



Regulation of Underground Space in Realising Community Welfare and Legal Certainty for Investment

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Abstract

The purpose of this research is to analyze and discover the regulation of underground space in realizing public welfare and legal certainty for investment and offer future concepts of underground space regulation in realizing public welfare and legal certainty for investment. This research is normative juridical research with statutory, historical, comparative, and conceptual approaches. The findings of this research show: (a) it has not been regulated regarding property rights, utilization of underground space for private and public, the authority of the central and local governments as well as the authority of notaries and/or PPAT, institutions, and the implementation of underground space. (b) has been regulated but the norms are unclear and not yet comprehensive regarding rights to underground space in the form of Right of Use, HPL and HGB. (c) there are still norms that regulate optional in the regulation of underground space; (d) there are conflicts of legal norms between sector laws. This research concludes that the current underground space regulation is inadequate to support welfare and legal certainty for investment, because there is no support from the Underground Space Law as an instrument of renewal. In addition, the main concept of the Draft Basement Law for the future is directed at public welfare and legal certainty for investment. The draft builds on the philosophical foundation of the welfare state the sociological foundation of the need for underground space utilization, the recognition of rights to underground space, and the juridical foundation of legal certainty.

Introduction

Natural resources found in Indonesia that have an important and strategic role in the past, present and future, one of which is land, which is a medium of life for humans found on the surface above ground and underground (Yu et al., 2020). In the perspective of land and human relations, they have an inseparable relationship. Land in its development becomes the basis of its alliance structure (social basis), the main capital (economic basis), a place to live and a place to maintain its life (Konno & Schillaci, 2021). Such is the importance of land for human life that it is not surprising that land, which is part of the natural resources listed in Article 33 paragraph 2 and paragraph 3 of the Constitution of the Republic of Indonesia (1945 Constitution) which basically affirms the greatest prosperity for the people because of that, the branches of production that are important for the state and that control the livelihood of many people are controlled by the state (Hartana, 2021).

The provisions in Article 33 of the 1945 Constitution above, in order to be implemented, require legislation as an implementation, therefore Law Number 5 of 1960 concerning Basic Regulations on Land Principles (UUPA) was issued (Efrianto, 2023). The provisions formulated in Article 2 of the UUPA above, when connected with the phrase: "natural resources contained therein" in Article 33 of the 1945 Constitution can be given the meaning of "natural resources contained therein" including the regulation of the land above it as well as the

regulation of the land contained in the underground space (RBT), however, the formulation of Article 2 of the UUPA does not explicitly regulate and mention the RBT, as well as those related to the implementation, allocation, use, supply and maintenance of the RBT (Kamilah, 2023). Likewise, it has not regulated legal events, legal relationships and legal consequences related to RBT.

Subsequent legal developments regarding RBT, although not specifically addressing RBT specifically, among others, are contained in Law Number 2 of 2012 concerning Land Acquisition for Development for the Public Interest (Land Acquisition Law), which functions as a complement while perfecting the substance of the UUPA, considering the increasingly high needs of Indonesian society and requiring legal certainty that must be in line with the basic principles in the 1945 Constitution and UUPA (Novira & Putri, 2023). One of the provisions listed in Article 1 point 4 of the Land Acquisition Law regulates the definition of land acquisition, which basically provides regulations regarding RBT other than land space, buildings, plants, objects related to land, or others that have value because RBT can be valued so that it includes land acquisition. In addition, Article 33 letter b of the Land Acquisition Law states that the assessment of the amount of compensation value by the Appraiser is carried out parcel by parcel so that RBT can obtain compensation, in the event of land acquisition as regulated in the Land Acquisition Law (Wu, 2022).

The written provisions of land law are sourced from the UUPA and its implementing regulations that regulate more specifically related to land as the main source, while the unwritten provisions of land law are sourced from customary law on land and jurisprudence on land as a complementary source of law (Lingaas, 2022). This explanation indicates that especially the written legal sources of UUPA and its implementing regulations have not regulated RBT. Clearly at the level of UUPA and its implementing regulations are regulated by the enactment of Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Land Cluster Job Creation (Ciptaker Law) which gives rise to new arrangements regarding rights related to the utilisation of RBT, although not yet comprehensive, as stated in Article 146 of the Ciptaker Law which states: "Utilisation of underground space can be granted rights with the status of HGB, right of use and HPL" (Jiang et al., 2022). As for the implementing regulations of the Ciptaker Law related to land clusters, the regulation regarding RBT is further regulated also in Article 1 point 6 of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Housing Units, and Land Registration. Based on the formulation contained in Article 1 point 6 of Government Regulation No. 18 of 2021, it is mentioned in a limitative and enurmativ manner regarding building use rights (HGB), use rights and land management rights (HPL), however, it has not yet regulated more specifically because of this, Government Regulation No. 18 of 2021 still requires technical implementation which is further regulated by ministerial regulations responsible for managing RBT (Gururaj et al., 2021).

