International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 06-01-2020; Accepted: 07-02-2020; Published: 05-03-2020
www.lawjournals.org
Volume 6; Issue 2; 2020; Page No. 26-34

Underground space: The concept of property right based on theory of property rights perspective

Dr. Bambang Slamet Riyadi[1], Dr. Sudjito Atmoredjo[2], Dr. Djoko Sukisno[3]
[1] Lecture of Law, at Faculty of Law, Universitas Nasional, Jakarta, Indonesisa. Student of Law Program Doctoral at Faculty of Law Universitas Gadjah Mada. Yogyakarta. Indonesia.
[2] Professor of Agrarian Law, at Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia
[3] Lecturer of Agrarian and Customary Law Faculty of Law, Universitas Gadjah Mada, Yogyakarta. Indonesia.
Corresponding Author: Dr. Bambang Slamet Riyadi

Abstract
The underground space becomes the solution to the limitations of surface soil. In line with the benefits derived from its use, there is much legal uncertainty about the underground space. This is because there is no law or special regulations that discuss about it. One of the fundamental problems in land use is the absence of the law has make obscurity in the underground space right, whereas the construction of any building or facility above or below the ground must have its legal basis. The most powerful title to the land is individual property right. This paper seeks to provide input on the issues surrounding the concept of underground space property rights, including: 1) the owners of the underground space; 2) the scope of the property rights of the underground space; 3) legal acts which may be exercised over the underground space property; 4) obstacles to the implementation of legal action on the underground space property; and 5) justification of property right relationship between underground spaces and land.

Keywords: property rights, underground space, theory of property rights

1. Introduction
The ever-increasing number of people, while the earth's surface is not growing, makes some of the unfilled needs of the land. While the land itself cannot be recreated by humans. Creation of the land by God is only one time and man cannot imitate it. Humans then look for alternative expansion of land that can be used. In line with technological developments, humans began to take advantage of the underground space to accommodate its activities more intensively. Intensive use of the underground space is essentially using space in the earth body to create buildings for human activities in the soil. Building by using the underground space is done due to land limitation factor as the main reason [1]. Since the discovery of technology that allows the use of underground spaces, today in the founding of a building, humans are no longer limited to two-dimensional land use (on the ground), but also three dimensions (above and underground), which means using the land above and beneath the surface of the earth. The use of soil beneath the surface of this earth should be space above ground [2]. Construction of any building or facility above or below the ground shall have its base of interest. All the grounds of the rights, both primary and secondary, are furnished with certificates as proof of property right of the land. The problem arises because the laws governing the underground space itself do not yet exist [3]. It is not yet known exactly who the owners of the underground space, the scope of underground space property rights, legal acts that can be done on the property of underground space, the obstacles of the implementation of the legal act of the property of underground space, and the justification of the relationship of property right of the underground space and above soil. To discuss the matter of the underground space law, in this analysis the proprietary theory is used. This theory is used as a foothold in the discussion of the underground space because the most crucial thing in terms of the land in general and the underground space in particular is the legal certainty. The condition of the creation of legal certainty is the clarity of property right of the underground space. The legal certainty of the property right of the underground space is an important fundamental to the use of underground spaces. Legal certainty about the owners of the underground space will also eliminate the possibility of conflict of mutual claims of property right of the underground space. In the context of rising regulations on underground spaces, the issue of property right of the underground space is becoming increasingly important. There needs to be clarity and certainty about land rights and land property right concept in Indonesia.

2. Review of Property Rights Theory
Property rights theory is based on rights that contain recognition or claims on things (a thing) can be tangible goods/physical, service or knowledge (information that

[1] Novina Sri Indiraharti, 2017, "Perlukah Asas Pemisahan Horisontal dalam Penggunaan Ruang Bawah Tanah?" *Prosiding Seminar Nasional: Problematika Pertanahan dan Strategi Penyelesaiannya*, Sekolah Tinggi Pertanahan Nasional Bekerjasama dengan Pusat Studi Hukum Agraria - Fakultas Hukum Universitas Trisakti, Oktober 2017.
[2] Febrina Kusuma Putri, 2012, "Pemanfatan Ruang Bawah Tanah dan Atas Tanah dalam Pelaksanaan Pembangunan Mass Rapid Transit Ditinjau dari segi Hukum Tanah Nasional", *Tesis*, Universitas Indonesia, Jakarta, hlm. 1.
[3] Urip Santoso, 2017, *Hasil Wawancara Penulis dengan Dosen/Penulis Buku Hukum Agraria Universitas Airlangga Surabaya*, pada tanggal 27 Oktober 2017.

intangible) or anything respected by others [4]. Bromley defines property rights as the right to secure a profit stream, as others respect the earnings stream, in respect of transactions [5].

In the term "property right" (property rights) contained the word "property" and the word property right (property right). Regarding the term "property" itself among experts there are still different views. According to Browder, Cunningham and Smith when layman is asked about the definition of "property", then the property is defined as "something tangible 'owned by a natural person, a corporation or a unit of government. Means "property" is something tangible or real that 'owned' by one person (or several persons) naturally, or owned by
corporation or government unit [6].

