

BASEMENT OWNERSHIP RIGHTS IN THE PERSPECTIVE OF INDONESIAN LAND LAW

**IBRAHIM SUMANTRI¹, I GDE PANTJA ASTAWA², YANI PUJIWATI³ and
DADANG EPI SUKARSA⁴**

^{1, 2, 3} Program Doktor Ilmu Hukum, Fakultas Hukum, Universitas Padjadjaran, Bandung, Indonesia.

Email: ¹ibrahim20002@mail.unpad.ac.id, ²GPastawa@yahoo.com, ³y.pujiwati@unpad.ac.id,

⁴dadang@unpad.ac.id

Abstract

The regulation of utilization and the granting of rights to land plots is regulated in Government Regulation Number 18/2021 concerning Management Rights, Land Rights, Flats Units and Land Registration. The availability of land plots, especially in urban areas currently increasingly limited due to the high urbanization and population growth of urban areas, thus encouraging people to develop the use of basements. However, this utilization has not been accompanied by comprehensive arrangements to realize the objectives of the law. This research is legal research with a typology of normative legal research or doctrinal research with data sources obtained through document studies that are then analyzed juridically qualitatively. The results of the study concluded that the right to the basement according to the National Land Law can be owned based on the control of the land through the Right of the Indonesian Nation and the Right of Control of the State. But the problem now is that there is no legal policy that legalizes or recognizes that basements can be controlled under property rights. Therefore, in the future, there is a need for the legal politics of basement ownership rights according to the National Land Law.

Keywords: Land, Land Right, and Basement

A. INTRODUCTION

The increase in development activities greatly affects the aspect of land provision which is one of the important factors in the implementation of development. Land availability is one of the obstacles in the implementation of development considering that the land area does not increase while the need for land continues to increase, both as a place of residence, a place of business, and other needs such as infrastructure.¹

Given that land is limited in nature, urban development leads to vertical development. This trend is one of the current and future development models that can be a must considering that the land is fixed / does not increase. Vertical building is widely found in the construction of housing and shops / malls including the construction of new models of transportation facilities that change people's lifestyles from the use of private vehicles to using mass transportation such as Mass Rapid Transit (MRT), Light Rapid Transit (LRT) and Commuter Line. Therefore, a breakthrough and development innovation is needed that can overcome the development of the needs of the community, that is the space below the earth's surface (basement). However, these breakthroughs and innovations certainly require the support of legal tools so that in their realization they can provide legal certainty and justice for the entire community. The granting of land rights or management rights in basements are regulated in Article (146) of Law Number 11/2020 concerning Job Creation (UUCK), which basically states:

“Land or space formed in a basement and used for certain activities may be granted building use rights, use rights, or management rights. The limit of land ownership in the basement by the holder of land rights is given in accordance with the limit of the depth of use regulated in accordance with the provisions of the laws and regulations. The use and utilization of land in the upper and/or basement by different rights holders may be granted building use rights, use rights, or management rights.”

These provisions are then further regulated in Government Regulation Number 18/2021 concerning Management Rights, Land Rights, Flats Units and Land Registration, which among others regulates that the limits on the use and utilization of basements by land rights holders are determined in accordance with spatial planning or up to a depth of 30 (thirty) meters from the ground level if it has not been regulated in the spatial plan as stated in Article (74) paragraph (1) point b.

The policy of granting rights to basements as stipulated in Article (146) paragraphs (1) and (4) of the UUCK is new in Indonesia. Even though factually the development model using or utilizing basements is not new, there have even been a few years before Indonesia became independent, such as the Kurok-Kurok Building in Aceh, Marlborough Fort in Palembang, Fatahillah Museum in Jakarta, Merdeka Building in Bandung, Sukamiskin Prison in Bandung, Pendem Fort in Cilacap, Lawang Sewu Building in Semarang, Vastenburg Fort in Surakarta, Kalisosok Prison in Surabaya, Fort Rotterdam in Makassar, and many more.

