

**INTERNATIONAL JOURNAL OF
CREATIVE RESEARCH AND STUDIES**

www.ijcrs.org

ISSN-0249-4655

**REGULATION OF BUILD OPERATE AND TRANSFER (BOT)
COOPERATION ON THE INFRASTRUCTURE
DEVELOPMENT IN INDONESIA**

Dyah Ochterina Susanti, Tutik Padmiati, M. Ervan Muktasimbillah, Baidlowi
Faculty of Law Universitas Jember

Abstract

This study aims to analyze and describe the regulation of the Build Operate and Transfer (BOT) cooperation on infrastructure development in Indonesia. The research method used is normative legal research, which is carried out by examining various formal legal rules such as laws and other regulations which are then related to the problems discussed in this study. The results showed that the arrangement of cooperation in the concept of Build Operate and Transfer (BOT) in Indonesia was still at the level of implementing regulations (Verodnung). In connection with the above regulation, there is a void of norms, where the government regulation issued is not sourced and based on higher norms, the law, because there is no regulation of the BOT system in the form of laws which are essentially the highest norm comparing with the government regulations.

Keywords: *Cooperation, Build Operate and Transfer (BOT), development, Indonesia*

Introduction

In the era of globalization, competition of the economy and business is now increasingly stringent, both in the national and international scope of competition. It demands developing countries to undertake various developments to improve the economy, and the welfare of the people, as the objectives of the State of Indonesia listed in the fourth paragraph of the 1945 Constitution of the Republic of Indonesia. These objectives can be realized through various kinds of infrastructure development needed by the community that spread evenly.

This equality is not effective if it is only managed by the central government, therefore, based on the principle of decentralization, the government gives its authority to autonomous regions to manage infrastructure development

in each region.¹ Along with the authority, the responsibility of the regional government towards the community is also bigger, one of which is related to the fulfillment of adequate infrastructure and public facilities.

In this regard, infrastructure procurement needs substantial funds, while the Regional Budget is very limited and insufficient.² Therefore, the local government needs to cooperate with the private sector to obtain funds to realize the objectives of infrastructure development as expected.

The Act has provided an opportunity for the Regional Government to cooperate with various parties, both other regional governments, third parties (such as private companies that are legal entities, State-Owned Enterprises, Regional Owned Enterprises, cooperatives, foundations and other institutions), and local institutions or governments overseas, as stated in Article 363³ and 366 paragraph (1)⁴ of the Act Number 23 of 2014 concerning Regional Government (now replaced by Act Number 9 of 2015 concerning Regional Government). Based on the above provisions, there is no prohibition if the regional government wants to cooperate with the private sector in infrastructure development, especially for the public interest and to increase regional income. This, one of the models of cooperation that can be carried out by the government with the private sector to participate in government project procurement is the Build Operate and Transfer system (hereinafter abbreviated as BOT).

The BOT system cooperation has been widely used by regions throughout Indonesia, one of which is in East Java. Various types of infrastructure development were built by the government through the collaboration of the BOT system, including cooperation between PT. Sasana Boga (SB) with the Surabaya Regional Government which resulted in the construction of the HI Tech Mall Building, which is the largest electronic shopping center in East Java,⁵ and the THR building and Surabaya Mall⁶; then the results of the BOT agreement between PT Gala Bumi Perkasa and the Surabaya Regional Government in the construction of a new Turi market⁷.

Other cooperation was also carried out by the Lamongan regional government, namely the construction of the Wisata Bahari Lamongan (WBL) which was formerly known as the Tanjung Kodok, which was the result of collaboration between the Lamongan Regional government and PT. Bunga Wangsa Sejati.⁸ Pasuruan Regency

¹ Decentralization is the transfer of authority from the central government to the regional government to deal with its own household affairs based on the initiatives and aspirations of its people within the framework of the unitary state of the Republic of Indonesia. See Eko Noer Kristianto. The Election of the Indirect Governor as an Affirmation of the Existence of the Governor as a Representative of the Central Government in the Regions. Volume 1 Number 3, December 2012, p. 398.

² Mercy M. Setlight. *Keadilan Dalam Perjanjian Bangun Guna Serah (Build, Operate And Transferred Contract/BOT)*. Vol.I No.6, Oktober-Desember 2013 Edisi Khusus, hlm. 90.

³ *Contents of Article 363 Act Number 23 of 2014 concerning Regional Government:*

In order to improve the welfare of the people, the Regions can establish cooperation based on consideration of efficiency and effectiveness of public services and mutual benefits.

1. Cooperation as referred to in paragraph (1) can be carried out by the Region by:

- a. Other region;
- b. Third party; and/or
- c. Institutions or regional governments abroad in accordance with the provisions of the legislation.

2. Cooperation with other regions as referred to in paragraph (2) letter a is categorized as compulsory cooperation and voluntary cooperation.