Apart from the incomprehensiveness of the regulation of RBT as described above, there are interesting things, namely the occurrence of legal developments aimed at anticipating the development of the utilisation or use of RBT which factually has become a necessity for both public and private interests as well as private and public interests (Kronenberg et al., 2020). The interests referred to as private, among others, are for residences, parking, warehousing and micro and small businesses (MSEs), while the use or use of RBT for business purposes, among others, such as property development (malls, apartments, basements, parking lots, hotels and so on). Public interests as intended such as road facilities and other public facilities provided by the government for infrastructure development, among others, building mass transportation and transportation as a model for the construction of a railway (sub way) from south Jakarta to

Central Jakarta. Whereas in Makassar (South Sulawesi) the RBT was used for the construction of the Karebosi Link shopping centre. Meanwhile, part of the land surface is used as a field and public facilities that can be enjoyed by the community (Kaklauskas et al., 2021).

The development of RBT for private and public purposes is one of the solutions that has begun to be developed to overcome the limited land as a means of running a business or developing a business, especially in big cities in Indonesia. However, it does not mean without problems regarding the sustainability of RBT space utilisation in particular and generally planning, implementation, supervision and guidance and coordination. (Wahab & Iskandar, 2020). Similarly, after the construction of RBT. In all of these stages, decisions and/or policies must be taken by the government with various considerations in developing RBTs.

The condition of the absence of legal certainty related to the regulation of RBT, can have implications for the absence of legal certainty, meaning that there will be no justice and benefits (welfare) for the community and the business world. Furthermore, it has implications for the difficulty of law enforcement due to the lack of clarity or absence or incompleteness of the regulations governing RBT. These conditions, in addition to making it difficult for the government to bring in domestic and foreign investors, can also cause in addition to legal conflicts as well as social conflicts, both vertical (government vs community or business world), horizontal conflicts (community vs business world) and diagonal conflicts between government agencies. (Kismartini & Pujiyono, 2020).

This research has two main objectives. First, to analyse and find solutions related to the regulation of RBT that can realise public welfare and provide legal certainty for investment. Second, to identify the concept of RBT arrangements for the future that can support community welfare and provide legal certainty for investment. Theoretically, this research is expected to add insight and legal knowledge, especially in the context of land law arrangements related to RBT. Practically, the results of this research are expected to increase public understanding of the concept of RBT, assist potential investors in planning investments in RBT development, and add and complement legal literature related to RBT from the results of previous research.

Methods

This research is included in the type of normative juridical research, which is research that examines various materials from a number of laws and regulations that are relevant to the research theme and other materials from a number of literatures related to the problem being studied. Meanwhile, the data sources used are secondary data, including primary legal materials in the form of regulations related to this research, secondary legal materials in the form of all publications on law that are not official documents, and tertiary legal materials including: dictionaries, encyclopedias and so on. Data collection methods are carried out by stages of library research or literature data to find concepts, theories, opinions or findings that are closely related to the subject matter that has been previously determined and interviews, face to face. The researcher as an interviewer asks various questions that have been previously designed to obtain answers that are relevant to the research problem to an informant or resource person who has knowledge and/or skills on the issue being asked. The method of data analysis is carried out by processing legal material which is an activity carried out by tidying up and analysing the legal material that has been collected, using a descriptive analysis method which is manifested in illustrations through a series of words or sentences separated by category, after the legal material is analysed then rearranged systematically in order to facilitate understanding and interpretation of legal material, so as to get conclusions about legal issues in this study.

Results and Discussion

Analysing the Regulation of Basements in Indonesia

The provision in the UUPA using the term "state control rights" as explained in the Elucidation of the UUPA number II/2 concludes that the rationale used regarding the legal relationship between the state and the earth, water, and space is that the state is considered as the personification of all the people (Bates, 2020). Formulated, one form of relationship referred to in the Elucidation of the UUPA, namely the relationship between the state directly with the earth and so on not as an individual subject, and not in its position as a state that owns, but as a state that becomes the personification of the people as a whole, so that in this conception the state is not separated from the people, the state only becomes the founder, supporter of the unity of the people.

The provisions in Article 2 paragraph 2 of the UUPA, which explain the "right to control the state", among others, have the authority to regulate and organise the allocation, use, supply and maintenance of the earth, water and space, utilising RBT is not prohibited on condition that it specifically pays attention to licensing (Building Approval / PBG) related to building construction and RBT utilisation which must be harmonised with spatial plans and regional plans before utilising RBT must fulfil, among others, PGB, Environmental Approval and other permits in accordance with regulatory provisions (Ananta & Purnamawati, 2020).