The use and utilization of basements still continues today, for example the Karebosi Sports Field in Makassar known as Karebosi link, ² basement of National Monument and Terminal Blok M and Apart Mahata with the concept of Transit Oriented Development (TOD) in Jakarta, ³ buildings used as boarding houses in Bandung, ⁴ and basement parking in office buildings or malls in almost all major cities in Indonesia. These examples further reinforce that the use and utilization of lower space is basically needed, especially in densely populated cities with high levels of activity that require many supporting facilities, but the availability of land at lower levels is limited. Although currently juridically the regulation regarding the use of land rights in the basement has been regulated in Government Regulation Number 18/2021, but these provisions still have many shortcomings, especially still limiting the nature of land ownership rights in basements.

B. RESEARCH METHOD

This research is legal research with a typology of normative legal research or doctrinal research. The nature of the research used in this study is descriptive analytical. The approach method used to answer legal issues in this study is normative juridical using a statute approach and a conceptual approach.)⁵ that is literature material related to the policy of utilizing basement rights. Research data are collected with document study techniques and then analyzed juridically qualitatively, that is qualifying and classifying problems systematically and then analyzed qualitatively.

C. DISCUSSION

A. Mastery of Land Rights in Indonesia

I. Theory of Land Rights Ownership

The concept of ownership of land rights began in Athens which is considered the first democracy during the reign of Solon.⁶ In its efforts to carry out constitutional reform, democratically succeeded in creating an agrarian law (known as seisachtheia) which essentially aimed to free the hectamors from debt, and at the same time free from their status from slaves in agriculture. That is because with a division of one-sixth of the proceeds the hectemor cannot return the debt. With the provisions of the law that had been issued, hectamor was free from debt, but the land did not immediately return to its owner because there was no redistribution of land, the poor peasants rebelled and Solon fell and continued with Pisistratus, with agrarian reforms on the way of redistribution of former pawn agricultural land through the program “land to the tiller dan land to the landless” land distribution to smallholder farmers and credit facilities from the government.

Starting from the division of land, the monopoly on land ownership at that time could be stopped, so that the land was no longer controlled or owned by a group or group of people but the land in accordance with the agrarian reform law had to be widely distributed to the hectamors who were originally considered slaves and had to be freed from the entanglements of the landlords. The constitutional reform of the land was a new milestone in the Greek period, then other countries also imitated the concept of the Greek period to improve the concept of land ownership. Thus the revolt of the peasant workers to demand arable land could be avoided by constitutional reforms in the land sector.

In the concept of ownership there are 2 (two) types of ownership theory. First; how ownership occurs, i.e. from the depiction of a fact (to discribe the facts). Second, explaining that ownership occurs through ethical judgment on facts and attempts to (justify or blame) private property institutions. However, the two point of views can be combined, for example one author assumes that ownership appears to reward a private company. Therefore ethically it can be considered.⁷ In the combination of the concept of ownership, get to know the five concepts.⁸ Of the five concepts, the most dominant in relation to the issue of plantation land rights is the Hegelians view which says that:⁹

“According to the Hegelieans some control of property is essensial for the proper development of personality. The community has slowly evolved from status to contract, from group holding to indivi. Dual property-liberty has grown in the process, and it is the control of property that makes men free. There is in this a valuable truth-he who is wholly dependent on property controlled by others in their own interest can hardIy Llive the life of the free. But the argument does not justify, but rather criticizes, the present system which allows concentration of property in a minority of the community. The Hegelian theory really leads to the conclusion that society should be so organized that every member can, by toil within his powers, ecquire such property as is necessary for true self-realization.”

In the point of view the Hegelians it is emphasized, some control of property rights is essential to the appropriateness personal development (personality). Society slowly upgrading from status to contract, from collective property to private property (individual). Such a displacement is a free growth in the process and it is a free control of man-made property rights.

Another view in the concept of ownership is that it is a creation of the state (a creation of the state) and achieved only after a very hard and long struggle of a community/people (clan).

“... Private property is creation of the State and achieved only after a long struggle with the clan. If we regard as the essential characteristic of private property the right to exclude others, to charge the res for debt, to alienate or leave by will, it is true that the State has provided the machinery by which these rights are enjoyed. The clan favours joint exploitation, dislikes alienation, and regards disposal by will as contrary to the interests of the family. Moreover, while the economic exploitation by the tiller of the soil may take place where there is no state, it is to the military exploits of the State that the huge proprietary manor is due. But is not this argument rather a case of post hoc ergo propter hoc? The State was a resultant of social and economic forces and did not arise ex nihilo. These same forces were tending to the creation of individual property. The emergence of the State and the creation of private property were the effects of the same causes and we can hardly say that one is the creation of the other. Moreover, private property may exist even where there is not a highly developed State, although protection of the owner's right to exclude others can hardly be effective till there is, a developed legal order.”¹⁰

From the view above, it is clear that the state is a strong institution, so it can provide ownership rights in accordance with what the state wants. It is very unlikely to have anything to do with the modern form of ownership without involving legitimate rules (statutes) with effective sanctions behind. Thus, the involvement of the state in ownership is absolutely necessary to guarantee the certainty of such ownership rights.