⁴ *Contents of Article 366 paragraph (1) of Act Number 23 of 2014 concerning Regional Government:*

“Regional cooperation with third parties as referred to in Article 363 paragraph (2) letter b includes:

- a. cooperation in the provision of public services;
- b. cooperation in asset management to increase value added that provides revenue for the Region. ”

⁵ Observation and interview of research team and the manager of Hi-Tech Mall building in early 2018 in Surabaya

⁶ Observation of research team in Surabaya early 2018

⁷ <https://www.bangsaonline.com/berita/20507/soal-kontrak-bot-pasar-turi-baru-wali-kota-ewuh-pakewuh-untuk-batalkan>. Diakses Jum'at, 31 Agustus 2018

⁸ <http://journal.unisla.ac.id/pdf/12612012/01.%20KERJASAMA%20ANTARA%20PEMERINTAH%20DAERAH%20SWASTA%20DAN%20MASYARAKAT%20-%20fix.pdf>, diakses Jum'at 31 Agustus 2018

also implemented a BOT system collaboration, where the East Java provincial government with PT Sarana Multi Infrastruktur collaborated in the construction of the Umbulan Drinking Water Supply System (SPAM) located in Umbulan Village, Winongan District.⁹

Some outcomes of the BOT system cooperation in infrastructure development in East Java, as above mentioned, show that cooperation with the BOT system has been in great demand and has become an effective step that can be used to implement infrastructure development with a limited budget. This, it is also necessary to regulate the BOT system to protect the parties, both the government and the private sector, in order that the cooperation will bring benefits for the parties involved.

Based on the the above explanation, the problems of this study namely: "How is the BOT Cooperation Arrangement on Infrastructure Development in Indonesia?"

Research Method

Type of Research

The type of research used in this article is normative legal research, which is carried out by examining various formal legal rules such as laws and other regulations which are then related to the issues discussed in this study. This is as stated in the book of the Legal Research Method by Soejono and Abdurrahman that normative research or what is often referred to as doctrinal research, namely research whose object of study is the legislation document and literatures.¹⁰ In this regard, the object of this study is related to the arrangement of the Build, Operate And Transfer (BOT) collaboration on infrastructure development in East Java.

The approach used in this study is the statute approach and conceptual approach. The statute approach is the approach taken by reviewing all laws relating to legal issues that are being solved or handled.¹¹ It is applied to examine the rules used in the collaboration of Build, Operate and Transfer (BOT) on infrastructure development in East Java. Furthermore, the conceptual approach carried out by not moving from the existing legal rules, and referring to the principles of law, legal concepts and principles of law contained in the view of the law or doctrines that develops in the legal views, which is relevant to legal issues.¹² It is used to examine the compatibility between the rules regarding the cooperation of the BOT system with the hierarchy of regulations and the Stufenbau Theory by Hans Kelsen.

Types and Source of Legal Materials

Legal materials are used to solve legal issues and at the same time provide prescriptions about what should be. The legal materials in this study are:

- a. Primary Legal Material is an authoritative legal material, which means having authority. The primary legal materials used in this study are as follows:
 1. The Act Number 12 of 2011 concerning Establishment of Legislation.
 2. Republic of Indonesia Government Regulation Number 6 of 2006 concerning Management of State / Regional Property;
 3. Government Regulation Number 38 of 2008 concerning Amendments to Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property;
 4. Government Regulation Number 27 of 2014 concerning Management of State / Regional Property;

⁹ <http://industri.bisnis.com/read/20170722/45/673864/sejarah-panjang-pembangunan-spam-umbulan>. Diakses 19 September 2018.

¹⁰ Soejono dan Abdurrahman. *Metode Penelitian Hukum*. (Jakarta: Rineka Cipta, 2003), hlm. 56.

¹¹ Peter Mahmud Marzuki. *Penelitian Hukum*. (Jakarta: Kencana Prenada Media, 2005), hlm. 93.

¹² Dyah Ochtorina Susanti dan A'an Efendi. *Penelitian Hukum (Legal Research)*. (Jakarta: Sinar Grafika, 2014), hlm. 115

5. Decree of the Minister of Finance of the Republic of Indonesia Number 248 / Kmk.04 / 1995 concerning Treatment of Income Taxes on Parties Collaborating in the Build Operate and Transfer system.
- b. Secondary Legal Materials are all forms of legal publications that are not classified as official documents, such as text books and legal journals.

Legal Material Selection Technique

The technique of investigating legal materials in this study was carried out by identifying legal facts and eliminating irrelevant matters to legal issues, collecting legal and non-legal materials that are relevant to this research, examining collected materials, drawing conclusions in the form of arguments that answer legal issues, and providing prescriptions based on the arguments built in the conclusions. The legal materials collected are arranged systematically by using the deductive method which concludes the discussion from the general to the specifics and is expected to provide prescriptions on what should be regulated in the Build, Operate and Transfer (BOT) on infrastructure development in East Java.

