

## The Public-Private Partnership as Legal Instrument in the State and Regional Property Management: Challenges and Development

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**Abstract.** *This research aims to know the dynamics of the development of people's lives are getting more advanced and the government's burden as the government administrator is increasing. This research is legal research using the statutory and conceptual approaches. This paper provides information on the latest trend in research. The results show that all State or regional property is used to maximize public services. Even some State/regional properties should be able to be enjoyed by the public. The existence of the Government and Private Entity Cooperation as one of the legal figures, which is a model of cooperation financing for the provision of infrastructure for State/regional property, in the end, actually raises legal problems related to its management. The conclusion show that the most important problem is the Government and Private Entity Cooperation, the potential for merging of public and private affairs that may participate in the provision of commercial facilities. Ideally, the Government and Private Entity Cooperation are intended to provide social and economic infrastructure in the context of public services.*

*Keywords: Contract; Enterprise; Partnership; Private; Public.*

### 1. INTRODUCTION

The existence of partnership between the government and private entities as one of the legal figures that becomes a model of cooperation financing in the context of providing State/Regional Property infrastructure which in turn creates its own legal problems related to its management. The most prominent problem is that through the concept of Government and Private Entity Cooperation (KPBU – *Kerjasama Pemerintah dan Badan Usaha*), the potential for merging of public and private affairs can occur. Ideally, Government and Business Entity Cooperation (KPBU) is aimed at providing

social and economic infrastructure in the context of public services. Therefore, in this context, it should not be possible for private and commercial affairs to be included in the provision of infrastructure as intended.

Government and Private Entity Cooperation is implemented as an efficiency in the management of State/Regional Property. The merging of public and private or commercial affairs in one or more infrastructures can cause disruption of the function of public services.<sup>1</sup> Government and Private Entity Cooperation should be directed at providing infrastructure only without any commercial activities in it because the private sector has received financial benefits which can legally be included in the proposal submission.

The dynamics of the development of people's lives are getting more advanced and the burden of the government as the administrator of the government is increasing, so that the role of the government should be partially left to the private sector to be managed.<sup>2</sup> This is a consequence of the emergence of a *New Public Management* perspective exists because it sees the phenomenon of the government's limited ability to manage public assets. A model that is applied in collaboration between the government and private sector in the management of public assets is privatization. This privatization model has become a major issue in public policy in Indonesia. Privatization is a multifaceted policy. Ideologically, it means minimizing the role of the State, then improving management efficiency in business management and increasing company value, while in budgetary terms, privatization can be interpreted as filling the reduced state or regional treasury.

According to Faizal Kurniawan and Shintarini Kristine Setyobudi<sup>3</sup>, the government opens the opportunity to cooperate with the private sector so that it has the same position as the parties to make contracts. Based on the principle of freedom of contract, emerge a system called the *Public-Private Partnership* (PPP). The regulation regarding the formation of PPP was first regulated in Presidential Decree No. 67 of 2005 concerning Government and Private Entity Cooperation in terms of providing infrastructure as amended several times by Presidential Decree No. 66 of 2013 concerning the Third Amendment to Presidential Decree No. 67 2005 concerning Government and Private Entity Cooperation in the provision of infrastructure. Even the government has issued Presidential Decree No. 38 of 2015 concerning Government and Private Entity Cooperation in the Provision of infrastructure where this Presidential Decree No. 38 of 2015 has eliminated Presidential Decree No. 67 of 2005 and its amendments.

In several countries, the implementation of public asset management has been widely practiced with various models of cooperation, and Indonesia itself is no exception.<sup>4</sup>

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<sup>1</sup> Hernoko, Agus Yudha, Ghansham Anand, and Fiska Silvia Raden Roro. "Method Determining the Contents of the Contract." *Hasanuddin Law Review* 3, no. 1 (2017): 91-103.

<sup>2</sup> Ibem, Eziyi, and Egidario B Aduwo. "Public-Private Partnerships (PPPs) in Urban Housing in Nigeria: Evidence from Ogun State." *International Journal of Architecture and urban development* 2, no. 2 (2012): 5-14.