The use of RBT, one of which must be considered, is the land rights attached to the land parcel. Land rights can be proven by a land title certificate, which contains physical data and juridical data in it, as long as the physical data and juridical data are in accordance with the data in the measurement letter and land book of the right concerned. However, land rights certificates do not yet support the use of RBT, because the physical data is only about the location, boundaries and area of the land plot, namely the calculation of the length times the width of the land plot, including information about the existence of buildings or parts of buildings on it. This indicates that land certificates containing physical data only support the existence of 2 (two) dimensional land use, not 3 (three) dimensional land use. Land rights as stated in the certificate of registered land do not provide legal certainty for the use of three-dimensional land rights because the measurement of the height (depth) of the land used is not part of the physical data contained in the certificate. The holder of a land right may use it for his or her personal use, for example for the daily needs of his or her household and business, within reasonable limits (O'Hara & Toussaint, 2018).

The use of RBTs where the surface of the land is titled for certain individuals is permitted, as long as the use is in accordance with the designation of the land rights, which means that it is only limited to supporting the utilisation of the property rights (Cai et al., 2020). For example, if the land is used for a residential building, the use of RBT is allowed to build a basement which is then used as a car park or warehouse for storing goods. If the use of the building for the basement is not more than two layers, then the licensing process is carried out as usual. However, if it is more than two layers, it must go through a team of building experts. The provisions of the UUPR factually only regulate space and the function of space for the greatest prosperity of the people, because it does not regulate land and determine land ownership and control, but the UUPR is based on land law whose source is UUPA. The connection between UUPA and land lies in land administration services, as referred to in Article 26 paragraph (3) of the UUPR: "the district spatial plan becomes the basis for the issuance of licences for development sites and land administration such as land rights certificates". The legal basis for the existence of the UUPR includes Article 5 paragraph 1, Article 20, Article 25A, and Article

33 paragraph 3 of the 1945 Constitution. Based on this, the implementation of spatial planning in Indonesia has been regulated by the UUPR.

The UUPR is related to several laws and regulations governing the protection of sustainable agricultural land, mineral and coal mining, forestry, housing and residential areas, coastal areas and small islands and others, as well as several other implementing regulations (Griggs & Reguero, 2021). The regulation of RBT is not clearly regulated in Article 32 of the UUPR as follows: (1) Spatial utilisation is carried out through the implementation of spatial utilisation programmes and their financing; (2) Utilisation of space as referred to in paragraph (1) can be implemented with the utilisation of space, both vertical utilisation of space and utilisation of space within the earth; (3) The spatial utilisation programme and its financing as referred to in paragraph 1 includes a description of the main programme indications contained in the regional spatial plan; (4) Spatial utilisation is carried out in stages in accordance with the timeframe indicated by the main spatial utilisation programmes set out in the spatial plan; (5) The implementation of spatial utilisation in the area as referred to in paragraph 3 is synchronised with the implementation of spatial utilisation of the surrounding administrative area; (6) Utilisation of space as referred to in paragraph 1 shall be carried out with due regard to minimum service standards in the provision of facilities and infrastructure.

The provisions contained in Law No. 28 of 2002 and government regulations as the implementation of Law No. 28 of 2002, regulate the existence of building structures in RBT. It can be seen from the definition of building which gives the definition of building according to Article 1 number 1 of Law No. 28 of 2002. This means that in addition to buildings that are above the surface of the earth, there are also buildings that are below the surface of the earth. If these buildings are analogous to buildings above the surface of the land, then the principles and principles of national land law generally apply to them, including the principle of horizontal separation (Engler et al., 2021). In addition, building construction, especially in RBT, is required to comply with cumulative criteria, including administrative and licensing criteria, in line with what is stipulated in Article 11 paragraph (1) of Government Regulation No. 36 of 2005 concerning Building, which states "Every building must be erected on land with clear ownership status, either owned or owned by other parties". This also applies if the building is in RBT and PGB requirements are needed and there are rights that juridically authorise the establishment, ownership and use of RBT.

The provisions as stated in Article 11 paragraph 2 of Law No. 28 of 2002, basically regulate the criteria for building buildings and buildings that are built, especially in RBT, are limited by prohibitions related to environmental protection and those that function for public infrastructure and facilities. Thus, the building regulations clearly explain that the construction of buildings can be utilised for public facilities and/or public interests in accordance with the technical and functions of both above and/or below ground developments. If viewed in the perspective of the purpose of the requirements for convenience in vertical relationships in building buildings oriented towards the (earth body) RBT, namely to reach underground space that requires a number of access roads as a predetermined technical standard, then the regulation of underground space in building buildings in the national legal system clearly regulates the utilisation of RBT. The indication is that a number of provisions contained in Law No. 28 of 2002 are limited to information on the implementation of public infrastructure and facilities or other facilities that will be built above or below the established building must be accompanied by a use permit granted by the competent authority so that the utilisation of underground space in building buildings follows the function of the building and its management (Van Cutsem et al., 2020).