Results and Discussion

The Build, Operate and Transfer Agreement (hereinafter referred to as BOT) is a form of cooperation agreement between landholders and investors, whereby the investor is given the right to construct the building during the term of the agreement, and after the term of the agreement expires, then the investor must return or transfer ownership of the building to landholder.¹³ In Indonesia, the term BOT was opined by B.J. Habibie, who served as Minister of State, Research and Technology immediately at the beginning of 1987, on a hearing held at the House of Representatives. At the meeting, B.J. Habibie offers a BOT system as an alternative to overcome the difficulties of funding of reconstruction and or technology. Further B.J. Habibie explained that with the BOT system, infrastructure development projects such as roads, telecommunications, electricity and other public infrastructure could still be realized even though the development funds were limited and insufficient.¹⁴ In other words, the BOT system was originally used as a solution and alternative to finance government projects.

The importance of the BOT system to improve national development, especially in each region, has not been supported by adequate rules related to the implementation of BOT system cooperation, and is only based on Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as follows:

"Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people".

It means that the land, and all existing natural resources constitutes the power of the Republic of Indonesia, so that the State has the right to use land to build facilities or infrastructures needed by the community, and which is then implemented in the form BOT system cooperation.

Regarding the above provisions, in 1995, the government issued a regulation concerning cooperation with the BOT system through the Decree of the Minister of Finance of the Republic of Indonesia Number 248 / Kmk.04 / 1995 concerning Treatment of Income Taxes on Parties Collaborating in the BOT system, which explains that:

¹³Anita Kamilah. *Bangun Guna Serah (Build Operate and Transfer/BOT), Membangun Tanpa Harus Memiliki Tanah (Perspektif Hukum Agraria, Hukum Perjanjian dan Hukum Publik)*. (Bandung: Keni Media, 2013), hlm. 6.

¹⁴I Gede Abdhi Prabawa. *Kajian Hukum Terhadap Perjanjian Build Operate And Transfer (Bot) Untuk Melindungi Hak Milik Atas Tanah Dalam Rangka Menunjang Sektor Pariwisata*. Diakses melalui <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/440>, hlm. 4.

"Built Operate and Transfer is a form of cooperation agreement made between land rights holders and investors, stating that land rights holders give investors the right to construct buildings during the period of the BOT agreement, and transfer ownership of the building to the holder of the land at the expiry of the agreement."¹⁵

The above provisions mean that the holder of land rights, the government, gives the private party the right as an investor to construct buildings under the agreed period of time, and after the agreement ends, the investor must return the ownership rights to the government. However, the provisions do not accommodate regulations in the implementation of BOT system cooperation, especially regional and private sector cooperation in infrastructure development. Thus, the government issued Presidential Decree No. 7 of 1998 concerning the Cooperation between the Government and Private Enterprises in the Construction and Management of Infrastructure (hereinafter abbreviated as Presidential Decree No. 7 of 1998). Several provisions in the decree contains the criteria of private legal entities that are allowed to become partners of cooperation, forms of infrastructure, procedures for the participation of private business entities in the construction and management of infrastructure, even the content that must be included in the cooperation agreement.¹⁶

The above regulation of Presidential Decree was later amended into Presidential Regulation Number 67 of 2005 which was later amended into Presidential Regulation Number 13 of 2010 concerning Amendments to Presidential Regulation Number 67 of 2005 concerning Government Cooperation with Business Entities in the Provision of Infrastructure. The form of infrastructure that can be cooperated is increasingly clearly stated in this Presidential Regulation, where this provision mentions the types of infrastructure as intended, including: transportation, road, irrigation, drinking water, wastewater e, telecommunications and information technology, electricity, and oil and natural gas infrastructures.¹⁷

The regulation as above described shows that until 2005 the arrangement of cooperation agreements with the BOT system was still at the level of Ministerial Regulation namely through the Ministerial Decree of the Minister of Finance Decree of the Republic of Indonesia Number 248 / Kmk.04 / 1995 concerning the Treatment of Income Taxes on Parties Who Conducted Collaboration in the Form BOT Agreement (hereinafter referred to as Ministry of Finance No. 248 / Kmk.04 / 1995), precisely referred to in Article 1 of the Ministry of Finance No. 248 / Kmk.04 / 1995, which explains the definition of BOT as the contents have been mentioned above. Furthermore, Article 2 of Ministry of Finance No. 248 / Kmk.04 / 1995 also mention the term Build Operate and Transfer which explains the management of development costs in the BOT agreement.¹⁸

¹⁵ The content of Article 1 of the Decree of the Minister of Finance of the Republic of Indonesia, Number 248 / Kmk.04 / 1995 concerning the Treatment of Income Taxes Against Parties Collaborating in the Build Operate and Transfer Agreement.

¹⁶ See Article 1-4 of Presidential Decree Number 7 of 1998 concerning Government Cooperation and Private Enterprises in Infrastructure Development and Management

¹⁷ See Article 4 of Presidential Regulation Number 13 of 2010 concerning Amendments to Presidential Regulation Number 67 of 2005 concerning Government Cooperation with Business Entities in the Provision of Infrastructure.