However, in terms of law, the answer is considered inaccurate, due to two reasons: (i) there is still confusion in the term "property" with various objects (objects) which also use the term "property", for example in terms of property stage meant not the property right of the stage, but the objects that become aids on the stage; and (ii) the definition fails to recognize that the "subject" of the property also includes something intangible. For theorists and practitioners of legal science, "property" is not a 'thing' at all, although 'things' are the subject of property (property is not just an object, although an object is a property subject). That is, who have property not only human, but can also not human. For example, the land can be owned by Bank, Religious Foundation, and others, which is not human at all.

Another property definition is given by Bentham [7] which is then summarized by Cohen as follows:

> That is the property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The State.

This means that the property is something that allows the following label to be pasted. To the world: do not disturb/grab my property except with permission from me that I can give. Signed: a citizen. Given: Country [8]. The Cohen statement assumes that the property is the norm. That is, with the possession of property by a person, then automatically apply the norm that he has the right to give permission or forbid others to use his property. These rights are the exclusive rights of the owner of an object that cannot be taken arbitrarily by another party, as it is a part of human rights. As a norm, this property right rule binds everyone and whoever violates it can get social sanctions and legal sanctions at once.

Parties that can enforce legal norms against property rights violations are government agencies through legal instruments such as courts and police. Because the
Government's presence is ubiquitous, the conventional government is seen as part of a system that can define and enforce property rights [9].

Opoulou (nd) discloses rights that include property rights there are three, namely: (i) exclusivity of rights to choose the use of a resource (the exclusivity of the right to choose how to use something owned); (ii) exclusivity of rights to services of a resource, and (3) rights to exchange of resources at mutually agreeable terms (the right to change those resources on a contractual basis). Based on the scope of property rights granted by Opoulou (nd) it is found that the right of property right guarantees the owner the right to do everything to the property in his or her best interests, whether to use it, not to use it, or to transfer property right rights [10]. The existence of rights that accompany property rights is likened to Edwin G. West that property rights are bundles of sticks, since the actual property consists of various rights that cannot be separated. In the form of complete property right, property right may grant to its owner the right to acquire the value or benefits of the property, the right to refuse any other party to use the property, and the right to transfer such property rights to others [11].

While Vincent points out that "the right" has five main elements:

1. The subject of right, the right-holder.
2. The object of right, what it is right to have, both positive and negative, like a claim on a right.
3. The Exercising a right, an activity that links between the subject (rights owner) and the object (what is claimed to be the right) (the activity which connects a subject to an object).
4. The barier of the correlative duty, in which the right of being attached to a person means against another who does not get the right, so it is a struggle to "defeat" all barriers/barriers from others.
5. The justification of a right, is a question of justification that something belongs to a person/group (the question of the justification of a right) [12].

From the opinion of the experts above, it can be summarized that the definition of property rights is an acknowledgment or claim on something that is respected by another tangible or intangible party that can be owned by human or non-human (company, religious institutions etc. according to the laws and regulations) which grants the owner the right to do everything to the property in his or her best interests, whether to use it, not to use it, or to transfer the right of property right, which cannot be taken arbitrarily by the parties because it is part of human rights.

---

[4] *Property Rights (Hak Kepemilikan) dalam Ekonomi Kelembagaan".* diakses dari Esl.fem.ipb.ac.id/uploads/media/12.Property_rights_SDA.pdf pada tanggal 21 Oktober 2017.

[5] *Ibid.*

[6] Olin L. Browder, Jr., Roger A. Cunningham, dan Allan F. Smith, 1984, *Basic Property Law*, Four Edition, West Publishing Co., St. Paul, hlm. 2.

[7] J. Bentham, 1975, *Theory of Legislation*, Pub. Inc., Oceana, hlm. 68.

[8] F. Cohen, 1954, "Dialogue on Private Property", *Rutgers Law Review*, Vol. ix, Winter, hlm. 9.

[9] Edwin G. West, "Property Rights in the History of Economic Thought: From Locke to J. S. Mill," dalam Terry L. Anderson & Fred S. Micchesney (eds), 2003, *Property Rights: Cooperation, Conflict, and Law* (eds), Princeton University Press, New Jersey, hlm. 1.

[10] Alexandr Opoulou (nd), "*Public property and property rights theory,"* diakses dari www.Ise.ac.uk/europeanInstitute/reserach/hellenicObservatory/pdf/4th_%20Symposium/PAPERS_PPS/LAW_CITIZENSHIP pada tanggal 21 Oktober 2017.

[11] Edwin G. West, *loc. cit.*

[12] RJ. Vincent, 2001, *Human Rights and International Relations*, Cambridge University Press, Cambridge, hlm. 8, mengadaptasi Gewirth, *Human Rights*, hlm. 2.

3. Concept of property right as the foundation for the establishment of the underground law

Theory of property right deals with the subject of right, the right-holder; the object of right, concerning what kind of rights (what it is a right to), which means concerning the scope of its right to a controlled underground space; the exercising a right, an activity that connects the subject (the right owner) to the object (what is claimed to be the right), which according to Gita Chandrika Napitupulu in this case relates to the activity of the underground space control of the space from one party to the party other (the barrier of the correlative duty) [13], in relation to the land de facto as if transfers property right, thus becoming an obstacle for landowners on the surface of the earth and/or other parties to control underground space and justification of right, concerning the justification of why the underground space must be either the property of the landowner on its surface, or otherwise not necessarily the property of the landowner on its surface.

