



The justice principle in the agreement on the implementation of public railway infrastructure in Indonesia

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Abstract

Consensus Basoeta which is a cooperation agreement between the Government through the Ministry of Transportation of the Republic of Indonesia to the state owned enterprises PT. Kereta Api Indonesia (Persero), the agreement requires PT. Kereta Api Indonesia to perform the construction of public facilities and railways Soekarno Hatta Airport through the city of Tangerang, it is known that the cooperation agreement is an assignment form of the President of Indonesia Decree Number 83 of 2011. As the general agreement, then the Basoetta conappropriation should adopt the principles that become the fundamental conditions in the establishment of a treaty. Therefore, in this research, the author was asking whether the cooperation agreement between the Governments through the Ministry of Transportation of the Republic of Indonesia with PT. Kereta Api Indonesia is already reflecting the sense of fairness for the parties. Through this research, it is known that the Basoetta conappropriations have not fulfilled the element of justice, because the principle of conappropriation implies that the treaty occurs because of the agreement or the free will of the parties who make the agreement on the contents or subject of the agreement. However, according to the Presidential Decree Number 83 of 2011 on the assignment by the president to PT. Kereta Api Indonesia for organizing the facility and facilities of railway Soekarno-Hatta Airport and the Jakarta-Bogor-Depok-Tangerang-Bekasi round about, PT. Kereta Api Indonesia shall accept the assignment and relieve the right to reject the assignment in the form of the agreement.

Keywords: basoetta concensus, the justice principle, Consensus Basoeta

Introduction

Increased the modernization process as a result of the discovery of communication tools, transportation and informatics has given considerable significance to the countries of the world ^[1]. Development has many aspects and dimensions, such as political, economic, social, legal, and cultural, and defense security ^[2]. Indonesia as a developing country, has a strong desire to do its economic development. Indonesia as a developing country, needs to be a development of facilities and infrastructure for the general benefit (infrastructure) of various aspects of life.

The acquisition of an often infrastructure requires very large funds, so it will be heavy if it's only charged on the State and Local Expenditure Revenue Budget, in Indonesia it's known as "Anggaran Pendapatan Belanja Negara and Anggaran Pendapatan Belanja Daerah" (APBN and APBD). The participation of other parties (either private or State-owned Enterprises in Indonesia it's known as Badan Usaha Milik Negara) in the procurement of infrastructure projects is certainly a new thing in Indonesia ^[3]. Patterns such as regional or national bond issuance, BOT (Build Operate Transfer), BOO (Build Operate Own), BROT (Build Rent Operate Transfer), KSO (Operation Cooperation or Joint Operation), in the form of joint venture, is a new

phenomenon not only for academic circles, but also practitioners, government agencies, lawyer, financial institutions, notary and others ^[4].

Along with the passage of time, often a cooperation agreement between the Government and the private, by conducting a Build Operate Transfer (BOT) agreement is a concept whereby the project is built on the full cost of private companies, some private companies, or cooperation with State-owned Enterprises in Indonesia it's known as Badan Usaha Milik Negara (BUMN) ^[5]. Then, once built and operated by the contractor as well as after the operation phase is completed as specified in the Build Operate Transfer (BOT) agreement is the transfer of the project to the government as the project owner. In this case, the Build Operate Transfer (BOT) that will be reviewed in this article is a cooperation agreement between the Directorate General of Railways, Ministry of Transportation of the Republic of Indonesia with PT. Kereta Api Indonesia (here in after in this research, the agreement will be referred to as Basoeta Consensus). PT. Kereta Api Indonesia (KAI) through the agreement is obliged to perform the construction of public facilities and railways Soekarno-Hatta Airport through the city of Tangerang ^[6]. It is also known that the cooperation

¹ Susilowati, E. 2007. Kontrak Alih Teknologi pada Industri Manufaktur. Yogyakarta: Genta Press, pp: 1

² Sidabalok, J. 2012. Hukum Perusahaan Analisis Terhadap Pengaturan Peran Perusahaan Dalam Pembangunan Ekonomi di Indonesia. Bandung: Nuansa Aulia, pp. 34

³ Vita Justia. Perjanjian Bangun Guna Serah (Build Operate Transfer) Antara Pemerintah Provinsi Sumatera Selatan Dengan Pihak Swasta. Jurnal Nurani, Vol. 15 (Number 1, June) , pp. 74

⁴ I Gede Abdhi Prabawa. Kajian Hukum Terhadap Perjanjian Build Operate Transfer (BOT) Untuk Melindungi Hak Milik Atas Tanah Dalam Rangka Menunjang Sektor Pariwisata. Jurnal Hukum Student Journal, Vol 12, Number 2, 2013, pp. 2

⁵ Lalu Hadi Adha. 2011. Kontrak Build Operate Transfer Sebagai Perjanjian Kebijakan Pemerintah Dengan Pihak Swasta. Jurnal Dinamika Hukum, Vol. 11 (No. 3, September), pp. 549

⁶ See at cooperation agreement between the Directorate General of Railways, Ministry of Transportation of the Republic Indonesia with PT.