Implementation of Law No. 28 of 2002, shows that the use of RBT in big cities tends to use a combination of functions in accordance with the general explanation in Article 5 paragraph (7) of Law No. 28 of 2002, namely the function of business economic activities and other interests, while the upper part (subway) is used for public facilities, such as terminals, offices, markets, and others. However, the regulation of RBT in building buildings has not been clearly regulated because the implementation of public infrastructure and facilities or other facilities built above or below the building is established with building approval (PBG) given by the authorised agency so that the use of underground space in building buildings follows the function of the building and its management (Kulikova & Balovtsey, 2020). The utilisation of RBT in buildings for commercial purposes such as the use of office functions, trade (malls), terminals, Mass Rapid Transit, and others, while the utilisation of RBT on private land rights is not clearly regulated. One of the other weaknesses in the utilisation of RBT regulated in Law No. 28 Year 2002 is limited to just discussing the establishment permit (based on the Cipataker Law, the permit is changed to PBG) in line with the building function that follows.

In contrast to Law No. 28 Year 2002 related to the Right to RBT, the provisions contained in the Ciptaker Law have been oriented towards the horizontal separation of ownership between the land above the surface and the space below the ground. Article 146 paragraph 1 of the Ciptaker Law states "land or space formed in the space above and/or below ground and used for certain activities may be granted a building use right, use right, or management right." This provision is limited by not mentioning property rights in relation to RBT rights. In addition, it does not explain what is meant by HGU, hak pakai, or HPL in RBT rights. It can be said that the Ciptaker Law only regulates relatively new regulations regarding space below the surface. Several elements are contained in the definition of RBT. First, regarding the phrase "certain activities" in Article 146 paragraph 1 of the Ciptaker Law does not explain it because it is already regulated in Article 1 number 1 of Law No. 28 of 2002. However, it does not further explore these activities in RBT so that there is uncertainty regarding the rights, objects, subjects, conditions and procedures for obtaining and utilising rights to RBT. Second, Article 146 paragraph 1 of the Ciptaker Law only regulates the rights that can be granted, including building use rights, use rights, or management rights. This provision does not mention property rights. Whereas in several countries in Europe, RBT, apart from being used for offices, parking, public facilities, is also used as a residence or house.

As is known, PP No. 18 of 2021 as the implementing regulation of the Ciptaker Law provides an understanding of what is meant by RBT in Article 1 of PP No. 18 of 2021 that "the space below the surface of the land used for certain activities whose control, ownership, use and utilisation are separate from the control, ownership, use and utilisation on the land plot". Based on the definition of RBT, it can be understood that this regulation wants to bring the concept of horizontal separation of ownership of land rights between above ground space and underground space. This concept will certainly change the implementation of the RBT utilisation cooperation between the local government and the party carrying out the construction and operation of the RBT.

The enactment of PP No. 18 of 2021 is also beneficial for parties managing RBT to cooperate in the utilisation of RBT with the local government to have rights to RBT land. This can certainly provide a more definite basis of ownership for parties who carry out RBT management. According to S.W. Lazerwitz (2020), Management Rights are rights from the state whose implementation authority is partially delegated to the right holder. States that the Management Right is an aggravation of the State's Right of Control. According to Stoelhorst (2021), Management Rights are Land Rights outside the UUPA. Regarding the mechanism for granting land rights for RBT, it is regulated based on PP No. 18 of 2021, which basically

regulates as follows: (1) Land rights holders can use and exploit the land sector owned limited by the depth limit regulated in the spatial plan or up to a depth of 30 metres from the land surface in the event that it has not been regulated in the spatial plan; (2) RBT can be granted HPL, HGB or right of use after the RBT is utilised. Such rights are granted by a decree granting rights by the Minister. After the RBT is utilised on the Above Ground Space or RBT has completed its physical construction and is used in accordance with its designation; (3) HGU and right of use on RBT granted over RBT Management Rights are granted by a decree granting rights by the Minister based on the consent of the Management Rights holder; (4) The granting of land rights to RBTs must be registered with the Land Office and given a certificate as proof.

Referring to the above description, it can be concluded that the granting of land rights to RBT that is utilised is granted by the Minister and also the approval of the holder of the management right holder. In addition, there are provisions that land rights can be granted after the RBT has been utilised, namely in the event that the RBT has completed its physical construction and is used in accordance with its designation.

One that regulates underground space is contained in the Regulation of the Minister of Public Works Number 2 of 2014 concerning Guidelines for Space Within the Earth (Permen PU No. 2 of 2014) made in order to overcome the limitations of land on the surface of the earth, realise integration between activities, and maintain and improve the quality of space and environmental sustainability, it is necessary to optimise the use of space within the earth. Legal arrangements related to rights to RBT cannot be called a "legal vacuum" because the legal position arrangements related to rights to RBT have been regulated in various laws and regulations as previously described, at the regional level several regions have issued in the form of regional regulations (Perda) and / or regional head regulations (Governor Regulations and Regent / Mayor Regulations) as an example of legal evidence (legal facts) carried out by the DKI Jakarta government by issuing Governor Regulation No. 167 of 2012 concerning Underground Space (Pergub No. 167 of 2012).

