it has also become one of the main capital, both as a forum for the implementation of development and as a factor of production to produce trade commodities that are needed to increase national income."

In line with the policies and politics of the national land law that has been put forward by the People's Consultative Assembly, it is an order that must be followed up by the Government and the Regional Government. The Decree of the People's Assembly, has a strategic value

⁵ Sri Hajati, et al, *Politik Hukum Agraria Nasional*, Airlangga University Press, Surabaya, 2017, halaman. 1 (Sri Hajati, et al, Politics of National Agrarian Law, Airlangga University Press, Surabaya, 2017, page. 1) Translated by Author

for the development of national land law, which can be concluded from 5 (five), namely: (i) special use of state land so that it can be used to realize social justice for all Indonesian people without exception; (ii) structuring land use is carried out in a planned manner for the maximum prosperity of the people; (iii) structuring land use needs to pay attention to people's rights to land, and social functions; (iv) land use must not be concentrated in one particular group, so as to harm the interests of the people; and (v) improvement of the land management institutional system, so that effective and efficient administration management can be manifested.

Referring to the view of the existence of underground building construction, it can use the basis of Article 4 of the Agrarian Basic Law⁶ which can be expanded by providing interpretations, namely analogy or extensive interpretation. Both are different in the formation of institutions, **Boedi Harsono** proposed for the establishment of a new institution in

⁶ The provisions in Article 4 of the Basic Agrarian Law of 1960 stated that: (1) Based on the controlling rights of the state as referred to in Article 2, various types of rights to land on the surface of the earth are called, which can be given to and owned by people, both alone and together with other people and legal entities. (2) the land rights referred to in paragraph 1 of this article authorize the use of the land concerned, as well as the body of the earth and water as well as those on it are only needed for interests directly related to the use of the land within the limits according to this law and other higher legal regulations. (3) in addition to land rights as referred to in paragraph (1) this article also stipulates rights to water and space.

the form of "underground use rights". While **Maria S.W Soemardjono** said there was no need to establish a new institution, but it was enough to consistently apply the interpretation of analogy and extensive interpretation. According to **Maria S.W. Soemardjono** that⁷:

"In accordance with the above thought, if the rights under the ground are separate from the control over them (for example a subway), then there are several possibilities that can occur, namely: (1) if the subway is built, owned, and operated by the government, rights can be granted Management Right; (2) if the subway is built, owned, and operated by the private sector, then the government has a management right and above that management right can be given the right to use building to the private sector; (3) if the subway is built by the government, but it is managed and operated by the private sector, the government has a Management Right; (4) for other users can be given Building Use Rights, Right to Use, Rental Rights, maybe even Property Rights with an analogy to the right

⁷ *Ibid*

to land which is regulated by Article 16 of the Basic Agrarian Law "

CONCLUSION

Buildings that are built, both on state land, which use land with management rights and on land ownership rights, and use rights. Thus, physically, the authority of the building under the ground is the authority attached to the agency or person or legal entity that builds the building in question. However, the issue of buildings, both underground and above ground, is a process that involves various institutions or agencies related to development as well as related to the authority inherent in the agency.

Agrarian law as a monumental work of the Indonesian people, which was extracted from the civilization and culture of the Indonesian Nation, which put family values as a very high value. It is this family value that underlies the formulation or preparation of the Basic Agrarian Law concerning Provisions on Basic Agrarian Principles. The determination of the designer of this law, which is seen in the establishment that, the principle that applies to national agrarian law, namely the principle of customary law, namely: "principle of horizontal separation", and not the

principle of attachment stated in the Civil Code.

By referring to the concept that developed in the construction of buildings under the surface of the land, then later to anticipate the increasingly complex problems of urban land, then one of the main considerations is, so that people enjoy their land well, and ownership is not lost, then the concept of Build and Operate Transfer (BOT) is one of the right solutions.

Build and Operate Transfer, which is the use of land owned by the Government by other parties by constructing buildings and/or facilities, then utilized by other parties within the agreed time period, then the land and buildings and/or facilities are returned to the manager after the period is over. The presence of a new concept in the field of building construction is one alternative solution in overcoming the complexities of community problems related to land.

SUGGESTION

It is better if the Government of Makassar City manages the issuance of Management Rights on Karebosi Field so as not to cause problems in the future and the Makassar City Government with PT. Tosan Permai Lestari implements the en-

tire agreement as stipulated in the Build and Operate Transfer agreement in order to revitalize the Karebosi Field. by law. The Makassar City Government should first have the right to the land of Karebosi Field which was issued by the National Land Agency and then the Makassar City Government could issue a Location Permit for PT. Tosan Permai Lestari

BIBLIOGRAPHY

Irawan Soerodjo, Agreement and Land Law, Build, Operate And Transfer (BOT) Agreement on Land.

Laksbang Pressindo, Yogyakarta, 2016

Muhammad Bakri, Right to Mastery by the State (New Paradigm for Agrarian Reform), Yogyakarta, 2007

Oloan Sitorus and Nomadyawati, Land Rights and Condos, Dasamedia Utama, Jakarta, 1995

Sri Hajati, et al., Politics of National Agrarian Law, Airlangga University Press, Surabaya, 2017

Indonesia Dictionary

Agrarian Basic Law of 1960