<sup>3</sup> Faizal Kurniawan and Shintarini Kristine Setyobudi. *Klausula Tipping Fee Dalam Kontrak Kerjasama Pemerintah Dengan Swasta (Public Private Partnership) Pengelolaan Persampahan*. Journal of ADIL Law, Volume 4 No. 1, 2013, pp. 26-27.

<sup>4</sup> Opara, Michael, Oliver Nnamdi Okafor, and Akolisa Ufodike. "Invisible actors: Understanding the micro-activities of public sector employees in the development of public-private

One example that is practiced in Indonesia is in Makassar, South Sulawesi Province, which applies a collaboration model to the private sector in managing public assets. One of the public assets whose management is handed over to private sector is Karebosi Field where the government of Makassar is revitalizing Karebosi Field. The purpose of this revitalization is to restore the function of the field, especially as a green area, recreation area, sports infrastructure, activities for various events, as well as a place for Eid Fitri/ Adha because the field conditions were not conducive at that time, namely muddy during the rainy season and dusty in the rainy season. Maintenance of this field is the responsibility of the government of Makassar, which requires a large amount of money, while there is absolutely no income from this field, so that the government is burdened because they are also required to carry out maintenance which costs a lot.

Through collaboration between the government and private sector, it is hoped that this public asset can be developed more quickly, there is better management of utilization and maintenance, and the community can be more comfortable in using it, and most importantly, the government is not burdened with the costs of management and maintenance. However, the developer can use this area as a business area to cover the costs of development, management, and maintenance which are their responsibility.

The latest fact of government cooperation and private sector in providing infrastructure is the construction of State Capital in Kalimantan where the government uses Presidential Decree No. 38 of 2015 in its implementation. The problem is that Presidential Decree No. 38 of 2015 is not based on Government Regulation No. 27 of 2014 concerning Management of State/Regional Property. For some infrastructure in Indonesia, the activities are based on Government Regulation No. 27/2014. Government Regulation No. 27/2014 also accommodates one form of State/Regional property management, namely cooperation in infrastructure provision.

The government is possible to cooperate with legal entities in terms of infrastructure provision. However, there is overlap in the arrangement of State property management. The regulation in question is between Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 with Presidential Decree No. 38 of 2015. If look at the regulation on cooperation in providing infrastructure in Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020, the impression that arises is effort the government to optimize state property or assets for the benefit of public services. However, if look at Presidential Decree No. 38 of 2015, the impression that arises is that it leads to a financing scheme. This impression is reflected in the consideration of "Considering" in Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 and Presidential Decree No. 38 of 2015 which can be seen as follows:

**Table 1.** Comparison of "Considering" of PP No. 27 of 2014, PP No. 28 of 2020, and Presidential Regulation No. 38 of 2015

<b>Government Regulation No. 27 of 2014</b>	<b>Government Regulation No. 28 of 2020</b>	<b>Presidential Decree No. 38 of 2015</b>
a. That the management of State/Regional Property which	a. That the management of State/Regional Property	a. That the availability of satisfy and sustainable infrastructure

partnerships in the United States." *Australian Journal of Public Administration* 81, no. 2 (2022): 237-278.