Agreement is a form of an assignment from the President of the Republic of Indonesia to Kereta Api Indonesia through the regulation of the President of the Republic of Indonesia Decree Number 83 of 2011 (here in after called as Perpres 83/2011).

The definition of the agreement, as set forth in article 1313 of Civil Law, "is an act by which one or more persons bind themselves to one person or more." Abdulkadir Muhammad in Ilhamdi has argumentation that the definition is so common that it could not describe the true essence. The weakness that exists in the definition is of unilateral nature, does not refer to the purpose, but also does not give boundaries on the word "deed" which is certainly very broad understanding^[7]. A treaty either orally or inscribed (written, contract) should be able to express the will of the parties of the public to become a more pronounced step or deed in order to realize the purpose for which the agreement was made previously agreed^[8].

The agreements made by the parties both verbal and in writing need to heed the principles of the Covenant Law, the Rules of Law relating to the Covenant. Those principles, among other things, are very important principles of contractual freedom, (freedom of contract, *Partij Autonomie*)^[9]. This principle is an enactment of the consensual principle, this consensual principle underpins the principle of binding on the Covenant strength (*Pacta Sun Servanda*)^[10]. According to Sepe, the application of these principles especially in the pre contract (pre contract) or generally at the stage of contract (contracts) cannot be done freely, but in the basic frame of good faith and dissolution^[11]. Good faith is not merely subjective^[12] in the sense of not being deceptive, not lying, dishonest, but also objectively. Objective in the sense of agreement must be implemented based on legislation^[13] and morality and decency^[14]. The principle of good faith in the common law countries, was originally implied contractual obligation^[15],

which later in its development became a promise as proposed by the state legislatures. However, when viewed in fact in the practice of activities/business activity, Business Agreement (business contract) is almost all made in written form.

It is known that the law of the treaty also makes room for the parties to form and determine the content of the agreement to be done, nevertheless, in its application there are several problems that are often experienced in carrying out such agreements^[16]. The agreement or contract is an agreement that is based on voluntary will, to achieve a profitable purpose (economic prospective) that is deemed fair for the parties. A contract or agreement is not born because of an agreement but also must comply with the legal provisions on the legitimate terms of the agreement as set forth in article 1320 of the Civil Law, in other words the agreement of any form is not able to ignore the applicable laws in which the agreement is made solely relying on the agreement based on the principle of contractual freedom^[17]. As the author mentioned previously, this article will review the cooperation agreement between the Directorate General of Railways, Ministry of Transportation of the Republic of Indonesia and PT. Kereta Api Indonesia (Persero). PT Kereta Api Indonesia (KAI) through the agreement is obliged to perform the construction of public facilities and railways Soekarno-Hatta Airport through the city of Tangerang. It is also known that the cooperation Agreement is an assignment form of the President of the Republic of Indonesia to KAI through Perpres 83/2011. Basically, the implementation of railway infrastructure is the responsibility of the Government in order to fulfill public services. From the concept of Welfare State is reasonably appropriate the government provides public facilities mass transportation in order to fulfill ideals for the welfare of its people. However, in all limitations of the Government to realize infrastructure to boost the economy of the country that is expected to affect the welfare of society, the government began to make adjustments in infrastructure project financing.

Then in order to fulfill the needs of the public service, the government gave the assignment scheme to the State-owned Enterprises or known as Badan Usaha Milik Negara (BUMN) to do the development of several infrastructure projects that belong to the national Strategic Project. Especially in the effort to fulfill public services in the field of transportation, the Government provides assignments for a number of railway infrastructure projects in Indonesia. The assignment was none other than the transfer of government responsibilities to PT Kereta Api Indonesia in organizing public services in the field of transportation. Of course, the government's assignment to PT. Kereta Api Indonesia should carefully review the utilization in fulfillment of community welfare objectives should not ignore the interests of PT. Kereta Api Indonesia as State-owned State-owned Enterprises or known as Badan Usaha Milik Negara (BUMN) to get corporate profit or called as profit oriented.