The provision in Article 5 of Pergub No. 167/2012 states that the designation of deep and shallow RBT is only given for several accesses such as shallow for stations, network systems, parking, offices, services and trade, for the foundation of the building above it. While the deep designation is only for mass public transport such as RBT trains, network systems and utilities, as well as the foundation of the building above it. In essence, the existence of Pergub No. 167/2012 shows that the legal position related to RBT rights in DKI Jakarta has been regulated and implemented. This reflects that there is progress for Agrarian Law by codifying RBT law into Regional Regulations and / or Regional Head Regulations, although until now national laws and regulations governing RBT specifically do not exist, what exists is legislation at the central level governing RBT rights which is partial, sectoral and not yet comprehensive and operational which can answer growing problems in government, business and society.

Referring to the description of relevant laws and regulations regarding RBT, it can be concluded that the regulation of RBT is still scattered in various laws and regulations, the substance of which mostly covers: the definition of RBT, rights to RBT and the utilisation of RBT, while other matters relating to authority, legal subjects, objects and legal sanctions have not been regulated much in legislation so that at the level of statutory regulation in the form of a comprehensive RBT Law which can be used as a kind of "legal umbrella" for the implementation of statutory arrangements under the law (such as government regulations, presidential regulations, ministerial regulations, provincial regional regulations, district / city regional regulations, governor regulations, regent regulations and mayor regulations).

A Concept for the Future of Basement Regulation in Indonesia

Establishment of the RBT Act as a societal reform

Legal reform related to the formation of the RBT Law, fighting for the legal system to be built hierarchically pyramidal composed of the legal ideals of Pancasila, the principles of national law and positive legal principles. The formation of the RBT Law is based on the philosophical foundation of the Indonesian nation, which is the basic view or idea that forms the basis of the philosophical ideals contained in the formation of legislation. These philosophical ideals, contained in the formation of the RBT Law, should reflect the philosophical ideals adopted by the Indonesian nation. This is important because the view of life of a nation contains the moral and ethical values of a nation, which consists of the values of truth, justice, decency and other values that are considered good by a nation.

The philosophy of life of a nation must be the basis for the formation of law in the life of the state, therefore the legal rules formed must reflect the philosophy of life of the nation or at least not conflict with the moral values of the nation. That is, do not let the philosophical ideals contained in the RBT Law, instead reflect the philosophy of life originating from other nations that are not compatible with the philosophical ideals of the Indonesian nation, therefore in the context of state life, Pancasila as a philosophy must be reflected in the philosophical considerations contained in the rules contained in the RBT Law, namely the earth, water, and space, including the natural resources contained therein, are at the highest level controlled by the State, in order to realise the greatest prosperity of the people who must be utilised to realise legal certainty and justice for all Indonesian people.

The realisation for the utilisation of prosperity for all Indonesian people is a natural resource that is oriented to meet the needs of the community and is a basic human need that has economic, social, cultural, religious and ecological values in accordance with public beliefs or the existence of public legal awareness, then it becomes a sociological foundation that serves as one of the bases for the formation of the RBT Law to be drafted. This is important so that the laws and regulations made are obeyed by the community, and do not become mere dead letters. Thus, the rules of the RBT Law to be made must be in accordance with the reality of community life or living law, which also includes community trends and expectations.

Living Law and positive law according to Eugene Ehrlich have differences. Positive law has an effective force if the content of the rules is in line with the laws that live in. Based on that, legislation products do not just record the instantaneous situation (moment opname). Because society changes, values also continue to change, for this reason, the tendencies and expectations of the community must be predicted and accommodated in the RBT Law which is to be formed with a future orientation. The sociological foundation must be described in the legal rules contained in the RBT Law that is formed, besides that it is expected to be able to overcome legal problems or fill legal gaps by considering existing rules, which will be changed, or which will be revoked in order to ensure legal certainty, protection and a sense of public justice.

Principles of Basement Law

Principles are general and abstract basic thoughts or the background of concrete regulations contained in and behind every legal system manifested in laws and judicial decisions, which are positive law and can be found by looking for common characteristics or characteristics in the concrete regulations. It is only necessary to realise that principles do not constitute law. However, no law can be understood without knowing the legal principles that exist in it. Therefore, to best understand the law of a nation, one cannot only look at its regulations, but must dig into its principles. This legal principle gives ethical meaning to the rule of law and legal system. Likewise, according to Sudikno, legal principles are dynamic, developing

following the law, while legal principles will change following the development of society, so they are affected by time and place.

In relation to the regulation of land use, Indonesia is orientated towards the principle of horizontal separation, (*horizontale sheiding*) as follows: "Separation between land and buildings or plants, which are on it. This means that the owner of the building or plant is different from the owner of the land or the owner of the land is not necessarily also the owner of the building built on his land. In essence, this principle can be interpreted to regulate the utilisation of underground space (Volchko et al., 2020). The principle of horizontal separation is the principle that every legal action regarding land rights does not automatically include legal actions on objects that are on the land. The meaning of this principle of horizontal separation, states that something similar to the principle of horizontal separation is that ownership of land and objects or everything that stands on the land is separate. The principle of horizontal separation separates the land from all objects attached to the land. The existence of this horizontal separation principle, the subject of the holder of the land rights can be different from the subject of the ownership of the building, so that the land and the building will be subject to different laws, the land will be subject to land law, while the building will be subject to land law which regulates the power of rights over non-land objects. Thus, in land law, it adheres to the principle of horizontal separation *mutatis mutandis*, this principle confirms that land and buildings are not a unit, which overrides the principle of attachment (*accessie*) regulated in Article 500 and Article 571 of the Civil Code.