<p>is growing and complex needs to be managed optimally;</p> <p>b. That Government Regulation No. 6 of 2006 concerning Management of State/Regional Property as amended by Government Regulation No. 38 of 2008 concerning Amendment to Government Regulation No. 6 of 2006 concerning Management of State/Regional Property is no longer in accordance with developments in the management of State/Regional Property, so it needs to be amended;</p> <p>c. Based on the consideration as intended on letter <i>a</i> and <i>b</i> and to implement the provisions of Article 49 paragraph (6) of Act No. 1 of 2004 concerning the State Treasury, it is necessary to stipulate a Government Regulation concerning the Management of State/Regional Property.</p>	<p>which is increasingly developing and complex has not been supported by a comprehensive arrangement so that it needs to be adjusted to the development of needs, so that in its implementation it can be managed optimally, effectively, and efficiently;</p> <p>b. That Government Regulation No. 27 of 2014 concerning the Management of State/Regional Property is no longer in accordance with the development needs for the management of State/Regional Property, so it is necessary to be amended;</p> <p>c. Based on the consideration as intended on letter <i>a</i> and <i>b</i>, it is necessary to stipulate a Government Regulation concerning Amendments to Government Regulation No. 27 of 2014 concerning Management of State/Regional Property.</p>	<p>is an urgent need, to support the implementation of national development in order to improve the national economy, improve the welfare of the community, and increase Indonesia's competitiveness in global competition;</p> <p>b. That in order to accelerate infrastructure development, it is necessary to take comprehensive steps to create an investment climate, to encourage the participation of private entity in the provision of infrastructure and services based on sound business principles;</p> <p>c. That in order to encourage and enhance cooperation between the government and private entities in the provision of infrastructure and social services arrangements is needed to protect the interests of consumers, communities, and private entities in an equitable manner.</p> <p>d. Based on the consideration as intended on letter <i>a</i>, <i>b</i>, and <i>c</i>, it is necessary to regulate the cooperation between the Government and private entities in the provision of infrastructure so that such cooperation can be carried out widely, quickly, effectively, efficiently, comprehensively, and sustainably</p>
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Source: Primary data, 2022 (edited).

The comparison of the consideration "*considering*" of three rules shows the difference in the "mystical atmosphere" of the legislator. In Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 is more about how to optimize the assets owned by the State or region to be able to optimize public services so that the community can enjoy and benefit from the assets of the State or region. Meanwhile, in Presidential Decree No. 38 of 2015, the regulation is more emphasized on creating an investment climate in Indonesia, which also means that the utilization and/or optimization of State/regional assets is for investment purposes, not based on efforts to optimize public services to the community. Hence, by not based on KPBU in the provision of infrastructure in Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020, it is appropriate to question the position of KPBU or what is known as the *Public Private Partnership* (PPP) in the management of State property or assets.

## 2. RESEARCH METHODS

This research is legal research. Legal research is conducted to produce new arguments, theories or concepts as prescriptions in solving legal problems encountered. This legal research is carried out using the statutory and conceptual approaches. Legal research sources can be in the form of primary and secondary legal materials. Primary legal materials are legal materials that are authoritative or have authority.<sup>5</sup> The primary legal materials that the author uses consist of laws and regulations related to natural resource management. Meanwhile, secondary legal materials used such as books and legal journals related to legal issues in this research. The approach used is observation and interpretation, which makes these phenomena observable. This paper provides information on the latest trend in research.<sup>6</sup>

## 3. RESULT AND DISCUSSION

### 3.1. Public-Private Partnership as Legal Instrument in the State and Regional Property Management: Challenges and Development

The paradigm shift of the central government towards the regions in the context of planning and implementing regional development to create greater regional independence is the first step in increasing the equal role of regional communities in development. The spirit of reform has a great effect on a regional autonomy. As an autonomous region, the region has the authority and responsibility to carry out the interests of the community based on the principles of openness, community participation, and responsibility to the community. Clean, corruption-free governance and direct public participation are part of the realization of the implementation of regional autonomy. Development of infrastructure such as facilities and infrastructure is the government's obligation as an effort to meet the needs of society in globalization era. However, with the limited budget owned by the government, it is necessary to collaborate with investors or private sector to build and develop facilities and infrastructure as a real form of government in meeting the needs of the community.

In order to realize the development of infrastructure and services that aim to prosper the community, the concept of *Public Private Partnership* (PPP) emerged, which is a concept of cooperation between the government and investors or private sector to meet the needs of the community. *Public Private Partnership* (PPP) is an alternative financing mechanism in the provision of public services that has been widely used in various countries, especially in developed countries. *Public Private Partnership* (PPP) is a contract-based relationship in which the contents specify in detail the responsibilities and obligations of each partnering party. In the cooperation contract it is stated clearly and in detail how the form of the agreement and all obligations that must be fulfilled by each party. *Public Private Partnership* (PPP) can also be interpreted as a framework that involves the private sector and the government which have their respective roles. The private sector acts as an investor with technical, operational and innovation expertise, while the government acts as a regulator or policy maker in the development.

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<sup>5</sup> Peter Mahmud Marzuki. *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2011, p. 141.