3.1. Owner of underground space

Land as other objects, may be the property of a person or legal entity whose proof of property right is a Certificate of Property. The legal basis for individual property right of land in general is a universal right that recognizes the property right of private rights. In Indonesia, the basic law of property rights is regulated in Article 28 G and Article 28 H paragraph (4) of the second amendment the Constitution 1945. Article 28 G states that everyone is entitled to the protection of property under his control, while Article 28 H paragraph (4) of the Constitution 1945 states that every person has the right to own property and that the right shall not be arbitrarily taken over, arbitrary by anyone. In Law Number 5 Year 1960 on Basic Regulation of Agrarian Principles, land property right rights are regulated in Articles 20-27. The definition of property rights in accordance with the provisions of Article 20 paragraph (1) of Law Number 5 Year 1960 is the right of down-heritage, the strongest and most fulfilling people can have on the land in view of the provisions of Article 6 of Law Number 5 Year 1960.

Property rights are hereditary intended to mean that the property right of the land does not only last for the life of the holder of property rights on the land, but can also be continued by the heirs if the heir dies. In other words, the term of property rights is unlimited. Property rights are strongest meaning that property rights are easily retained from the interference of others. Fully owned property shows that property rights are the parent of all other land rights in the sense that the holder of property rights may grant the land rights to another party with less right to property right, such as Hak Guna Bangunan and Hak Pakai. In addition, the nature of property rights using can be seen also from the allocation that can be used for the most widespread of other rights, which can be for housing, agricultural business or for social purposes. In contrast to Building Use Rights for example, which can only be used for buildings only [14].

As the strongest and most fulfilled right does not mean the right to property is an absolute, unlimited and irrevocable right, as referred to in *eigendom* rights [15], but property rights are limited by the social function as stipulated in Article 6 of the Basic Agrarian Law. Article 6 of the Basic Agrarian Law states that all rights to land have a social function, so that property rights also have a social function, meaning that the right of property right of the subject (right holder) shall not be used solely for personal gain. There should be a balance between the interests of government and society. In addition to being hereditary, strongest and most fulfilled, property rights may also be transferred and transferred to other parties. To know the owner of the underground space, it is necessary first to know the basic understanding of the subject of law, because the owner of the right to the underground space is as the subject of law. According Soeroso, the subject of law is something that according to the law is entitled/authorized to perform legal acts or who has the right and ability to act in law. In short, the subject of law is anything that by law has rights and obligations [16]. In principle everyone is the subject of law (*natuurljik persoon*). Associated with the ability to uphold rights and obligations, people will become legal subjects if such individuals are able to support their rights and obligations. In this sense, immature persons, persons under custody and persons deprived of their civil rights, can not be classified as legal subjects in the context of the ability to uphold rights and duties. From this description it is known that all persons can become the subject of land law (landowners) to the extent of being able to fulfill their rights and obligations and not being deprived of their civil rights.

Article 21 of the Basic Agrarian Law provides for the subject of law which may have property rights in its provisions as follows.

1. Only Indonesian citizens can have Individual Property Right.
2. By the Government shall be established legal entities which may have the right and the conditions thereof.
3. Foreigners who are subsequent to the coming into force of this Law acquire the Property because inherited inheritance or mixing of property due to marriage, as well as Indonesian citizens who have the Property right after the coming into effect of this Law to lose their nationality shall be obliged to relinquish that right in the time of 1 (one) year since the acquisition of such right or loss of citizenship. If after such a period of time the Individual property right is not released, then the right shall be abolished because the law and the land falls to the State, provided that the rights of the other party to which it is burdened continue.
4. As long as a person in addition to Indonesian citizenship also obtains foreign citizenship he can not own the land with the right of miik and for him to apply the provisions in paragraph (3) of this Article.

Based on the provisions of Article 21 of the Basic Agrarian Law above, it can be seen that only Indonesian citizens can have Hak Milik. Property rights can not be owned by foreign nationals or dual citizens (Indonesian citizens as well as foreign citizens). For a foreign citizen or dual citizen

[13] Gita Chandrika Napitupulu, 2005, *Isu Strategis dan Tantangan Dalam Pembangunan Perkotaan: Bunga Rampai Pembangunan Kota Indonesia Abad 21*, Buku I, Urban and Regional Development Institute (URDI) dan Yayasan Sugijanto Soegijoko, Jakarta, hlm. 14.

[14] Aslan Noor, 2006, *Konsepsi Individual property right Atas Tanah Bagi Bangsa Indonesia*, Mandar Maju, Bandung, hlm. 81.

[15] *Ibid.*

[16] R. Soeroso, 2006, *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta, hlm. 228.

who obtains property due to inheritance or mingling of property due to marriage, shall be obligated to relinquish that right no later than one year after obtaining property rights. If the period ends and the property rights are not released, the property rights will be abolished because the law and the land fall to the state with due regard to the rights of others who burden the land. Foreigners can only own land with limited limited Use Rights. However, Article 21 Paragraph (2) of the Basic Agrarian Law is granted an exemption, namely that the Government may establish legal entities which may own property. The exclusion of legal subjects who may own the land of proprietary rights may be found in Government Regulation No. 38 of 1963 concerning the Appointment of Legal Entities that Owns Property right of Land.