¹⁸ Article 2 Decree of the Minister of Finance of the Republic of Indonesia Number 248 / Kmk.04 / 1995 Concerning the Treatment of Income Taxes on Parties Collaborating in the Form of Build Operate and Transfer Agreement:

- (1) The cost of constructing building issued by an investor is the income value of the investor to obtain the right to use or the right to utilize the building, and the amount of the cost incurred by the investor is amortized in the same amount every year during the agreement of BOT.
- (2) Amortization as referred to in paragraph (1) begins in the year the building starts to be used or attempted by investors.
- (3) The BOT agreement period is shorter than the period specified in the agreement, the remaining unamortized construction costs are amortized at the same time by the investor in the end of the construction period.
- (4) If in the implementation of the build operate and transfer as referred to in paragraph (3) is given reimbursement or compensation to the investor, the reimbursement or compensation is income for the investor in the year the compensation is received.

In its development, in 2006, a regulation emerged regarding the cooperation agreement with the BOT system, namely the Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property explaining the definition, terms of implementation, determining the status of use of goods resulting from BOT cooperation, period of time, contents of the BOT agreement, the transfer of properties, and mechanism of the BOT agreement implementation specifically for state / regional properties. Two years later, the regulation was changed to become Government Regulation Number 38 of 2008 concerning Amendments to the Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property. In this regulations, the regulation regarding BOT did not change, but there were several changes in other sections, such as in Article 1 numbers 4 and 5 inserted 1 (one) number, which is number 4a containing the definition of assessment, namely:

Assessors are parties who conduct an independent assessment based on their competence consisting of internal and external assessors.

Subsequent amendment are in the contents of Article 2 paragraph (2) letter c; addition of 2 (two) paragraphs in Article 26, amendment to Article 39 paragraph (1), paragraph (2) and paragraph (4) and 2 (two) added; then amendment to Article 44 paragraph (1) letter a.; changes in Article 46 paragraph (3) letter e, and amendments to Article 51 paragraph (3).

Regarding the above provisions, the progressive and rapid development of an era causes the Government Regulation of the Republic of Indonesia Number 38 of 2008 concerning Amendments to the Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property, no longer matches the government needs relating to the management of state / regional property, thus in 2017, the provision was changed to Government Regulation Number 27 of 2014 concerning Management of State / Regional Property which is used today. The regulation also regulates the definition, implementation requirements, the determination of the status of the use of goods resulting from the BOT cooperation, the period of time, the contents of the BOT agreement, as well as the mechanism for the implementation of BOT as contained in the government regulation No. 38 of 2008 previously, but in the latest regulation, arrangements related to the implementation mechanism of BOT are more complete, and there are several additions, such as the addition of types of goods that are forbidden to be guaranteed, pawned, and transferred, i.e., in the contents of Article 36 paragraph (3) government regulation . No. 27 of 2014 concerning Management of State / Regional Property:

The established partners of Build Operate and Transfer agreement during the operation period:

- a. are obliged to pay contributions to the account of the State / Regional General Treasury annually, the amount of which is determined based on the outcomes of the calculation of the team elected by the authorized official;
- b. are obliged to maintain the object of Build Operate and Transfer; and
- c. are prohibited from pledging, mortgaging, or transferring:
 1. land that becomes the object of Build Operate and Transfer;
 2. the outcomes of Build Operate and Transfer used directly for the implementation of tasks and functions of the Central / Regional Government; and or;
 3. results of Build Operate and Transfer.

(5) *If the term of BOT agreement is longer than the period specified in the agreement due to the addition of buildings, the additional building costs will be added to the remaining unamortized costs and being amortized by the investor until the end of the building period.*

The above provisions show the obligations of the BOT described in detail, especially in the letter c, which mention any things that are prohibited to be guaranteed, mortgaged, or transferred, however in the government regulation No. 38 of 2008, only stated the object of Build Operate and Transfer.¹⁹ Furthermore, in Article 36 Paragraph (4) government regulation No. 27 of 2014 concerning management of State/Regional Property, explains that:

During the operation period, the results of Build Operate and Transfer must be used directly for the implementation of tasks and functions of the Central / Regional Government at least for 10% (ten percent).

This provision implies that the results of the BOT, in the form of buildings, houses, shops, etc. must be operated and used for activities and interests of the Central / Regional Government, with a minimum use of 10% (ten percent) of the total use of the BOT results. Thus, there are differences in the previous regulation and current regulation i.e., the existence of a limitation in the form of percentage related to the use of BOT results for the implementation of tasks and functions of the Central / Regional Government, while government regulation No. 38 of 2008 do not regulate these minimum limits.²⁰ Other differences are in the contents or matters that must be included in the BOT agreement, that the government regulation No. 38 of 2008 the BOT agreement must consist of 5 (five) contents as stated in Article 29 paragraph (5) of government regulation No. 38 of 2008, explains that:

Build Operate Transfer and Build Transfer Operate are carried out based on an agreement letter which at least contains:

- a. parties who are bound in the agreement;
- b. the object of Build operate Transfer and Build Transfer Operate;
- c. the period of time Build operate Transfer and Build Transfer Operate ;
- d. the rights and obligations of the parties bound in the agreement;
- e. Other necessary requirements

On the other hand, the latest government regulation only contains 4 (four) elements, which are listed in Article 36 paragraph (5) of government regulation No. 24 of 2017 concerning Management of State/Regional Property, which states;

Build Operate and Transfer is carried out based on an agreement that at least contains:

- a. the parties who are bound in the agreement;
- b. the object of Build Operate and Transfer;
- c. Period of time of Build Operate and Transfer; and
- d. The rights and obligations of the parties bound in the agreement.