<sup>6</sup> Keng, Shao-Hsun. (2017). Handout Research Topic Development, Collage of Management, National University of Kaohsiung, Taiwan.

According to William J. Parente of the USAID Environmental Services Program, the definition of a *Public Private Partnership* (PPP) is:<sup>7</sup>

*An agreement or contract, between a public entity and a private party, under which: (a) private party undertakes government function for specified period of time, (b) the private party receives compensation for performing the function, directly or indirectly, (c) the private party is liable for the risks arising from performing the function and, (d) the public facilities, land or other resources may be transferred or made available to the private party.*

Based on the explanation above, several characteristics of a *Public Private Partnership* (PPP), namely:

- An agreement between the government and the private sector
- Private parties carry out their functions in the use of assets within a certain period of time.
- Both parties receive compensation directly or indirectly, and
- The private sector is responsible for the risks posed during the implementation of the cooperation.<sup>8</sup>

The concept of PPP can benefit the State as the owner of the assets because the private sector can provide financial assistance in infrastructure development and carry out operations if the assets used as objects have completed the development process. Each party also benefits directly or indirectly from this cooperation. This certainly benefits the government as the owner of the assets as well as the private sector itself.

*Public-Private Partnership* (PPP) is an agreement or contract between the government, either central or regional with the private sector. Through this agreement, the expertise and assets of both parties (government and private) integrated in providing services to the community.<sup>9</sup> In carrying out this collaboration, the risks and potential benefits of providing services or facilities are shared between the government and the private sector. PPP is a form of partnership between the government and the private sector that involves large and capital-intensive investments where the private sector finances, builds, and manages infrastructure and facilities, while the government as a partner in handling service arrangements, in this case remains as the owner of assets and controller of the implementation of the cooperation.<sup>10</sup>

In Indonesia, the concept of *Public Private Partnership* (PPP) is embodied in Presidential Decree No. 38 of 2015 concerning Government and Private Entity

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<sup>7</sup> Thunder Priadi, *Penerapan Konsep Public Private Partnership (PPP) dan Konsep New Public Management (NPM) Dalam Meningkatkan Pemanfaatan Aset Negara*, 2016. Article accessed on: <https://www.djkn.kemenkeu.go.id/article/baca/11075/Implementation-Concept-Public-Private-Partnership-PPP-And-New-Public-Management-NPM-In-Enhancing-State-Asset-Utilization.html>

<sup>8</sup> *Ibid*

<sup>9</sup> Baranovska, Vira, Valeriia Zavertneva-Yaroshenko, Volodymyr Dryshliuk, Myroslav Leshanych, and Iryna-Mariia Huk. "Legal regulation of public-private partnership relations and protection of the interests of business entities in Ukraine." *Amazonia Investiga* 11, no. 50 (2022): 99-108.

<sup>10</sup> Egy Richardo Saragih. *Studi Public Private Partnership Dalam Proyek Infrastruktur: Kasus Jalan Tol Tg. Marowa-Tebing Tinggi*, Faculty of Engineering, University of North Sumatra, 2010. Accessed on <https://123dok.com/document/rz3d7mmy-public-private-partnership-project-infraktur-tanjung-morawa-tebing.html>

Cooperation. Article 1 point 6 of this Presidential Decree No. 38 of 2015 stipulates that "Government and Private Entity Cooperation, hereinafter referred to as KPBU is a collaboration between the government and Private Entities in the provision of infrastructure for the public interest by referring to the specifications previously determined by the Minister/Head of Institutions/Head of Regions/State-Owned Enterprises, which partly or wholly uses the resources of the private entity with due observance of the risk sharing among the parties."