Meanwhile, related to the principle of *accessie* or the principle of *natrekking*, which is translated in Indonesian as the principle of attachment, previously explained in advance about the background or history of the formation of Law No.4 of 1996 concerning Mortgage Rights (UUHT), which was initially to attract investors, the government began to make several regulations to open up opportunities for exploration of land and natural resources in Indonesia. As a first step to attract foreign investors, in addition, the UUPA was deemed unable to fulfil and answer the challenges of the times, especially in the field of credit. On a philosophical basis derived from Pancasila as the philosophical basis of the Indonesian nation and the preamble of the 1945 Constitution. The principle of *accessie* as the principle of attachment is defined as buildings and objects or plants contained on the land are an integral part of the land, and are part of the land concerned. Thus, the notion of land rights also includes ownership of buildings and plants on the land to which a person is entitled, unless there is an agreement to the contrary with the other party. The principle of attachment is regulated in Article 500 of the Civil Code.

Rule or Norm as the substance of RBT

Shallow RBT and Deep RBT types

RBT can be categorised into two conditions, called "Shallow" RBT and "Deep" RBT. "Shallow" RBT means that it is owned by a person who has a land title with a depth limit regulated in the UUPR, if it is not regulated in spatial planning, a maximum depth limit of thirty metres from the land surface is determined. Meanwhile, the "Deep" RBT referred to is land which in terms of function, structure, and title is not owned by anyone or is separate from the owner of the land rights. "Shallow" RBT as mentioned above, can be owned by land rights holders with a depth limit of 30 metres. The land rights in question can be granted in the form of usage rights, HPL and HGB by the minister, but if the utilisation of "Shallow" RBT is considered to have the potential to interfere with the public interest, then approval from the land rights holder is required, made in front of a notary official. Authentic deeds, which are the authority of notaries regarding all actions, agreements and stipulations regulated and desired

by law for the parties, aim to ensure certainty of the date of making the deed, making the deed, storing the deed, providing goose, copies and quotations of the deed. Furthermore, the granting of management rights, HGB, HPL or rights of use on RBT must be registered with the Land Office and given a certificate as proof of ownership, accompanied by the required documents. Further provisions regarding such documents are regulated in the Regulation of the Minister of Agrarian and Spatial Planning/National Land Agency.

Legal Subjects of Basements

Two legal subjects are known, namely individual legal subjects and legal entities (corporations) which can become legal subjects of RBT, only certain legal subjects can become subjects of rights to RBT. In practice, there are three terms including subjects of land rights, holders of land rights, and/or owners of land rights, although there are three different terms due to the fact that in these terms there are two combinations of different perspectives, namely the perspective of civil law and the perspective of agrarian law, but they have the same meaning and understanding. Concretely, anyone who can hold and/or own rights to RBT, includes: "central government agencies; regional governments; state-owned enterprises; regional-owned enterprises; state-owned legal entities; regional-owned legal entities; legal entities appointed by the central government; land bank agencies; and customary law communities.

Referring to the above description, the subject of rights, if it is related to who is the right holder who can utilise, own or build a building in the RBT, includes, firstly, the utilisation of RBT space can be given a legal status that is different from the status of land rights, namely with the designation HGB RBT, RBT usage rights, HPL RBT and so on, the substance of which authority is applied *mutatis-mutandis* in accordance with the authority of land rights in accordance with statutory provisions. The rationale is an extensive interpretation of the provisions contained in Article 4 paragraph (2) of the UUPA. Secondly, for the utilisation of space above and RBT, separate rights are given, namely space rights on land and RBT rights (new types of rights). Such as HGB, HPL, Hak Pakai, and Hak Milik.

Rights to Basements

The legal position of rights to RBT in the land law system in Indonesia can be explained, the legal position in this case related to land rights is a right that authorises those who have the right to use or take advantage of the land. In this case, it will be explained related to the rights of RBT arrangements contained in various laws and regulations in the field of agrarian law and land law. The types of rights to RBT, as follows: (a) HGB as Right to Basement. The legal relationship between HGB-RBT holders lies at the entrance and exit between the surface of the earth and RBT. If the space above the surface of the earth and RBT are owned by the same person, it does not cause problems because the HGB-RBT base follows its parent, namely the base of the right above the surface of the earth. The problem arises when there is different ownership between the space above the earth's surface and the RBT. The legal relationship between HGB-RBT holders lies in the entrance and exit between the surface of the earth and the RBT. If the space above the surface of the earth and the RBT are owned by the same person, it does not cause problems because the HGB-RBT base follows its parent, namely the base of the right on the surface of the earth. The problem arises when there is different ownership between the space above the earth's surface and the RBT. The use and utilisation of land in the above space and/or RBT by different rights holders can be granted HGB or hak pakai. Meanwhile, with regard to the use of underground space, it includes basements and stand-alone buildings in RBT (the earth bellow the surface). For buildings located in the basement, especially on the subject, it is necessary to regulate the rights that give the authority to build, own and use the building. The use of RBT for the purposes of building construction is carried