The differences of BOT regulations as above described are shown in the following table:

¹⁹See and compare with Article 29 paragraph (3) Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property that has been changed to Government Regulation Number 38 of 2008 concerning Amendment to Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State Property /Area.

²⁰See and compare with Article 29 paragraph (4) Government Regulation Number 38 of 2008 concerning Amendments to Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property.

Table 1: Regulation of BOT in Indonesia

No	Benchmark	Ministry of Finance Decree No. 248/Kmk.04/1995	Government Regulation No. 6 of 2006	Government Regulation No. 38 of 2008	Government Regulation No. 27 of 2014
1.	Definition of BOT	Form of cooperation agreement made between land rights holders and investors, stating that land rights holders give investors the right to construct buildings during the period of the BOT agreement, and transfer ownership of the building to the holder of the land at the expiry of the agreement	Utilization of state/regional property the form of land by another by constructing buildings / or facilities and utilized by other parties within the agreed period, and building will then be returned after the end of the period	The definition of BOT does not changes (Government Regulation No. 6 of 2006)	The definition of BOT does not changes
2	Determination of BOT Partners	Determination of partners in the BOT collaboration on the MPR Decisions is not regulated	Determination of BOT partners is carried out through tenders by participating at least five participants (Article 29 paragraph (2))	Regulations related to the determination of BOT partners in this Government regulation remain the same as Government regulation No. 6 of 2006	Determination of the BOT partners is carried out through participant-free tenders (Article 36
2	Objects that are prohibited to be guaranteed, pawned, or transferred in the BOT agreement	There are no regulations regarding the prohibition of guarantees, pawning, and the transfer of BOT objects	Only mention the object of BOT, without clear specifications (Article 29 paragraph (3) letter b)	Article and substance of the BOT object are the same as the provision in Government Regulation No. 6 of 2006	BOT objects that are prohibited consist of land, the results of BOT, and the results of Transfer and Build

					(Article 36 paragraph (3) letter c)
3	Use of BOT results directly for the implementation of tasks and functions of the Central / Regional Government	In this MPR TAP there are no rules regarding the use of BOT results	There are no restrictions regarding the use of BOT results directly (Article 29 paragraph (4))	Article and substance related to the use of BOT results remain the same as the regulation in the Government Regulation No. 6 of 2006	A limitation of 10% related to the use of BOT results directly for the implementation of tasks and functions of the Central / Regional Government (Article 36 paragraph (4))
4	Content of the BOT Agreement	No Article that regulates what must be stated in the BOT agreement	The contents in the BOT agreement must consist of 5 (five) elements (Article 29 paragraph (5))	The contents that must be in the BOT agreement does not change, as what is stated in the Government Regulation No. 6 of 2006	The contents of the BOT agreement must consist of 4 (four) elements (Article 36 paragraph (5))
5	Permits to establish building resulting from oBOT	There is no Article that regulates building construction permits resulting from BOT	Building construction permits resulting from Build Operate and Transfer and Build Transfer and Operate should be in the name of the Government of Republic of Indonesia / Local Government (Article 29 paragraph (6))	Article and substance related to the building permits resulting from the BOT remain the same as the Government Regulation No. 6 of 2006	There are additions, where the License must be on behalf of: a. Government of the Republic of Indonesia, for State Property; or b. Regional Government, for Regional Property (Article 36 paragraph (6))

6	Preparation and Implementation Costs of BOT	There are no rules governing the cost of BOT preparation, but the cost of building construction is charged to investors (Article 2 paragraph (1))	All costs related to preparation and the implementation of BOT cannot be charged to the APBN / APBD (Article 29 paragraph (7))	Article and substance related to the cost of the BOT Preparation and Implementation are not changed, it remains the same as the Government Regulation No. 6 of 2006	All costs related to preparation and BOT implementation is charged to partners (Article 26 paragraph (7))
7	Transferring of BOT Properties	After the BOT agreement expires, the building is handed over by the investor to the land rights holder (Article 3 paragraph (1))	Transfer of goods is regulated separately in Article 30, where after the period has expired, the partner must return the object of state property to the manager of the goods, while the property of the region to Governor / Regent / Mayor (Article 30 paragraph (1) and (2))	There are no changes related to the transfer of goods resulting from BOT, it remains the same as the Government Regulation No. 6 of 2006	Returns of Property is regulated in Article 36 together with the rules for determining partners, the period of BOT, building permits, and the cost of preparation and implementation of BOT. the content in the Article related to transfer is the same as the provisions regulated in Government Regulation No. 6 of 2006 (Article 36 paragraphs (8) and (9))
8	Procedure of BOT implementation	no rule regarding the procedures for implementing BOT in the	The procedure of BOT implementation is regulated in	There are no changes regarding the procedures for implementing	The procedure for implementing BOT is