Therefore, the question of whether the cooperation

Kereta Api Indonesia (Persero) on the implementation of public railway infrastructures Soekarno Hatta Airport through the city Tangerang

⁷ Ilhamdi. 2014. Perjanjian Kerjasama Waralaba antara PT. Raos Aneka Pangan dengan Ny. Hj. Maryenik Yanda. JOM, Jurnal FH Riau Vol. 1 Number 2 Oktober, pp. 1- 15

⁸ Alan Schwartz & Robert E Scott, 2003. Contract Theory and the Limits of Contract Law. Virginia: Yale Law Schools Publishing, see at Ery Agus Priyono, Aspek Keadilan Dalam Kontrak Bisnis Di Indonesia (Kajian pada Perjanjian Waralaba), Jurnal Law Reform Program Studi Magister Ilmu Hukum Volume 14, Number 1, 2018, pp. 16

⁹ Ibid.

¹⁰ Priyono, E.A. 2015. Penerapan Asas Kebebasan Berkontrak dalam pembuatan Perjanjian Franchise Es Teler 77 (suatu pendekatan normatif). Jurnal FH Undip, Masalah-Masalah Hukum. Vol.44 Number.2, April, pp. 123-129

¹¹ S.M. Sepe. 2010. Good Faith And Contract Interpretation: A Law And Economics Perspective Arizona : James E Roger College of law Publishing

¹² Black Law Dictionary, lihat dalam Priyono, E.A, Penerapan Asas Kebebasan Berkontrak dalam pembuatan Perjanjian Franchise Es Teler 77 (suatu pendekatan normatif). Op.cit

¹³ Muhamad Hasan Muaziz & Achmad Busro. 2015. Pengaturan Klausula Baku Dalam Hukum Perjanjian Untuk Mencapai Keadilan Berkontrak, Jurnal Law Reform Program Studi Magister Ilmu Hukum Volume 11, Number 1, pp. 75

¹⁴ S.M. Sepe, 2010. Op.cit

¹⁵ Implied contractual obligation is an implied contract is a legally binding obligation derived from the actions, behaviors, or circumstances of one or more parties in an agreement. It has the same legal force as the express contract, which is a contract voluntarily created and agreed to orally or in writing by two or more parties. Implied contracts, on the other hand, are assumed to exist, but no written confirmation, this information was taken from https://www.investopedia.com/terms/i/implied_contract.asp, access ed February 05, 2020

¹⁶ Muhamad Hasan Muaziz & Achmad Busro, Pengaturan Klausula Baku Dalam Hukum Perjanjian Untuk Mencapai Keadilan Berkontrak, Op.cit, pp. 75

¹⁷ D. Echenberg. 2011. Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements, London: Cambridge University Press.

agreement between the Government through the Ministry of Transportation of the Republic of Indonesia with PT. Kereta Api Indonesia which it to do the construction of public facilities and railways Soekarno Hatta Airport through the city of Tangerang has given a sense of justice for the parties?

Research Method

The type of this research is normative legal research or called as doctrinal research. The specification of this research uses a descriptive analytical specification, namely, that is author in analyzing the problem by providing factual description associated with the relevant legal norms.

The normative legal research uses secondary data that is a legal data, especially primary legal data material^[18]. Data collection methods are based on data sources acquired in this research, data is collected by means of library research^[19]. As a way to draw conclusions from the results of the research that has been collected, will be used method of normative-qualitative analysis, which is concentrated on the philosophical aspect (justice) with a reduction model of the immutation.

Research Result

1. Anatomy of Consensus Cooperation Agreement Basoeta

Basoeta was created and signed on 10 July 2014, between the Directorate General of Railways, the Ministry of Transportation of the Republic of Indonesia with PT. Kereta Api Indonesia (Persero). In this agreement, the PT KAI amounting to 2.5 trillion rupiah explains that:

- a. The government has assigned to PT. Kereta Api Indonesia to organize infrastructure facilities of Soekarno Hatta Airport based on President of Republic Indonesia Decree Number 83 of 2011.
- b. The reconstitution in the President of Republic Indonesia Decree Number 83 of 2011 is an assignment given by the Government to State-owned Enterprises or known as Badan Usaha Milik Negara (BUMN) engaged in the railway as stipulated in article 23 of Law Number 23 of 2007 concerning Railways *juncto* Article 175 paragraph (2) of Government Regulation Number 56 of 2009 concerning Railway organizing *juncto* Article 2 Government Regulation Number 19 of 1998 on Public Company Form Transfer of railways to be Company (Persero).
- c. Pursuant to article 307 of Government Regulation Number 56 of 2009 2009 assignment of implementation of railway facilities and infrastructure that was born from the assignment need to be set in the agreement of public railways infrastructure between the first Party (Directorate General of Railways with PT Kereta Api Indonesia)

The agreement titled the Cooperation Agreement consists of 25 articles. As is generally the cooperation agreement that is often used is with the agreement made in Build Operate Transfer (BOT) is a binder between the parties to conduct

cooperation that raises the legal relationship^[20]. The contents of the Build Operate Transfer (BOT) agreement have been agreed upon, which one of the parties is entitled to the achievement and the other party is obliged to fulfill the achievement^[21].

2. The process of agreement

The agreement seen from its formation can be distinguished into three phases; the pre contract stage; contracts and post contracts^[22]. The pre contract is a very important step in the series of agreements, because at that stage there is a process of agreement (negotiations) commonly referred to as offer (offer) and acceptance (acceptance) which leads to two possibilities, agreed or disagreed^[23]. The freedom of contract is an essential principle, both for individuals in developing themselves both in personal and social life to the community, so that some scholars assert the freedom of contracting is a part of human rights that should be respectful^[24].

Countries with the Common Law system know the numbness of contracting with the term Freedom of Contract or *Laissez faire*. The principle of freedom of contract (*Partij Autonomie*, freedom of contract), becomes the source of developing legal agreements, not only in Indonesia, as well as at the regional and international level^[25]. Based on the principle of freedom of contract, people may make or not make covenants. The parties who have agreed will make the free agreement determine what could and should not be included in a treaty. The agreements taken by the parties bind them as laws. (Article 1338 of Civil Law). The application of this principle provides an important place for the enactment of the consensual principle, indicating the balance of importance, tinginess in the division of risk load, and the balance of the collective position (bargaining position)^[26].

Its development in practice what is binding as a law for the parties is based on a false agreement. In its development this principle appears to be a new paradigm in the law of contracts that lead to freedom of limitless (unrestricted freedom of contract). The present condition, the principle also makes strong people can impose his will against the weak, so that the ideals of freedom of contract that initially provide a legal balance, balance of interest and also balance in the bid, become a means of suppressor for the weak, therefore article 1337 of the Civil Code gives a limitation on the practice of implementing the principle by asserting "cause" the agreement should be lawful means not

²⁰ Anis Sazira Bakri, et. all. Risk Management In Build Operate Transfer (BOT) For Roads And Highway Project In Malaysia. Built Environment Journal, Vol. 6 No. 1, tahun 2009, pp. 2-3

²¹ Husni Thamrin. Kajian Build Operate Transfer Dalam Hukum Perjanjian di Indonesia. Jurnal Ilmu Hukum The Juris, Vol. 1 Number. 2, Desember 2017, pp. 117

²² R. Khairandy, R. 2013. Hukum Kontrak Indonesia dalam Perspektif Perbandingan. Yogyakarta: FH UII Press.

²³ Ery Agus Priyono, Aspek Keadilan Dalam Kontrak Bisnis di Indonesia (Kajian pada Perjanjian Waralaba), Jurnal Law Reform Program Studi Magister Ilmu Hukum Volume 14, Number 1, 2018 Fakultas Hukum Universitas Diponegoro, pp. 19

²⁴ R. Khairandy, R. 2013. Op.cit.

²⁵ Zhang, M. 2006. Chinese Contract Law, Leiden, Boston: Martinus Nijhoof Publisher.

²⁶ Ikka Puspitasari & Budi Santoso, Perjanjian Kerjasama Pemerintah Dan Swasta Dengan Pola (BOT) Build Operate Transfer dalam pembangunan Jalan Tol (Studi Pembangunan Jalan Tol Semarang-Solo), Jurnal Law Reform Program Studi Magister Ilmu Hukum Volume 14, Number 1, 2018 Fakultas Hukum Universitas Diponegoro, pp. 65

¹⁸ H. Hadikusuma. 1995. Metode Pembuatan Kertas Kerja atau Skripsi Ilmu Hukum. Bandung: Mandar Maju.

¹⁹ M. Nazir. 2005. Metode Penelitian. Jakarta: Ghalia Indonesia

prohibited law, not is contrary to good morality or public order.