Based on Article 1 of Government Regulation Number 38 Year 1963, legal entities that may own land of property rights, namely:

1. Banks established by the State (hereinafter referred to as the State Bank);
2. Agricultural Cooperative Societies established pursuant to Law Number 79 of 1958 (Statute Book of 1958 No. 139);
3. Religious bodies, appointed by the Minister of Defense/Agrarian Affairs, upon hearing the Minister of Religious Affairs;
4. Social bodies, designated by the Minister of Agriculture/Agrarian Affairs, upon hearing the Minister of Social Welfare.

3.2. Scope of underground property

Speaking of the scope of underground space property rights means talking about the characteristic of the underground space property, the way it is acquired, and how the property rights loss. As with any surface soil, the underground space property is the right of the strongest and most fulfilled land and can be passed down through generations without any expiration. The proof of property right in the form of a Underground Title Certificate is a type of certificate whose owner has full property right of a plot of land in a certain area specified in the certificate [17].

The property right status of the Certificate of The underground space property is also not limited by the time constraint as in the Right to Build. With a certificate of property right, the owner may use it as a strong proof of land property right. In the event of a matter of property right, the name contained in the Property Certificate shall be the legal owner of the Property. A Certificate of Property can also be a powerful tool for sale and purchase transactions and credit guarantees. In addition, these property rights may also be attached to lower secondary rights such as Building Rights, Cultivation Rights, Use Rights, Rental Rights and Reef Rights (with the exception of tenure), which is similar to state authority (as ruler) to grant land rights to its citizens.

The characteristics of underground space property rights are:

1. Property rights may be transferred and transferred to another party.
2. Only Indonesian citizens can own property.
3. The Government shall be subject to legal entities which may own property and conditions (State banks, associations of agricultural cooperatives, religious bodies and social bodies).
4. Occurrence of property rights due to customary law and Government Determination, and due to the provisions of law.
5. Any transition, removal and imposition of title with other rights shall be registered with the local Land Office. The registration is a strong proof [18].

The occurrence of property rights to the underground space can be through various events as regulated in Article 22 of the Basic Agrarian Law stating that:

1. Occurrence of property rights under customary law shall be regulated by a Government Regulation;
2. In addition to the manner referred to in paragraph (1) of this Article, property rights occur because:
   a. Determination of the government, in the manner and conditions stipulated by a Government Regulation;
   b. Terms of Law.

According to Edy Ruchyat, in general property rights to land may occur due to the following:

1. According to Customary Law

According to Article 22 of the Basic Agrarian Law, property rights under customary law shall be governed by government regulations in order to prevent harm to public and state interests. The occurrence of land rights under customary law usually originates from forest clearing which is part of customary land of a customary law community.

2. Government Determination

Property right rights arising from the determination of the government are granted by the competent authorities in the manner and conditions stipulated by government regulations. The land granted with the right of property right may also be given as a change than the applicant has, for example the right to use the building, the right to use, or the right to use, this right is the grant of a new right.

3. Provision of Right to the State

Such property rights are granted on the application concerned. The application for obtaining the right of property right is filed in writing to the authorized official with the intermediary of the Regent of the Mayor of the Region to the head of the Regional Agrarian Office concerned. By the competent authority of the requested property it is granted by issuing a decree granting of property rights.

4. Provision of Right to Change Right

Persons owning land with tenure, use rights or use rights, if the wish and fulfillment of conditions may file a request for the amendment of rights to the competent authority, in order for that right to be converted into property rights. Therefore, the applicant must first relinquish his/her right to his/her

[17] Mengenai nama hak yang diberikan atas ruang bawah tanah ini, Maria S.W. Sumardjono mengusulkan untuk membedakan (sekedar nama) antara hak-hak yang diperoleh di ruang bawah tanah dan di permukaan bumi, maka penyebutannya dapat ditambah dengan, misalnya, Hak Milik Bawah Tanah (HMBT), Hak Guna Bangunan Bawah Tanah (HGBBT), dan sebagainya. Lihat Sumardjono, Maria S.W., 1991, "Redefinisi Hak Atas Tanah: Aspek Yuridis dan Politis Pemberian Hak di Bawah Tanah dan di Ruang Udara," *Makalah yang disampaikan dalam Seminar Hak Atas Tanah dalam Konteks Masa Kini dan yang Akan Datang, diselenggarakan atas kerja sama Fakultas Hukum UGM-BPN*, Yogyakarta, 15 Oktober 1991, hlm. 7.

[18] Adrian Sutedi, 2010, *Peralihan Hak Atas Tanah dan Pendaftarannya*, Sinar Grafika, Jakarta, hlm. 60.

land to the state land, after which it is requested (again) with the right of property right [19].

From the means of acquisition of property rights described above, the first means of acquisition of property right (by clearing forest), can not be applied in acquisition of underground space property rights, because the requested is not surface soil but a non-forest underground space.

Property rights have uniqueness indefinitely, therefore property right rights can be inherited to abandoned families. However, the property right rights may also be erased, in Article 27 of the Basic Agrarian Law it is stated that the right to property is abolished if:

a. The land fell to the state

1. Due to the withdrawal of rights under Article 18 Under the provisions of Article 18 of the Basic Agrarian Law that in the public interest including the interests of the state and the state and the common interest of the people, land rights may be repealed, by compensating suitably and in a manner regulated by law.
2. Because of the voluntary submission by the owner The deletion of property right of land due to the voluntary surrender by its owner relates to Presidential Decree No. 55/1993 on Land Procurement for the Implementation of Development for the Public Interest, which is further implemented in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 1 of 1994 on Provisions Implementation of Presidential Decree No. 55/1993 on Land Procurement for the Implementation of Development for the Public Interest. This voluntary submission according to Presidential Decree Number 55/1993 is purposely made for the interest of the state, which in this case is implemented by the government.
3. Because it is abandonedThe regulation on abandoned land is regulated in Government Regulation No. 36/1998 on the Control and Utilization of Abandoned Land. Article 3 and 4 of Government Regulation Number 36 Year 1998 regulates the criteria of abandoned land, namely:

1. land that is not utilized and/or maintained properly.
2. land not used in accordance with the circumstances, nature or purpose of the grant of such right.