		MPR TAP	Article 30 to join the provisions of the transfer of goods, and each implementation provision consists of 4 provisions (Article 30 paragraphs (3) and (4))	BOT	regulated in a separate Article, i.e., Article 37, and each implementation provision consists of 3 provisions (Article 37 paragraph (1) and (2))
--	--	---------	---	-----	---

Source: *Personal Note, Processed, 2018*

Relating the above table, the BOT regulation is inseparable from the order of legislation that began in 1966 through the Decree of the People's Consultative Assembly No. XX / MPRS / 1966 concerning the DPR-GR Memorandum concerning the source of the law of the Republic of Indonesia and the order of the laws of the Republic of Indonesia (hereinafter referred to as TAP MPR No. XX / MPRS / 1966). The decree determines the types of legislation in the order: the 1945 Constitution, the TAP MPR, the Law / legislations, Government Regulation, Presidential Decree, and implementing regulations, such as the Ministerial Regulation. With regard to the regulation, Bagir Manan opines that the order of laws and regulations regulated in the MPR's TAP is wider than that stipulated in the 1945 Constitution, but the facts and practices are narrower, meaning that there are other regulations which are not mentioned above, especially the Regional Level Regulations. This shows that there are weaknesses in the MPR TAP No. XX / MPRS / 1966, so that it needs to be improved, as confirmed in the TAP MPR RI Number: V / MPR / 1973 concerning the Review of Products in the Form of Provisions of the Provisional People's Consultative Assembly of the Republic of Indonesia.²¹

Furthermore, the demand to improve TAP MPR No. XX / MPRS / 1966 was later realized in 2000, with the issuance of TAP MPR No.III / MPR / 2000 concerning the Sources of Law and Order of Laws and Regulations stipulating that the order of laws and regulations of the Republic of Indonesia, including the 1945 Constitution, the Decree of House of the Representatives, the Acts, Government Regulation in Lieu of Law, Government Regulations, Presidential Decrees and Regional Regulations.

In its development, the hierarchy of laws and regulations has change by the issuance of the Act Number 10 of 2004 concerning the Establishment of Legislation, and it is amendment in 2011 to Act Number 12 of 2011 concerning Establishment of Legislation which is still in use today. The hierarchy of laws and regulations listed in Article 7 paragraph (1) of Act No. 12 of 2011 concerning the Establishment of Legislation, consists of:

²¹ Content of Article 3 of the Decree of the Republic of Indonesia MPR Number: V / MPR / 1973 concerning the Review of Products in the Form of Provisions of the Provisional People's Consultative Assembly of the Republic of Indonesia:

- (1) TAP XX / MPRS / 1966 concerning "DPR-GR Memorandum concerning the Sources of the Law of the Republic of Indonesia and the Regulations on the Laws of the Republic of Indonesia";
- (2) TAP XXV / MPRS / 1966 concerning "Dissolution of the Indonesian Communist Party, Statement as a Prohibited Organization in the entire Territory of the Republic of Indonesia for the Indonesian Communist Party and Prohibition of Any Activities to Spread or Develop the teachings of Communism / Marxism-Leninism. "
- (3) TAP XXIX/MPRS/1966 concerning "Appointment of Ampere Hero"

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Decree of the People's Consultative Assembly;
- c. The Acts / Government Regulation in Lieu of Law;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regulation; and
- g. Regional Regulation.

Regarding the above provisions, other regulations that belongs to the laws and regulations, namely the regulations established by the People's Consultative Assembly, the Indonesian Legislative Assembly, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, Minister, entity, institution or commission of the same level established by the Act or Government on the orders of the Law, Provincial Regional Representative Council, Governor, Regional Representative Council, Regent / Mayor, Village Head or the same level.²²

Based on the hierarchy of laws as referred in Article 7 Paragraph (1) of Act No. 12 of 2011 concerning the Establishment of Laws and Regulations above, the regulation of BOT until 2011 was still at the level of Government Regulation. At such a level, in other words, there is a void of norms, that there is no law that regulates BOT, even though a lower legal norm cannot appear first without being followed or derived from higher legal norms. *Stufenbau Theory* opined by Hans Kelsen in Dyah Octorina Susanti stated that the norm is tiered in a hierarchical arrangement, meaning that lower legal norms are applicable, sourced and based on higher norms that it then reach a norm that cannot be traced further (the highest norm) namely the basic norm (*Grundnorm*). The basic norm is a source of law, where each legal norm is a source for other norms, because it contains procedures for establishing norms or the contents of norms that will be made, or in other words that any higher legal norm is a source of lower legal norms.²³ It shows that lower (inferior) norms can be formed based on higher norms (superior), which in the end the law becomes tiered to form a hierarchy.²⁴