The scheme for the utilization of State/Regional Property based on Government Regulation No. 27 of 2014 concerning Management of State/Regional Property has several forms including lease, *Kerjasama Pemanfaatan (KSP)*, *Bangun Guna Serah/Bangun Serah Guna (BGS/BSG)*, *Pinjam Pakai*, dan *Kerjasama Penyediaan Infrastruktur (KSPI)*<sup>11</sup>. In Government Regulation No. 28 of 2020 which amends Government Regulation No. 27 of 2014 added 1 (one) form of utilization of State/Regional Property as specified in Article 27 paragraph (2), namely *Kerjasama Terbatas Untuk Pembiayaan Infrastruktur (KSTPI)*. The forms of utilization of State/regional property mentioned can be explained as follows:

- Lease is the utilization of State/Regional Property by another party within a certain period of time and receiving cash.<sup>12</sup>
- *Pinjam Pakai* is the transfer of the use of goods between the central and regional governments or between regional governments within a certain period of time without receiving compensation and after that period ends, it is handed back to the property manager for the goods user.<sup>13</sup>
- *Kerjasama Pemanfaatan* is the utilization of State/Regional Property by other parties within a certain period of time in the context of increasing non-tax state revenues/regional revenues and other financing sources.<sup>14</sup>
- *Bangun Guna Serah* is the utilization of State/Regional Property in the form of land by another party by constructing buildings and/or facilities along with their facilities, then utilized by the other party within a certain agreed period of time, to subsequently hand over the land along with buildings and/or facilities. the following facilities after the expiry of the period.<sup>15</sup>
- *Bangun Serah Guna* is the utilization of State/Regional Property in the form of land by another party by constructing buildings and/or facilities along with their facilities, and after the construction is completed it is handed over to be utilized by the other party within a certain agreed period of time.<sup>16</sup>
- *Kerjasama Penyediaan Infrastruktur* is cooperation between the Government and Private Entities for infrastructure provision activities in accordance with the provisions of the laws and regulations.<sup>17</sup>

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<sup>11</sup> Article 27 Government Regulation No. 27 of 2014 concerning Utilization of State/Regional Property

<sup>12</sup> Article 1 No. 11 Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 concerning Utilization of State/Regional Property

<sup>13</sup> Ibid, Article 1 No. 12

<sup>14</sup> Ibid, Article 1 No. 13

<sup>15</sup> Ibid, Article 1 No. 14

<sup>16</sup> Ibid, Article 1 No. 15

<sup>17</sup> Ibid, Article 1 point 16

- *Kerjasama Terbatas Untuk Pembiayaan Infrastruktur* is the optimization of State-Owned Property to improve the operational function of State-Owned Property in order to obtain funding for financing the provision of other infrastructure.<sup>18</sup>

Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 concerning Management of State/Regional Property has determined that State/Regional Property is all property purchased or obtained at the expense of the State or Regional Revenue and Expenditure Budget or originating from other legitimate revenue. The property referred to in this definition are tangible objects that can be valued, counted, measured, and weighed, excluding money and securities. Meanwhile, property derived from other legal acquisitions are goods obtained from grants/donations or the like, property obtained as the implementation of an agreement or contract, property obtained in accordance with the provisions of the legislation, and property obtained based on a court decision issued by law has permanent legal force. Then, according to the Regulation of the Minister of Finance No. 171/PMK.05/2007 concerning the Central Government Accounting and Financial Reporting System, State Property includes the following elements:<sup>19</sup>

1. Current assets. Current assets referred to in terms of State/Regional Property are inventories. Inventories are current assets in the form of goods or equipment intended to support government operational activities, and goods intended to be sold and/or delivered in the context of services to the community.
2. Fixed assets. Fixed assets are tangible assets that have a useful life of more than 12 (twelve) months to be used in government activities or utilized by the general public. Fixed assets referred to in terms of State/Regional Property are land, buildings and structures, equipment and machinery, roads, irrigation, and networks.
3. Other assets. Other assets referred to in the definition of State/Regional Property are fixed assets that are discontinued from active use by the government so that they do not meet the definition of fixed assets and must be transferred to other asset accounts in accordance with their carrying value.
4. Historic asset. Historical assets referred to in the sense of State/Regional Property are fixed assets that have legal provisions as historic assets due to cultural, environmental, and historical interests.

Furthermore, it is explained in Article 1 No. 10 of Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 that "Utilization of State/Regional Property is the utilization of State/Regional Property that is not used for carrying out the duties and functions of the Ministry/Institutions/Work Units and/or optimization of State/Regional Property without changing ownership status." Based on this understanding, it can be seen that utilization has characteristics, namely there is an effort to utilize State/Regional Property, it is not used in the implementation of tasks and functions (*idle*), and does not change the ownership status.