Another approach in the concept of ownership is a functional concept, in this concept it is explained:

“This approach is sometimes called the functional theory; and it lays down that property which is the result of effort or involves the giving of service is ethically justifiable, but property which is an undeserved claim on the wealth produced by others is not. If property is to be effective in encouraging production, then society should see that it is distributed on proper principles. Duguit would put it that property ceases to be a right and becomes a duty; the owner is no longer free to exercise his arbitrary will but must perform a social function”.

This approach bases ownership of business results or also the involvement of ethics justifiable service delivery (ethical justifiable), So the concept of ownership exists based on a person's eligibility for property rights, but property rights should not be claimed by the proceeds of someone else's property. If property rights become effective in encouraging production, then society needs to see that division is carried out on the basis of the appropriate (principle). Duguit laying down that property rights ends up being a truth and becoming an obligation; the owner is no longer free to use arbitrarily but must use the property rights a social function).¹¹

II. Mastery of Land Rights in Indonesia

The right of control over the land itself contains a series of powers and obligations and/or a series of prohibitions for the holder of the right to do something about the land he is entitled to.¹² The authority, obligations, and prohibitions to be carried out are the contents of the right of control over land which is the difference between the right of control over one land and the right of control of another. These authorities include to use the land he is entitled to indefinitely, because it is hereditary or with a time limit, the use of land in the form of occupying, working on and/or controlling a piece of land and having plants or buildings on it, with no question whether the building is used alone or not.

The types of land rights under the National Land Law include:

1. Rights of the Indonesian Nation

The first control of land rights is the Right of the Indonesian Nation, when viewed Article (1) paragraph (1) of the UUPA it is stated that the entire territory of Indonesia is the unity of the homeland of all Indonesian people who are united as the Indonesian Nation, which is explained in general explanation number II / I that there is a legal relationship between Indonesian people and land throughout the territory of Indonesia called the right of the Indonesian nation, then it can be concluded that land throughout the territory of Indonesia is the common right of the Indonesian nation and is century old, thus the right of the Indonesian nation is the highest right of control over land and becomes a source for other land tenure rights in the hierarchy of land rights control. People who belong to the Indonesian nation itself according to Article (2) of Law Number 12/2006 concerning the Citizenship of the Republic of Indonesia, are included in the class of Indonesian Citizens, which are not based on their ancestry, gender and they have the same opportunity to obtain land rights and to get benefits and results both for themselves and their families.¹³ In addition to this, the Right of the Indonesian Nation also has the authority to regulate land in all parts of Indonesia, where this authority based on Article (2) paragraph (1) of the UUPA is assigned to the State which is the organization of the power of all people, this assignment of authority is an authentic interpretation of the meaning of "controlled by the State" contained in Article (33) paragraph (3) of the 1945 Constitution Of The Republic Indonesia.

2. The Right to Control of the State

The second arrangement of land rights is the right to control from the State, where the thing that underlies the emergence of the right of control is the sound of the 4th paragraph of the preamble to the 1945 Constitution Of The Republic Indonesia whose content is, among others, that the Indonesian nation forms the State of the Republic of Indonesia to carry out the goals of the Indonesian nation which among others is to improve the general welfare of all Indonesian people. Where in order to carry out the purposes of the Nation, the State must have a legal relationship with the land throughout the territory of the State in order to lead and govern it.

However, based on the provisions of Article (2) of the UUPA, the right to control the State does not give the authority to physically control the land and use it like other land tenure rights,

because it is solely public authority. Then the right to control the State only has the following authority: ¹⁴

- a. Regulate and administer the designation, use, supply and maintenance of the earth, water and space;
- b. Determining and regulating the legal relations between people and the earth, water and space; and
- c. Determining and regulating the legal relationship between people and legal acts concerning the earth, water and space.