Relating the above explanation, Hans Kelsen's thoughts and opinions were later developed by his student Hans Nawiasky through *theorie von stufenufbau der rechtsordnung*, who divided the norm into 4 (four) groups, namely:²⁵ First, Fundamental Norms / State (*staatsfundamentalnorm*), i.e., The norm which is the basis for the establishment of Constitution of a State, and contains basic rules for further State regulation.²⁶ Second, the Basic Rules of the State (*staatsgrundgesetz*), are outlines of general rules, or is a single legal norm. This norm is also used as a basis for the establishment of the Law (*formell gesetz*) and other lower regulations, which can be stated in a state document called *staatsverfassung* or can also be written in several scattered documents called *staatsgrundgesetz*.²⁷ Third, Formal Law (*formell gesetz*) is a group of norms under basic rules. It is not only a primary norm (principal), but is bounded by secondary norms. Thus, there are differences between these norm groups and other norms regarding their formation, this norm group is formed by the House of Representatives as the Legislative Body.²⁸ The last, the Executing Regulations and the Autonomous Regulations (*verodnung* and

²²See Article 8 Paragraph (1) of Law Number 12 of 2011 Regarding the Establishment of Legislation.

²³Jimly Asshiddiqie dan Ali Safa'at. *Teori Hans Kelsen Tentang Hukum*. (Jakarta: Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006), hlm. 117.

²⁴Aziz Syamsuddi. *Proses dan Teknik Penyusunan Undang-undang*. (Jakarta: Sinar Grafika, 2011), hlm 14-15.

²⁵Jimly Asshiddiqie dan Ali Safa'at. *Op. Cit.*, hlm. 170.

²⁶*Ibid.*

²⁷Maria Farida Indrati Soeprapto. *Ilmu Perundang-Undangan I (Jenis, Fungsi, Dan Materi Muatan)*. (Yogyakarta :PT.Kanisius, 2007), hlm. 48.

²⁸*Ibid.*

autonome satzung) are regulations under the law that functions to regulate the provisions of the law.²⁹ Both of these regulations have differences that can be seen from the source of authority, where the implementing regulation derives from the authority of the delegation, for example the provisions contained in Article 67 paragraph (2) of Law Number 1 of 1974 concerning Marriage which explains that:

"the matters that require implementation regulations in this law, are further regulated by Government Regulation."

These provisions indicate that there is a delegation of authority to form legislation by the Act (in this case Law Number 1 of 1974 concerning Marriage as a higher regulation) to government regulations (in this case Government Regulation Number 9 of 1975 concerning Implementation Law Number 1 of 1974 concerning Marriage as a lower regulation).

The autonomous regulations derived from attribution authority is the authority to form legislation provided by the constitution or Acta to a state / government institution.³⁰ as in accordance with the provisions contained in the 1945 Constitution of the Republic of Indonesia which authorizes the President to stipulate government regulations in Lieu of Law in matters of urgency.³¹

Based on the above explanation, it shows that Hans Nawiasky's opinion is in line with the opinion of his teacher, Hans Kelsen, who stated that the legal norms are tiered, meaning that lower norms are applied, derived, and based on higher norms, as explained earlier. It also applies to the hierarchy or order of laws and regulations when it is linked to Hans Kelsen's *Stufenbau Theory* which was later developed by Hans Nawiasky through the grouping of legal norms, that is shown in the figure below:

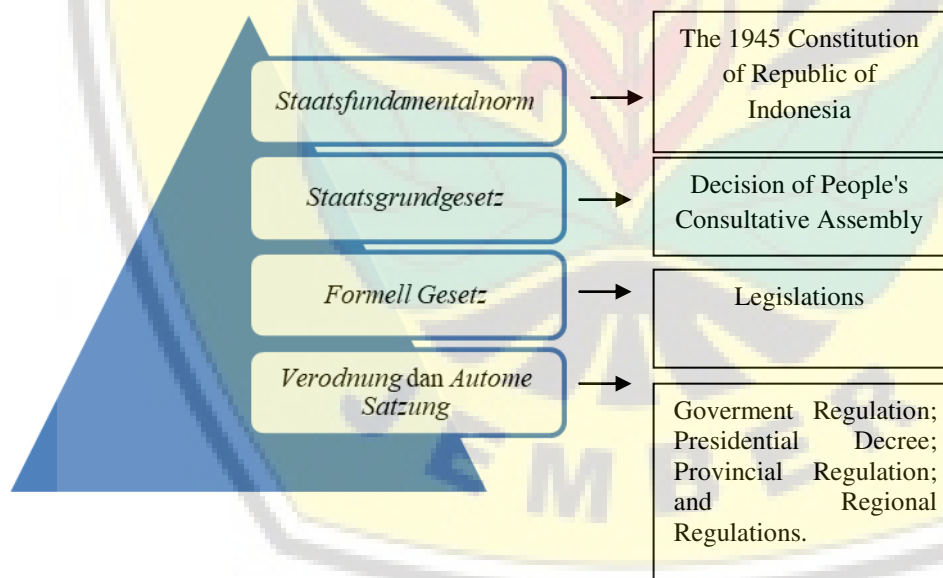


Figure 1: The relationship between Stufenbau Theory and Hierarchy Legislation in Indonesia

Source: *Personal Notes*, Processed, 2018.