out in RBT on which it is not privately owned land (either individuals or legal entities). This means that the construction of buildings on RBT can only be carried out on state land used for public facilities, such as bus terminal highways, fields or if there are still private land rights on the land, then legally it must release its rights first through the process of land acquisition or procurement; (b) HPL as Right to Basement. The subject matter regarding HPL as a right over RBT can adopt from the provisions regarding HPL on RBT regulated in Article 146 paragraph (1) of the Ciptaker Law which states that land or space formed by RBT which is used for certain activities can be granted HPL. HPL can be granted after RBT is utilised based on a decision to grant rights by the Minister, however, if the utilisation of RBT is an Authentic Deed; (c) Right to Use Right to RBT. In relation to the period of RBT rights for Hak Pakai, for the purposes of the substance of the RBT Law, it can adopt the provisions stipulated in Article 52 of Government Regulation No. 18 of 2021, but with some adjustments, so that the concept offered is ended, Land of Hak Pakai returns to land directly controlled by the State or Land of Management Rights. Land directly controlled by the State, rearrangement is carried out regarding the use, utilisation and ownership under the authority of the minister responsible for land and spatial affairs and can be given priority to former right holders. The above concept is different from the Ciptaker Law, which regulates the holders of Hak Pakai, HGB and HPL, if within a period of 2 (two) years they do not apply for an extension of the period or renewal of rights, their land status becomes state land, and the determination of further legal relations is left to the discretion of the Minister of Agrarian and Land Use/Head of BPN. This legal policy becomes naive when the Ciptaker Law gives the Minister discretion to give it back to the former right holder or to hand it over to and/or to become an asset of a land bank agency or to be designated as abandoned land or for other purposes outside of legal regulations. The Minister's discretion is as broad and large as it is likely to be abused and can justify abuse of authority that leads to corrupt criminal acts.

Proprietary Rights to RBT

Hak milik is a right that cannot be limited in duration and can be the parent of other RBT rights. Hak Milik RBT can be granted on top of it with HGB RBT and Hak Pakai RBT with a certain period of time. This provision must be regulated in the RBT Law to be drafted, while more technical operational provisions regarding the procedures and conditions for granting rights to RBT Property Rights are regulated in the implementing regulations of the RBT Law, in this case regulated by Government Regulation. The RBT Property Rights, it is necessary to provide transitional provisions as a transition period related to certain legal entities that no longer meet the requirements within a period of 1 (one) year must submit an application for change of Property Rights to Property Rights over RBT in accordance with the provisions stipulated in the RBT Law. If they no longer meet the requirements within a period of 1 (one) year, do not submit an application for a change of rights, then the RBT Property Right is removed and the land is directly controlled by the state and the regulation, use and utilisation of the land subsequently by the RBT Law is delegated to the authority of the minister responsible for land/spatial planning affairs.

Hak Milik that occurs due to legislation is implemented through conversion, applicable to former Hak Milik land over customary RBT that already existed before the enactment of the UUPA. Meanwhile, Hak Milik that occurs due to Government stipulation is implemented through the stipulation of granting rights, applicable to land directly controlled by the state on the basis of an application for RBT land rights. Meanwhile, former Adat Owned land is implemented through affirmation or recognition. In necessary, further provisions regarding the procedures and conditions for granting Property Rights over RBT are delegated to Government Regulations. Property Rights over RBT can be transferred and assigned to qualified parties and

can be used as debt collateral encumbered by a hak tanggungan. Transfer of Property Rights over RBT is carried out through sale and purchase, exchange, donation, equity participation, gift by will, inheritance, gift according to customary law, and other actions.

RBT Business Licence

Business licensing in RBT must be regulated by the government, which is tasked with ordering, prohibiting and creating licensing systems. The definition of Permit made by the framer of the Ciptaker Law followed by Article 1 point 14 of Government Regulation No. 5 Risk-Based Business Licensing (PP No. 5 of 2021) refers to the opinion of N.M. Spelt and J.B.J.M. ten Berge, which provides the definition of Permit as an approval from the ruler (government) based on laws or government regulations, to in certain circumstances deviate from the provisions of statutory prohibitions.

Every business entity incorporated or unincorporated, which intends to utilise RBT is obliged to obtain Approval of Conformity of Underground Space Utilisation Activities (PKKPRBT) as a substitute for licensing if it is related to spatial planning including RBT planning. PKKPRBT is a document that states the conformity between the plan for underground space utilisation activities and the spatial plan (RTR) other than the detailed spatial plan (RDTR) depending on whether the PKKPRBT is the authority of the Government or Regional Government. PKKPRBT towards "Shallow" land generally follows the same process as above ground space, except for certain zones or areas that have been designated as special areas. PKKPRBT on "Deep" land can only be granted specifically by the Head of the Region based on a recommendation from the Head of Service responsible for spatial planning.