4. Because the provisions of Article 21 paragraph (3) and Article 26 para-graph (2)

Article 21 paragraph (3) of the Basic Agrarian Law stipulates that foreigners who acquire property rights due to inheritance or mixing of marital property, as well as Indonesian citizens who have property rights and after the entry into force of this Basic Agrarian Law lost their nationality, shall be obliged waive that right within 1 (one) year of the acquisition of such right or loss of citizenship. If after such period of time the property rights have not been released, then the right shall be void because the law and the land fall to the state, provided that the rights of the other party to which it is burdened continue.

Article 26 Paragraph (2) of the Basic Agrarian Law states that any sale, exchange, grant, giving with a will and other deeds intended to directly or indirectly transfer property right to a foreigner, to a citizen in addition to the Indonesian citizenship having foreign nationality or to a legal entity, except as determined by the Government, that legal entities which may own the property and its terms, are void because the law and land fall to the State, provided that the parties' rights others whose burdens remain and all payments received by the owner can not be claimed again.

b. The land was destroyed

The purpose of the land is destroyed is the land that has changed from its original form due to natural events and can not be identified again so that can not be functioned, used and utilized properly. Due to such circumstances, the right of property may be erased.

As granting, transfer and imposition of the Property that must be registered in a land book, the abolition of land property right rights is also required to be registered. This is regulated in Government Regulation No. 24/1997 on Land Registration. In the underground space, all manner of removal of property rights to land mentioned above, also apply.

3.3 Legal acts can be done to the underground space property

Discussion of legal acts which may be carried out on underground space property refers to linking the subject (owner of rights) to the object (what is claimed as a right), in this case relating to the activity of the underground space control of the underground space from one party to another other parties.There are several legal acts that can be done in the context of the transfer of rights to the underground space, among others: Sale and Purchase, exchange, agreement of transfer of rights, release of rights, transfer of rights, auctions, grants or other means agreed with parties other than the government implementation of development including development for the public interest. Any transfer of title to land, carried out in the form of sale and purchase, exchange or grant must be made in the presence of the Land Deed Authority.

The sale, purchase or exchange of this grant in the conception of customary law is a legal act of a light and cash nature. It is expressly meant that such legal act must be made in the presence of an authorized official witnessing the exercise or making of that legal act. While with cash means that with the completion of legal acts before the Land Deed Authority means also the completion of legal action conducted with all the legal consequences. This means that such legal conduct can not be undone, unless there is a substantial defect in the property right of the transferred land, or defects in the capacity and authority to act on the plot of land.

Land Deed Authority has an obligation for the transfer of property right of land, can be properly implemented. Land Deed Authority that will make the transfer of land rights have the duty to ensure the truth about the land property right rights, ensure the ability and authority to act from the parties who will transfer and receive the transfer of land rights. With respect to the object of title to the transferred land, the Land Deed Authority shall examine the validity of the documents

1. Regarding the registered plot of land or property rights of the apartment unit, the original certificate of the rights concerned. In case the certificate is not submitted or the certificate submitted is not appropriate with lists in the Land Office; or
2. Regarding the land not yet registered

a. A certificate of validity to prove the old landrights

[19] Edy Ruchyat, 2007, *Politik Pertanahan Nasional Sampai Orde Reformasi*, Alumni, Bandung, hlm. 47-51.

which have not been converted or certified by the Village Head claiming that the person in question controls the plot of land in good faith, and there has never been any problems arising in relation to his land tenure; and

b. A certificate stating that the parcel of land concerned has not been certified from the Land Office, or for land located in an area far from the Land Office office, from the right holder concerned by the Head of Village; and in the event that the letter can not be submitted, the PPAT shall refuse to make the deed of transfer of such landrights including the right of property right of the land to be transferred.

Article 25 of the Basic Agrarian Law states that "Property rights can be used as collateral for debt with burden of mortgage". The mortgage under Article 1 Sub-Article 1 of Law Number 4 Year 1996 concerning Mortality Rights is defined as

The mortgage rights over land and other land-related items, hereinafter referred to as Mortgage Rights, are guaranteed rights imposed on the right to land as referred to in Law Number 5 of 1960 concerning Basic Agrarian Basic Regulations, the following or not other objects which constitute a unity with the land, for the repayment of certain debts, which gives priority to certain creditor to other creditor ".

The imposition of a Depositary is preceded by a pledge to grant a Deposit Insurance as a security of a particular debt settlement, set forth in the agreement and an integral part of the agreement of the related debts or other agreements resulting in such debt. The underground space as well as the surface soil, may be burdened by the mortgage.