²⁹*Ibid.*, hlm. 55.

³⁰*Ibid.*

³¹These provisions are contained in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which stated as follows: "In the case of forced urgency, the President has the right to set government regulations in lieu of the law."

Based on the chart and explanation above described, it can be concluded that a law is made by considering the higher regulations, because it will be a source and basis of the lower regulations. Therefore, the BOT system cooperation should consider the Stufenbau Theory and the hierarchy of laws and regulations, in which the establishment of the regulations must see the validity, source, and basis of the higher norms, in this case starting from 1945 Constitution of the Republic of Indonesia.

After finding the regulation or Article in the 1945 Constitution of the Republic of Indonesia relating to the cooperation of the BOT system, regulations for the cooperation of the BOT system in the form of Acts or Government Regulation in Lieu of Law can be established. In this regard, if there are additional or further regulations related to the procedure of implementation or other matters, then it can be regulated in government regulations, or other implementing regulations.

However, the cooperation regulations of the BOT system in Indonesia do not consider the legal norms in the hierarchy of laws and regulations. It can be seen in the table below:

Table 2: Regulation of BOT System Cooperation in Indonesia

No.	Regulations	Forms of Regulation	Year Issued
1.	Ministry of Finance No. 248 / Kmk.04 / 1995 Concerning the Treatment of Income Taxes on Parties Collaborating in the Build Operate and Transfer Agreement	Implementing Regulations (Ministerial Decree)	1995
2.	The Government Regulation No. 6 of 2006 concerning Management of State/Regional Owned Property	Implementing Regulations (Government Regulation)	2006
3.	The Government Regulation No. 38 of 2008 on the amendment to Government Regulation No. 6 of 2006 concerning Management of State/Regional Owned Property	Implementing Regulations (Government Regulation)	2008
4.	The Government Regulation No. 27 of 2014 concerning Management of State/Regional Owned Property	Implementing Regulations (Government Regulation)	2014 - today

Source: *Personal Notes, processed, 2018*

The table above shows that the Regulations of BOT system cooperation are not in accordance with Stufenbau Theory, and are not based on hierarchy or order of laws and regulations. It is evidenced by the issuance of the first regulation on the BOT system in the form of a ministerial decree, which was followed by the issuance of a more specific regulation on the BOT system in the form of government regulations from 2006 to 2014. It shows that the cooperation with BOT agreement used from 1995 is still at the level of implementing regulations, even though implementing regulations is the lowest norm (included in the *verodnung* group) according to Stufenbau Theory.

Thus, the regulation regarding the BOT system should be made in the form of an Act or Government Regulation in Lieu of Law to be used as a source and basis for the rules that follow, i.e., through government regulations. In fact, the Acts relating to the regulation of the BOT system has not yet existed, and this shows that there is a void of norms, where lower norms appear first compared to higher norms.

Conclusion

Based on the above description, it can be concluded that the regulation of BOT cooperation on infrastructure development in East Java from the lowest to the higher regulations is regulated as follows:

- 1) Ministerial Decree of the Minister of Finance of the Republic of Indonesia Number 248 / Kmk.04 / 1995 concerning Treatment of Income Taxes on Parties Collaborating in the Build Operate and Transfer Agreements
- 2) Republic of Indonesia Government Regulation Number 6 of 2006 concerning Management of State / Regional Property
- 3) Government Regulation Number 38 of 2008 concerning Amendments to the Government Regulation of the Republic of Indonesia Number 6 of 2006 concerning Management of State / Regional Property
- 4) Government Regulation Number 27 of 2014 concerning Management of State / Regional Property

Based on the above regulations, there are weaknesses in these regulations that the BOT system is still at the level of implementing regulations (Verordnung). It can be seen from the rules issued in the form of ministerial decrees and government regulations, and the rules the regulations used today namely Government Regulation Number 27 of 2014 concerning Management of State / Regional Property, where these rules govern related to definitions, implementation requirements, determination of the status of the use of goods resulting from BOT cooperation, period of time, preparation and implementation costs, contents of the BOT agreement, as well as the mechanism and procedures for the implementation of BOT. In connection with the above regulation, it can be seen that there is a void of norms, where the government regulation issued is not sourced and based on higher norms i.e., the law, because the regulation of the BOT system is still not in the form of Acts which are essentially the higher norms than government regulations.

Suggestions

- The following suggestion are recommended to the Government and the Indonesian Legislative Assembly:
- a. to regulate BOT in the form of an Act, as a legal protector for implementing regulations that govern the current BOT.
 - b. to change the existing implementation rules as the rank of the Act.