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<sup>18</sup> Ibid, Article 1 point 16a

<sup>19</sup> Attachment to the Regulation of the Minister of Finance No. 171/PMK.05/2007 concerning the Central Government Financial Accounting and Reporting System, Part Four concerning the Management Information System and Accounting for State Property



**Table 2.** Comparison between KSP, KSPI, KSTPI, and KPBU

<b>Indicator</b>	<b>Utilization Cooperation</b>	<b>Infrastructure Provision Cooperation</b>	<b>Limited Cooperation for Infrastructure Financing</b>	<b>Government with Private Entities Cooperation</b>
Object	<ul style="list-style-type: none"> <li>- State Property on goods manager</li> <li>- Regional Property in the form of land and/or buildings that have been handed over by the user of the goods</li> <li>- State Property on goods users</li> <li>- Regional Property in the form of a portion of land and/or buildings that are still used by goods users</li> <li>- Regional Property other than land and/or buildings</li> </ul>	<ul style="list-style-type: none"> <li>- State/Regional Property in the form of land and/or buildings for goods users/goods managers</li> <li>- State/Regional Property in the form of a portion of land and/or buildings that are still used by goods users</li> <li>- State/Regional Property other than land and/or buildings</li> </ul>	State Property on goods users	<ul style="list-style-type: none"> <li>- Development of economic infrastructure and social</li> <li>- State/ Regional Property in the form of land through land acquisition</li> </ul>
Subject	<ul style="list-style-type: none"> <li>- Government: Goods Users and Goods Managers</li> <li>- Private, Private Entity</li> </ul>	<ul style="list-style-type: none"> <li>- Government: Goods Users and Goods Managers</li> <li>- Private Entities: PT, BUMN, BUMD, Cooperative</li> </ul>	<ul style="list-style-type: none"> <li>- Government: BLU</li> <li>- Private, Private Entity</li> </ul>	<ul style="list-style-type: none"> <li>- Government as PJKP</li> <li>- BUMN/BUMD as PJKP</li> <li>- Private Entity: BUMN, BUMD, PT, Foreign BH, Cooperative</li> </ul>
Period	<ul style="list-style-type: none"> <li>- Non Infrastructure: 30 years + renewal</li> <li>- Infrastructure: 50 years + renewal</li> </ul>	50 Years + renewal	Not specified	Until the project ends
Etc	Utilization by Private/Business Entities for a specified period of time	Utilization by Private/Private Entities for a specified period of time	Utilization by Private/Private Entities for a specified period of time	There is no utilization by the Private Entity, but there is a return on investment + profit for the implementing Private Entity

Based on the previous explanation, it can be concluded that the concept of PPP in Indonesia is implemented in the form of KPBU as stipulated in Presidential Regulation No. 38 of 2015 concerning Government with Private Entities Cooperation. In the context of the management of State/regional property, PPP is embodied in the form of KSP, KSPI, and KSTPI as stipulated in Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 concerning Management of State/regional property. It is just that it needs to be distinguished between KSP, KSPI, and KSTPI with PPP where KSP, KSPI, and KSTPI are models of State/regional property management activities, while PPP is a model of cooperation financing in the context of providing infrastructure.

In other countries, especially developed countries, the practice of PPP has often been implemented because PPP can increase the potential for State revenue and can maximize the potential for idle or *idle* assets. In the Netherlands, for example, the role of PPP is very important in the ongoing development of infrastructure in the country. According to Ecorys, PPP project is implemented to build infrastructure and regional development. Entry of the private sector into infrastructure development in the Netherlands is considered more efficient to assist the government in providing infrastructure. The private sector is considered more innovative in the implementation of infrastructure development that is used for the community.<sup>20</sup>

In Indonesia, PPP is embodied through KSP, KSPI, and KSTPI is aimed at increasing the potential for State revenues and maximizing the potential for *idle* assets. This is for example set in Article 31 Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 which stipulates that *Kerjasama Pemanfaatan* (KSP) of State/regional property is carried out in order to optimize the usability and efficiency of State/regional property or increase State/regional revenues. Based on the perspective expressed in Government Regulation No. 27 of 2014 jo. Government Regulation No. 28 of 2020 shows that there is a potential for State revenue originating from KSP.