3.4. The barriers to the implementation of underground property legal actions

As noted above, the legal act of the underground space property is essentially the same as the legal act of surface soil, among other things, trading, exchange, transfer agreement, other way. The obstacles to the implementation of legal action for the underground space lies in the absence of definitive rules on the underground space (a vacuum law inevitably occurring) so that the property rights of the underground space are still unregistered. Though this registration is very important for the strength and certainty of the law of property rights of the underground space. This legal strength and certainty is created by the issuance of the certificate of property right of the underground space. Without proof of property right of this right, there can be no special legal action against the underground space. So far and until now, what has happened is: If there is a legal action on the surface soil will result in the underground space is also considered as being transacted in the event. So now, there can not be a separate legal act between the underground space and the surface soil because there is no evidence of separate property right between the two. The Local Government, also experiencing obstacles in carrying out the development in the underground space due to the existence of this underground space law kevakuam. For example, the Government of DKI Jakarta, which has planned to build subway tracks, has constrained the absence of legal rules that accommodate this development. Whereas the cost of such development takes a long time and high investment, and involves many parties (there are investors from China, Japan, and from within the country ie the Government of DKI Jakarta itself). In such circumstances, a legal certainty is required for the parties to undertake the construction. Therefore, to overcome the legal vacuum, the Government of DKI Jakarta issued the Regulation of the Governor of DKI Jakarta No. 167 of 2012 on the Underground (Provincial News of the Special Capital Province. of Jakarta No. 162 of 2012).

The regulation does not have a strong legal basis on it, because the rules of the underground space do not yet exist. A statutory ordinance should not be contrary to the above legislation, for example by Law, Government Regulation, or Presidential Decree. If the Regional Regulation is contrary to the above legislation, then academically the said Regional Regulation shall be declared null and void. This is what threatens the legal certainty of the construction of the subway network in DKI Jakarta and development in other underground spaces. In addition to causing unenforceable legal action over the underground space and vagueness of the foundations of the construction of underground spaces, the legal underground space of the underground space also caused people to experience barriers to using the underground space. This is as happened in Makassar. The people of Makassar City have football field in the center of Makassar City. Personally, no one owns the land, so it can be said that the land is an ulayat land that belongs to the general people of Makassar. However, the Makassar City Government has granted the Right to Build to PT Tosan Permai Lestari, the capital owner who then utilized the underground space to build an underground mall under Karebosi Field. Since the granting of Right to Build Serah to PT Tosan, the Karebosi Field was originally open to the public and became one of the green open spaces that became the means of sports, footwear and public recreation facilities, at the request of PT Tosan Permai Lestari, limited by its utilization by Makassar City Government. This is done by the Government of Makassar City by issuing the Mayor of Makassar Regulation No. 23 of 2007 on the Division of Space Allotment and Prohibition of Use in Karebosi Field Surface Area of Makassar City. The loss of people's right to use Karebosi Field, has made the public citizen lawsuit to the Makassar City Government. In the citizen lawsuit, the public demanded the return of their right to utilize the Karebosi Field just as before the underground underground mall underneath. However, the Makassar District Court won the Makassar City Government in the case of the citizen lawsuit by reason of the right to manage and grant the right to PT Tosan Permai to the underground space is the exercise of the authority of regional autonomy and according to Article 2 paragraph (2) of the Basic Agrarian Law determines that "The right of control of the country referred to in paragraph (1) of this article authorizes

a. organize and organize the use, stockpiling and maintenance of the earth, water and space;
b. determine and regulate the legal relations between people and the earth, water and space;
c. determine and regulate the legal relationships between persons and legal acts concerning the earth, water and space."

The Makassar District Court's verdict in favor of the owners of capital and to the detriment of the general public is a bad precedent in the legal arrangement of the underground space. All of this can happen because of the vacuum legal

vacuum. This vacuum makes the Local Government make its own laws, regardless of the interests of the community. This led to legal turmoil. As van Vollenhoven has pointed out in 1919 State equipments without the rules of Constitutional Law will be paralyzed, because their authority (authority) is absent or uncertain. State equipment without the Law of State Administration is free at all, because the tools will exercise its power at will [20]. From the cases described above, it is known that in the life of society required a legal system to create a harmonious and orderly society life. In fact the law or legislation that is made does not cover all cases that arise in society, making it difficult for law enforcement to complete the case. The principle of legality that should provide legal certainty and protection to the community, even a principle that harms the sense of community justice. This can happen because the society continues to grow along with technological advancement, but such rapid changes have not been regulated in a legislation.

The absence of statutory rules on underground spaces that establish the "limitations" of power constraints, led to the executive officials, in this case the Mayor of Makassar and the Governor of DKI Jakarta, as if "finding and determining its own law" in regulating the space under soil. This resulted in arbitrariness. According to S. Prajudi Atmosudirdjo such matters make urgent a legislation which regulates the operation and control of administrative or administrative powers over administrative powers. This law will be the guide or the way in carrying out the law [21].

From the description above, it is clear that the vacuum law vacuum becomes a serious obstacle in the implementation of legal action against the underground space property, becoming obstacles to the implementation of development, and on the contrary, instead creating arbitrariness by the rulers and owners of capital over the small people.

3.5 Justification of the property right relationship between underground space and land

Speaking of the justification of the relationship of property right of the underground space and the land, it means talking about the justification of why the underground space must also belong to the owner of the land on its surface, or otherwise not automatically belong to the landowner on its surface.