With regard to the first authority, among others, Law Number 24/1992 concerning Spatial Planning has been made, specifically regarding land equipped with Government Regulation Number 16/2004 concerning Land Stewardship, Government Regulation Number 36/1998 concerning the Issuance and Utilization of Wastelands. With regard to the second authority regarding land, including the creation of Law Number 56 Prp of 1960 concerning the Determination of Agricultural Land Area. As for the third authority specifically regarding land, including Government Regulation Number 24/1997 concerning the Implementation of Land Registration. All such authority in its implementation is regulated under article (2) paragraph (4) of the UUPA can be authorized to self-sufficient areas and indigenous peoples, only necessary and not contrary to the national interest, following the provisions of the Government Regulation.

3. Customary Rights of Indigenous Peoples

The third control of land rights is the Customary Rights of Indigenous Peoples, whose meaning can be seen from the content of article (1) paragraph (1) of the Regulation of the Minister of Agrarian State / Head of the National Land Agency Number 5/1999 concerning guidelines for the settlement of Customary Rights of Indigenous Peoples, where the customary rights of Indigenous Peoples and other similar rights are the authority that according to Customary Law belongs to certain Customary Law communities over certain areas that are environmental its citizens to benefit from natural resources, including land within the territory for their survival and life, arising from hereditary and uninterrupted outward and inner relationships between the indigenous peoples and the territories concerned. The reason why the control of land rights based on customary law is still maintained is because the right is still recognized for its existence in Article (3) of the UUPA, but as long as the right according to reality still exists, which in its implementation still pays attention to the provisions of the UUPA and other laws and regulations and is adjusted to the interests of the National and State based on the unity of the Nation.

4. Individual Land Rights

Individual rights to land are the last land tenure rights in the hierarchy of land rights control, where this right is basically a legal relationship between an individual or legal entity with a certain piece of land that gives the authority to do one on the land he is entitled to, the source of which is directly or indirectly in the Rights of the Indonesian Nation. This right is divided

into various forms of land tenure rights, which are broadly divided into three forms, namely Land Rights, Waqf Land Rights and Land Guarantee Rights. The first form of individual rights to land is land rights where this right gives the right holder the authority to control, use and benefit from a certain piece of land that is rightfully entitled. Land rights broadly consist of two forms, namely primary land rights and secondary land rights.

a. Primary Land Rights

The first form of land rights is primary land rights that contain rights granted by the state¹⁵ and sourced directly to the Rights of the Indonesian Nation, where the rights to the land are further divided into:¹⁶

- 1) Proprietary;
- 2) Right to Use Buildings;
- 3) Business Use Rights; and
- 4) Adoption Rights granted by the State.

b. Secondary Land Rights

Secondary land rights are land rights granted by landowners and sourced from the rights of other parties, 14 land rights of this form in addition to being divided into HGB and HP are also divided into:

- 1) Right to Use Buildings;
- 2) Right of Use granted by landowners;
- 3) Lease Rights;
- 4) Profit Sharing Business Rights;
- 5) Mortgage Rights; and
- 6) Hitchhiking Rights.

B. Indonesian Land Law Perspectives on Basement Ownership Rights

Constitutionally, every citizen has the right to live a prosperous life, namely by granting property rights to an object, including in this case owning land as a place to live or to do a business. The guarantee of this right is implicitly contained in Article (28H) paragraphs (1) and (4) of the 1945 Constitution of the Republic Indonesia, which states that:

- 1) Everyone has the right to live a prosperous life born and lived, to live and to have a good and healthy living environment.
- 2) Everyone has the right to have private property rights and those rights must not be arbitrarily taken over by anyone.

The above provisions, indeed, do not explicitly mention the property rights to land in the basement, but these provisions can be used as a basis for every citizen to defend his property rights in order to realize welfare. Thus, with the motto "For the Sake of Realizing the Welfare of the People" something that was previously impossible can become possible, if the situation and conditions require that this includes in this case the State must give the right to its citizens

to be able to obtain ownership of land rights in the basement. This needs to be given in view of the development of increasingly complex community needs as described above.