In Indonesia, PPP has also been applied in terms of the management of State/regional property. It has legally been stated in Government Regulations and Presidential Decree. It can also be said that PPP through KSP, KSPI, and KSTPI is a privatization model in the field of State/regional property management. The problem is that the management of State/regional property through PPP can cause infrastructure that should be used for the benefit of public services and public interests to turn into private affairs because its utilization is left to the private or business entities.

In essence, all State or regional property is used to maximize public services. Even some State/regional property should be able to be enjoyed by the public. The presence of PPP as one of the legal figures which, according to the author is a model of cooperation financing in the context of providing infrastructure to State/regional property, actually creates its own legal problems in terms of managing State/regional property. Moreover, in its regulation, KPBU can be initiated by a Business Entity as regulated in Article 14 of Presidential Decree No. 38 of 2015. Indeed, with KPBU infrastructure development can be implemented and can be directly used by the State/regional government, but it also makes the State indebted to the Implementing Business Entity. In fact, according to the author, KPBU as outlined in the form of an agreement can cause the State position to be on an equal footing with the Implementing Business Entity.

KPBU as outlined in the form of a contract is theoretically categorized as a public contract. According to Badrulzaman,<sup>21</sup> a public contract is an agreement partially or wholly controlled by public law because one of the parties acts as the ruler (government). In this public contract, Anshori Ilyas<sup>22</sup> concluded that the position of the government that represents the State cannot be equated with legal entities or business entities because it will weaken the position of the State as the highest power organization. For this reason, in the context of KPBU, the position of the State must

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<sup>20</sup> Moeh. Yafie Abbas. *Public Private Partnership Dalam Pembangunan dan Pengelolaan Suncity Plaza* Sidoarjo. Source: [http://repository.unair.ac.id/72514/3/JURNAL\\_Fis.AN.24%2018%20Abb%20p.pdf](http://repository.unair.ac.id/72514/3/JURNAL_Fis.AN.24%2018%20Abb%20p.pdf)

<sup>21</sup> Anshori Ilyas, *et.al. Kontrak Publik*, UPT Unhas Press, Makassar, 2017, p. 39

<sup>22</sup> *Ibid*, p. 106

remain as the ruling party whose position is higher than that of a business entity.

Furthermore, Anshori Ilyas<sup>23</sup> explained that when a private party enters into a contract with the government where the object of the agreement is public services, then the private party is withdrawn as executor of government duties or public servants. In the context of the welfare state, public services have the most important position where every government action is carried out in an effort to carry out government functions, including service functions. In every contract related to public services, the state cannot be positioned as a private person or legal entity because the contract is in the name of the people, for public service needs, and for the public interest.

The concept of PPP is embodied in the form of KPBU as implemented in Indonesia must refer to the concept of a public contract as described above. PPP is also implemented in accordance with the concept and mechanism of state finances so that the position of the Implementing Business Entity is as an investor who capitalizes on infrastructure development that has been planned to be budgeted for in the following fiscal year.<sup>24</sup> The concept of PPP in the form of KPBU cannot position the State as a "debtor" to the Implementing Business Entity as it is a debt receivable in the realm of private law, but the State is positioned as a "debtor" who will definitely pay its debts in the next fiscal year. This is based on the objectives of KPBU, one of which is to meet the funding needs in a sustainable manner in the Provision of Infrastructure through the mobilization of private funds.

Another problem is that through this KPBU, the potential for merging public and private affairs can occur. Article 5 paragraph (4) Presidential Decree no. 38 of 2015 stipulates that KPBU may participate in the provision of commercial facilities. Ideally, KPBU are intended to provide social and economic infrastructure in the context of public services. For this reason, in this context it should not be possible to include private and commercial affairs in the provision of the infrastructure in question.

In general, that KPBU are actually implemented for the efficiency of State/regional property management. The point is that the financing model with KPBU, State/regional assets can be properly empowered so that public services can run optimally. Likewise with the procurement of State/regional assets, this KPBU can also realize the efficiency of the procurement of State/regional assets in the context of optimizing public services.