Discussion of this justification can be seen from five different established theories in order to justify private property.

The first theory is occupation theory. This theory suggests that the simple facts about occupation and possession of something justify the legal protection of the occupiers or the party claiming possession of the thing.

The second theory labor theory. According to this theory a person possessing/possessing property possesses a moral right to property right and controls what he produces or earns through his labor (sacrifice) [22].

The third theory is contract theory. According to this theory private property is the result of contracts between individuals and communities.

The fourth theory is natural rights theory, which states that natural law dictates the recognition of private property property right.

The fifth theory is social utility theory which states that the law must promote the maximum fulfillment of human needs and aspirations, and the private property property right umbrella is one of promotion for the fulfillment of those needs [23].

of the five theories above, which will be used to discuss the justification of the relationship of property right of the underground space and the soil is the fifth theory, the social utility theory which states that the law must promote the maximum fulfillment of human needs and aspirations, and the legal umbrella private property property right is one of the promotions to meet those needs. This theory is used because basically according to the author, the owner of the underground space is private, sourced from the state (Rights of State), which then given property right to the individuals. Exceptions to this are for lands that are public or state-owned land (land that does not have a clear property right status), then the management is carried out directly by the state. These lands are, for example, ulayat lands, land of government offices, no man's land, land along paved roads, and lands with other public property. Based on theory of social utility which states private property property right is one of the promotions for the fulfillment of human needs, then according to the authors, the owner of the surface surface automatically becomes the owner of the underground space within the same horizontal boundary (length and width), with the depth limit to be determined later by legislation regarding the underground space. This opinion is proposed by the author, for the sake of simplicity of property right arrangements on surface soil and underground space. Furthermore, there is provided different evidence of property right between the two lands. The existence of this separate proof of property right, will make the landowner able to perform a separate legal act between the surface soil and the underground space. Speaking of the use of underground spaces, the decisive thing is the entrance to the underground space. There are two different conditions in this regard. The first condition, the landowners who are on the surface and underground are the same. The second condition is that landowners on the surface and underground are different. For the same landowner between the surface and the underground, the owner of the underground space and the ground is also the same, belonging to the same person. Since the owner is the same, the entrance to the underground space is not a problem at all. For buildings with the same landowners between the surface and the underground, it usually has the characteristics of the buildings fused between the upper and lower buildings. Buildings like this underground are commonly called underground spaces. Underground spaces can be used for personal use, for example for garages, car parks, warehouses, rooms, kitchens, or for other purposes. In addition, the underground space can also be used for common purposes, for example in buildings for malls that are used by some parties with a lease system to the owner of the building.

For landowners who are not equal between the surface and

[20] R.D.H. Koesoemahatmadja, 1975, *Pengantar Hukum Tala Usaha Negara Indonesia* (Terjemahan dan Saduran dari Buku W.P. Prins, "Inleiding in het adminislratiefrecht van Indonesie"), Alumni, Bandung, hlm. 10.

[21] S. Prajudi Atmosudirdjo, 1988, *Hukum Adminislrasi Negara*, Cetakan ke-9, Seri Pustaka Ilmu Administrasi, Ghalia Indonesia, Jakarta, hlm. 43.

[22] Olin L. Browder, Jr., Roger A. Cunningham, dan Allan F. Smith, *op. cit.*., hlm. 3.

[23] *Ibid*.

the underground, then the entrance to the underground space, must use the surface soil part. To that end, the owner of the underground space must buy part of the surface soil that will be the entrance to his underground space. In this case, the authors suggest buying the land, because if only the lease system, then one day the land surface owners can not rent the land again so it will complicate the owner of the underground space. The arrangement of the matters as stated above should be clearly regulated in the rules concerning the underground spaces to be created. This is very important in order to avoid conflicts between land surface owners and underground spaces. Where necessary, special arrangements concerning land surface acquisition issues will be used as entrance to the underground space, in order to create order and legal certainty.

4. Conclusion

The owners of the underground space. Under the provisions of Article 21 of the Basic Agrarian Law, it can be concluded that those who may be the owners of underground spaces are only Indonesian citizens and may not be owned by foreign citizens or dual citizens. In addition, those who may have underground underground spaces are: 1) Banks established by the State (hereinafter referred to as the State Bank); 2) Agricultural Cooperative Societies established pursuant to Law Number 79 of 1958 (Statute Book of 1958 No. 139); 3) Religious bodies, appointed by the Minister of Defense/Agrarian Affairs, upon hearing the Minister of Religious Affairs; 4) Social bodies, designated by the Minister of Agriculture/Agrarian Affairs, upon hearing the Minister of Social Welfare. The scope of property rights of the underground space. The characteristics of underground space property rights are: 1) Property rights may be transferred and transferred to another party; 2) Only Indonesian citizens can own property; 3) The Government shall be subject to legal entities which may own property and conditions (State banks, associations of agricultural cooperatives, religious bodies and social bodies); 4) Occurrence of property rights due to customary law and Government Stipulation, and due to the provisions of law; and 5) Any transition, removal and imposition of title with other rights shall be registered with the local Land Office. The registration is a strong proof. The method of obtaining the underground space is through: 1) Government Determination; 2) Provision of Right to the State; 3) Provision of Right to Change Right. The way of underground space property rights loss is generally caused because the land fell to the state and the land was destroyed. Deletion of property right rights due to land falling to the state due to: 1) Revocation of rights under Article 18; 2) Voluntary submission by the owner; The land is abandoned; 3) Violation of the provisions of Article 21 paragraph (3) and Article 26 paragraph (2) concerning land property right by foreign citizens and the transfer of land rights to foreign citizens.