Basement Coordination

The need for coordination is considered as a result of the existence of divergerende invoelden or scattered forces, which live in the environment of fields / sectors / agencies that in the implementation of their duties seem to be opposite to each other, for which solid cooperation and coordination are needed. Cooperation can briefly be defined as the collective action of one person with another to achieve a common goal. Under certain circumstances there may be co-operation but no co-ordination. Coordination is essentially a manifestation of cooperation, mutual assistance and mutual respect for the duties and functions and responsibilities of each. This is because the unit/work unit in carrying out its activities depends on the assistance of other units/work units. So the existence of interdependence or interdependence is what encourages the need for cooperation, this is in accordance with the characteristics of coordination.

RBT Supervision and Guidance

Supervision is the process of observing the implementation of all organisational activities to ensure that all work being carried out is in accordance with a predetermined plan. According to P. Nicolai, supervision is a preventive measure to enforce compliance. Referring to the views of experts regarding the definition of supervision above, it can be concluded that supervision is a form of action to observe and pay attention to activities that occur as part of the prevention process so that there is no deviation from the desired goal. Based on the description of the definition and purpose above, the ways to conduct RBT supervision in general can be done, among others: notification, report, complaint, direct observation, verification and supervision.

Guidance relating to the utilisation of RBT is carried out by the Government and Regional Governments in accordance with their authority. Coaching is carried out periodically, planned, integrated and sustainable. Guidance is the function of the Regional Government and the

Central Government in accordance with their authority relating to the authority with their duties and functions. The Central Government provides guidance to the Provincial Government. Meanwhile, the Province provides guidance to the City/Regency Regional Government in accordance with its authority. Meanwhile, the Regency / City Government provides guidance to the Department / Agency in its environment in accordance with the authority in its area. In conducting such guidance, periodically based on the hierarchical level of government provides a report on the results of its guidance. The report on the results of this guidance is one of the materials for conducting supervisory evaluations.

Settlement of Underground Space disputes

RBT is something that is relatively new, both in terms of legislation and in terms of its implementation (implementation and management) has the potential to experience disputes that are vertical (government with the community), horizontal (community with other communities) and diagonal (central government with provincial regional government or provincial regional government with regency / city regional government and the like) which must be regulated in the RBT Law to be formed, so that it can be resolved. A dispute is a dispute that occurs between the parties to an agreement due to a default committed by one of the parties to the agreement. The regulation of RBT land rights juridically normative has the potential to give birth to norm conflicts and legal anomalies, not only at the level of norms, propositions and conceptions, but also at the level of legal politics (*rechtsidee*) adopted from each law.

Sanctions Applied in Basements

Violations of RBT utilisation can be divided into two categories, namely violations after the establishment of the RBT, when violations are committed after the spatial plan has legal force and is stipulated by government regulations and violations that occur before the establishment of the spatial plan. Types of administrative sanctions can range from the lightest to the heaviest. The heaviest administrative sanctions are likely to be more effective when compared to the imposition of criminal sanctions. In accordance with the scope of its substance, a law does not need to be forced to regulate sanctions because it will not necessarily be more effective. As stated above, it may happen that law enforcement of a regulation is not always followed by sanctions.

Meanwhile, in relation to the use of criminal means in the utilisation of RBT, its application must be carried out with the principle of *ultimum remidium* (last resort) and even if it must be applied, it is done carefully, carefully, economically, selectively and limitatively. The principle of criminal law as an *ultimum remidium* is a reaction to the relative ease with which legal problems or disputes that occur in society are resolved criminally. Whereas the criminal sanction, in developed countries is no longer the main way to solve the problem, but other means other than criminal are used, for example with fines or administrative law. However, if there is no other choice and the criminal offence cannot be applied other than the civil law, then there is no other choice but to implement it.

Conclusion

The existing regulation of underground space in realising welfare and legal certainty for investment has not been supported by a Law specifically regulating underground space as a means of renewing the implementation of underground space for the sake of legal certainty for investors and public welfare based on social justice; and the main concept of the content material of the Draft Underground Space Law for the future is directed at public welfare and legal certainty for investment which is prepared based on the philosophical basis of the welfare state, the sociological basis of the need for utilization and recognition of rights to underground

space and the juridical basis of legal certainty, with the main content in the form of revision and harmonisation of the provisions of previous legislation and new norms that have not existed before. The main content material for the substance of the Draft Underground Space Law, includes: objectives, principles and scope; subjects of rights to underground space; rights to underground space; registration of rights to underground space; designation of underground space; activities in underground space; underground space utilisation patterns, including deep "Shallow" RBT depth and RBT activities; authority of the central government and regional governments; management and exploitation of underground space; and control of underground space utilisation.

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