The cooperation agreement between the Government of Indonesia and PT. Kereta Api Indonesia consists of 25 articles always include matters of responsibility/obligation to be fulfilled by the parties, the contents of the agreement written in the 25 articles of the agreement according to the authors not a reflection of the outcome of the agreement. How it is not said so if the agreement consisting of 26 articles contains obligations for PT. Kereta Api Indonesia which is more than 15 obligations in reverse with the first party is only 2 liabilities. At the same time we know the right of the first party namely the government and PT Kereta Api Indonesia has a similarity of 5 (five) rights. A very unbalanced condition. Even if we follow the opinion of Untung Felix S Soebagjo stating. "considered a deal when the parties interests can be implemented in a balanced" [27]

Article 1338 paragraph 3 of Civil Law: the agreement must be executed in good faith (Black, 2017). Good faith in Black's Law Dictionary is defined as

"is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone."

3. An unfairness agreement

This principle provides the information that a treaty has essentially existed since the agreement between the parties in the Treaty was achieved. The principle of consensualism contained in article 1320 of the Civil Code implies the willingness of the parties to cleave to each other and this will generate confidence that the Covenant will be fulfilled [28]. Eggen states, the consensual principle is a culmination of human enhancement that is implied in the saying "*een man een man, een word een word*". It is then said by him that the phrase "one must be able to hold the speech" is a moral claim, but article 1320 of the Civil Law becomes the legal basis for its enforcement. Unfulfilled conditions of consensualism in the agreement that the Treaty of government can be cancelled, because it does not meet subjective conditions [29].

This principle relates to the basic of a covenant. Consensualism implies that the treaty occurs because of the agreement or free will of the parties who make the agreement on the contents or subject of the agreement. Article 1338 paragraph (1) the civil law mentions that: "All agreements made legally valid as laws for those who make it". In the chapter, the principle of consensualism is found in the word "... The agreement made legally...", which refers to article 1320 of the Civil Law, especially in paragraph 1 that they agree to bind himself.

The document of the Basoetta agreement that has been signed by the parties, is an agreement in the form of an assignment from the president as the head of the Government of the Republic of Indonesia to PT. Kereta Api

Indonesia through President of Republic Indonesia Decree Number 83 of 2011 to organize the railway infrastructure facilities Soekarno Hatta Airport, so indirectly does not provide sufficient opportunities for the party of PT. Kereta Api Indonesia to express freedom based on the principle of freedom of contract (either refuse or accept) to protect importance as a party to the agreement. The validity of the Basoetta is no need to be questioned, but it still needs to be discussed whether the agreement is not very strenuous and does not contain unreasonable clauses that are deeply incriminated on the second party, so that the Treaty is an oppressive and unfair agreement.

The principle of freedom of contract as can be concluded from article 1338 paragraph (1) of the Civil Code which has a close relationship with section 1320 of the Civil Code governing the principle of consensualism which becomes one of the terms of the term of a treaty is likely to be violated with the conappropriation of the Basoetta, where PT. Kereta Api Indonesia as the second party could not be reject because of the President of Republic Indonesia Decree Number 83 of 2011.

Conclusion

Based on the research result, the conclusion of the research include: Basoetta Concensus which is a cooperation agreement between the Government through the Ministry of Transportation of the Republic of Indonesia to State-owned Enterprises or known as Badan Usaha Milik Negara (BUMN) PT. Railways Indonesia or Kereta Api Indonesia (Persero) can be said to not reflect the values of justice, it is because consensualism implies that the agreement occurred because of the word or free will of the parties who made the of the Covenant. However, according to the 83/2011 Presidential decree on the assignment by the president to PT Kereta Api Indonesia for organizing the infrastructure and facilities of Soekarno-Hatta Airport railways and the Jakarta-Bogor-Depok-Tangerang-Bekasi line, PT Kereta Api Indonesia is obliged to accept the assignment and eliminate the right to reject the assignment.

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²⁷ Untung Felix Soebagjo. 1993. Perkembangan asas-asas Hukum Kontrak dalam Praktek Bisnis selama 25 tahun terakhir. Pelatihan Hukum Perjanjian UGM Jogjakarta.

²⁸ Ikka Puspitasari & Budi Santoso, Op.cit, pp. 63

²⁹ Ery Agus Priyono, Aspek Keadilan Dalam Kontrak Bisnis di Indonesia (Kajian pada Perjanjian Waralaba), Op.cit, pp. 22

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