Legal acts which may be exercised in the context of the transfer of rights to the underground space, among others: Sale and Purchase, exchange, agreement of transfer of rights, disposal of rights, transfer of rights, auctions, grants or other means agreed with parties other than the government for the implementation of development including development for the public interest.

The obstacles to the implementation of legal action for the underground space lies in the absence of definitive rules on the underground space (a vacuum law inevitably occurring) so that the property rights of the underground space are still unregistered. Though this registration is very important for the strength and certainty of the law of property rights of the underground space. Justification of property right relationship between underground and land is based on social utility theory which states that the law must promote the maximum fulfillment of human needs and aspirations, and private property property right is one of promotion for the fulfillment of those needs. Based on this theory it is concluded that the owner of the underground space is private, sourced from the state (Rights of State), which is then given its property right to the individuals. Exceptions to this are for lands that are public or state-owned land (land that does not have a clear property right status), then the management is carried out directly by the state.

5. References

1. Atmosudirdjo S Prajudi. Hukum Adminislrasi Negara, Cetakan ke-9, Seri Pustaka Ilmu Administrasi, Ghalia Indonesia, Jakarta, 1988.
2. Bentham J. Theory of Legislation, Pub. Inc., Oceana, 1975.
3. Browder Olin LJr, Roger A. Cunningham dan Allan F Smith. Basic Property Law, Four Edition, West Publishing Co St. Paul, 1984.
4. Cohen F. "Dialogue on Private Property", Rutgers Law Review, Winter, 1954, 9.
5. Constitution (Undang-undang Dasar 1945), 1945.
6. Indiraharti, Novina Sri. "Perlukah Asas Pemisahan Horisontal dalam Penggunaan Ruang Bawah Tanah?" Prosiding Seminar Nasional: Problematika Pertanahan dan Strategi Penyelesaiannya, Sekolah Tinggi Pertanahan Nasional Bekerjasama dengan Pusat Studi Hukum Agraria - Fakultas Hukum Universitas Trisakti, 2017.
7. Law Number 5 Year 1960 on Basic Regulation of Agrarian Principles (Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria), 1960.
8. Koesoemahatmadja RDH. Pengantar Hukum Tala Usaha Negara Indonesia (Terjemahan dan Saduran dari Buku W.P. Prins, "Inleiding in het adminislratiefrecht van Indonesie"), Alumni, Bandung, 1975.
9. Napitupulu Gita Chandrika. Isu Strategis dan Tantangan Dalam Pembangunan Perkotaan: Bunga Rampai Pembangunan Kota Indonesia Abad 21, Buku I, Urban and Regional Development Institute (URDI) dan Yayasan Sugijanto Soegijoko, Jakarta, 2005.
10. Noor Aslan. onsepsi Hak Milik Atas Tanah Bagi Bangsa Indonesia, Mandar Maju, Bandung, 2006.
11. Opoulou (nd), Alexandr, "Public property and property rights theory," diakses dari, 2017.www.Ise.ac.uk/europeanInstitute/reserach/hellenicObservatory/pdf/4th-%20Symposium/PAPERS_PPS/LAW_CITIZENSHIP pada tanggal.
12. Property rights (Hak Kepemilikan) dalam Ekonomi Kelembagaan. diakses dari Esl.fem.ipb.ac.id/uploads/media/12.Property_rights_SDA.pdf pada tanggal, 2017.
13. Putri Febrina Kusuma. "Pemanfatan Ruang Bawah Tanah dan Atas Tanah dalam Pelaksanaan Pembangunan Mass Rapid Transit Ditinjau dari segi

Hukum Tanah Nasional", Tesis, Universitas Indonesia, Jakarta, 2012.
14. Ruchyat, Edy Politik Pertanahan Nasional Sampai Orde Reformasi, Alumni, Bandung, 2007.
15. Santoso Urip. Hasil Wawancara Penulis dengan Dosen/Penulis Buku Hukum Agraria Universitas Airlangga Surabaya, pada tanggal, 2017.
16. Soeroso R. Pengantar Ilmu Hukum, Sinar Grafika, Jakarta, 2006.
17. Sumardjono Maria S. "Redefinisi Hak Atas Tanah: Aspek Yuridis dan Politis Pemberian Hak di Bawah Tanah dan di Ruang Udara," Makalah yang disampaikan dalam Seminar Hak Atas Tanah dalam Konteks Masa Kini dan yang Akan Datang, diselenggarakan atas kerja sama Fakultas Hukum UGM-BPN, Yogyakarta, 1991.
18. Sutedi Adrian. Peralihan Hak Atas Tanah dan Pendaftarannya, Sinar Grafika, Jakarta, 2010.
19. Vincent RJ. Human Rights and International Relations, Cambridge University Press, Cambridge, hlm. 8, mengadaptasi Gewirth, Human Rights, 2001.
20. West Edwin G. "Property Rights in the History of Economic Thought: From Locke to J. S. Mill," dalam Terry L. Anderson & Fred S. Micchesney (eds), Property Rights: Cooperation, Conflict, and Law (eds), Princeton University Press, New Jersey, 2003.