The granting of land rights to the basement is based on the "Right of Possession of Land". The right of control over the land contains a series of authorities and obligations and/or a series of prohibitions for the holder of the right to do something about the land he is entitled to.¹⁷ The authority, obligations, and prohibitions to be carried out are the contents of the right of control over land which is the difference between the right of control over one land and the right of control of another. These authorities include to use the land he is entitled to indefinitely, because it is hereditary or with a time limit, the use of land in the form of occupying, working on and/or controlling a piece of land and having plants or buildings on it, with no question whether the building is used alone or not. From several types of control of land rights according to national land law as described above, the right to the basement can be owned based on the control of the land through the Right of the Indonesian Nation and the Right of Control of the State.

1. Rights of the Indonesian Nation

The entire territory of Indonesia is the unity of the homeland of all Indonesian people who are united as the Indonesian nation. There is a legal relationship between the Indonesian nation and land throughout the territory of Indonesia called the right of the Indonesian nation, so it can be concluded that land in all parts of Indonesia is the common right of the Indonesian nation and is eternal. Thus, the Right of the Indonesian Nation is the highest right of control over land and is a source for other land tenure rights in the hierarchical arrangement of land rights control. Thus, on the basis of the Right of the Indonesian Nation ownership of land in the basement becomes mandatory without any restrictions as currently regulated in Government Regulation Number 18/2021.

2. The Right to Control of the State

The Indonesian nation formed the State of the Republic of Indonesia to carry out the objectives of the Indonesian nation which among others is to improve the general welfare of all Indonesians. Where in order to carry out the purposes of the Nation, the State must have a legal relationship with the land throughout the territory of the State in order to lead and govern it. However, based on the provisions of Article (2) of the UUPA, the right to control the State does not give the authority to physically control the land and use it like other land tenure rights, because it is solely public authority. Therefore, the Right to Control of the State only has the following authority:¹⁸

- 1) Regulate and administer the designation, use, supply and maintenance of the earth, water and space.
- 2) Determining and regulating the legal relations between people and the earth, water and space.
- 3) Determining and regulating the legal relationship between people and legal acts concerning the earth, water and space.

All of the aforementioned powers under Article (2) paragraph (4) of the UUPA can be authorized to self-sufficient areas and indigenous peoples, only necessary and not contrary to the National interest, according to the provisions of the Government Regulation. Thus, the Right of Acquisition of the State can certainly be used as a basis for citizens to own land in the basement.

D. CLOSING

A. Conclusion

- 1) Land tenure rights are a series of authorities, obligations and/or prohibitions for land rights holders to use land indefinitely or with time limits on land use in the form of occupying, working and/or controlling a piece of land or building on it, with no question whether the building is used alone or not. The control of land rights under the National Land Law includes: Indonesian National Rights, State Control Rights, Customary Rights of Indigenous Peoples and Individual Rights to Land.
- 2) The right to a basement according to the National Land Law can be owned based on the control of the land through the Right of the Indonesian Nation and the Right of Control of the State. Based on the Rights of the Indonesian Nation, that land in all parts of Indonesia is the common right of the Indonesian nation and is eternal. The right of the Indonesian nation is the highest right of control over land and is a source for other land tenure rights in the hierarchical arrangement of land rights control. Therefore, ownership of land rights in the basement becomes a must without any restrictions as currently regulated in Government Regulation Number 18/2021. If based on the Right to Control of the State, it means that the land currently controlled by the State is essentially the property of the nation assigned to the state for public service. On this basis, citizens indirectly have the right of ownership of the land in the basement. But the problem now is that there is no legal policy that legalizes or recognizes that basements can be controlled under property rights. Therefore, in the future, there is a need for legal politics of basement ownership rights according to the National Land Law.

B. Suggestion

- 1) The government should immediately revise the provisions regarding the use of land rights in basements as stipulated in Government Regulation Number 18/2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration. This is because the regulation is substantially contrary to the Right of Control over Land, both the Rights of the Indonesian Nation and the Right to Control of the State whose existence has been guaranteed constitutionally and the National Land Law System.
- 2) The government and legislative institutions in order to ensure certainty and fairness in granting land rights to basements in Indonesia can consider the concept of basement ownership rights that the author has described in this study. In order to realize the welfare of the people, it will not be realized without changes to the current regulations as stipulated in Government Regulation Number 18/2021. Therefore, the Government should

immediately implement revisions to the regulation, so that the public can get legal certainty and justice in using and utilizing underground space.

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