The provision of infrastructure with KPBU's model as the Presidential Decree No. 38 of 2015 also provides compensation to the Implementing Business Entity to utilize the infrastructure built under the provisions of Article 5 paragraph (4) of Presidential Decree No. 38 of 2015. In addition to compensation for the utilization of the infrastructure that has been built, the Implementing Business Entity can legally also benefit from the return on investment by the Person in Charge of the Cooperation Project (PJK - *Penanggung Jawab Proyek Kerjasama*).<sup>25</sup> Likewise for KPBU that initiated by the Implementing Business Entity, alternative compensation that can be given to the Implementing Business Entities include:

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<sup>23</sup> *Ibid*, p. 110-111

<sup>24</sup> Lagle, Emma. "Public-private partnerships and smart growth: A legislative tool kit for public-infrastructure projects." *Pace Envtl. L. Rev.* 37 (2019): 211.

<sup>25</sup> Article 11 paragraph (1) Presidential Regulation No. 38 of 2015 concerning Government Cooperation with Business Entities stipulates that PJK determines the form of return on investment which includes closing capital costs, operational costs, and profits of the Implementing Business Entity.

- Granting additional value of 10% (ten percent);
- Granting the right to bid by the Initiating Business Entity to the best bidder (*right to match*), in accordance with the results of the assessment in the auction process; or
- Purchase of Initiating KPBU, including the accompanying intellectual property rights by the Minister/Head of Institution/Head of Region or by auction winner.

The compensation as described above is sufficient to provide benefits to the Implementing Business Entity for its investment. For this reason, it is no longer necessary to provide compensation in the form of participation in commercial activities from the Implementing Business Entity on the infrastructure that has been built. Moreover, the provision of infrastructure using KPBU model is not done because the State (State or local government) has no money at all to build it, but in principle to involve the community and the private sector to participate in the development process. In addition, KPBUs are carried out because the infrastructure development in question is not included in government planning (not included in the State/Regional Budget) so that investment from the private sector/public is needed to provide it first and will be budgeted for in the following fiscal year.

Ultimately, this KPBU model raises the question, namely what is the difference between KPBU with KSP, KSPI, and KSTPI? In KPBU model, by allowing the private sector to exercise commercial activities on the infrastructure that has been built, causing PPP as embodied in KPBU model are no different from KSP, KSPI, and KSTPI models. Even KPBU model allows the private sector to be "involved" in public affairs for a relatively longer period of time based on the agreement of the parties as outlined in the agreement.

The merging of public and private or commercial affairs in one or more infrastructures can cause disruption of public services. For this reason, the regulation in Article 5 paragraph (4) of Presidential Decree No. 38 of 2015 which allows the private sector to exercise commercial activities on the infrastructure that has been built does not need to exist. KPBUs should be directed at providing infrastructure only without any commercial activities in it because the private sector has received financial benefits that can legally be included in the proposal. Another reason is that the infrastructure built by the Implementing Business Entity is social and economic infrastructure. In Presidential Decree No. 38 of 2015 it is not divided which is social infrastructure and which is economic infrastructure.

For this reason, it can be justified that the infrastructure built by the Implementing Business Entity is infrastructure for the benefit of public services so that the author assumes that there is no need for commercial affairs on the infrastructure built with this KPBU model. State/regional property should be used for public service purposes. For this reason, the infrastructure built for optimizing public services cannot be merged with private or commercial affairs because it can cause disruption of public service affairs to the community so that it can also have implications for non-optimal public services provided by the government.

#### **4. CONCLUSION**

Essentially, all State or regional property is used to maximize public services. Even some State/regional property should be able to be enjoyed by the public. The existence of KPBU as one of the legal figures which is a model of cooperation financing

for the provision of infrastructure for State/regional property in the end actually raises legal problems related to its management. The most important problem is KPBU, the potential for merging of public and private affairs can occur that KPBU may participate in the provision of commercial facilities. Ideally, KPBU are intended to provide social and economic infrastructure in the context of public services. Therefore, in this context it is not possible to include private and commercial affairs in the provision of the infrastructure in question.

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