

PalArch's Journal of Archaeology  
of Egypt / Egyptology

The Legality of the Toll Road Concession Agreement which has Revenue Its  
Investment and has Obtained a Reasonable Profit

*Heru Sugiyono<sup>1</sup>, Abdul Rachmad Budiono<sup>2</sup>, Sihabudin<sup>3</sup>, and Satria Amiputra Amimakmur<sup>4</sup>*

**Heru Sugiyono<sup>5</sup>, Abdul Rachmad Budiono<sup>6</sup>, Sihabudin<sup>7</sup>, and Satria Amiputra Amimakmur<sup>8</sup>, The Legality of the Toll Road Concession Agreement which has Revenue Its Investment and has Obtained a Reasonable Profit- Palarch's Journal Of Archaeology Of Egypt/Egyptology 16(3). ISSN 1567-214x, Keyword: Legality, Toll Road Concession Agreement, Toll Road**

**Abstract -**

The toll road concession agreement (PPJT) for 13 toll roads between the government and Jasa Marga Company is a continuation of the Decree of the Minister of Public Works No. 242 / KPTS / M / 2006 concerning the Stipulation of Granting Concessions for Toll Roads that are operated by Jasa Marga Company. The contents of the PPJT include the government giving a concession for 40 years to Jasa Marga Company is starting from January 1<sup>st</sup>, 2005. Based on the report on the results of the BPK's investigation of the concession granting of 13 toll road sections for 40 years, it turns out that there are several toll roads that have revenue their investment and received reasonable profits before 40 years. In this study, the authors will analyze why the government provides concessions to private sector (Jasa Marga Company) for toll road management and how the legality of PPJT is related to the granting of toll road concessions that have paid off their investment returns and have obtained a reasonable profit. This study uses a normative juridical research method, namely research conducted by examining library materials which include primary legal materials sourced from various laws and regulations and secondary legal materials in the form of explanations used to analyze primary legal materials in the form of interviews, document searches, books and scientific papers. The results showed that the reason the government gave concessions to Jasa Marga Company for the management of toll road sections was because the government lacked funding sources and human resources in developing toll road infrastructure. PPJT between the Government and Private Sector related to the granting of concessions for toll road sections that have paid back their investment and have obtained a reasonable profit does not meet the objective legal requirements of the agreement so that it is

legally null and void as referred to in Article 1320 Number 4 of the Indonesian Civil Code. It is necessary to evaluate the government's decision to grant concessions to toll roads that have paid off their investment returns and have obtained a reasonable profit.

**Keyword:** Legality, Toll Road Concession Agreement, Toll Road

## 1. Introduction

Based on the Decree of the Minister of Public Works No. 242 / KPTS / M / 2006 concerning Stipulation of Granting of Concessions for Toll Roads that are operated by Jasa Marga Company, in this decree provides a grace period for the concession period for 13 toll roads which is set for 40 years, calculated from January 1<sup>st</sup>, 2005 and followed up with the making of a toll road concessions agreement. Referring to Article 50 Paragraph (6) of Law No.38 of 2004 concerning Roads (Road Law), the granting of concession periods to toll road sections is to meet the return-on-investment value and get a reasonable profit. Through the granting of this concession, it is hoped that returns on investment and profitability based on social welfare are expected, therefore the duration of this concession is a determining factor in the implementation of PPP which makes the people prosperous.<sup>9</sup> The granting of concessions is preceded by a concession agreement which regulates the assignment of private parties to manage, operate and maintain infrastructure that is the object of the agreement.<sup>10</sup> Depending on the type of PPP scheme to be used, there are other assignments besides those previously mentioned, such as design, construction, operation, maintenance and financing.<sup>11</sup>

It was found that out of the 13 toll roads that were granted concessions based on the Decree of the Minister of Public Works No. 242 / KPTS / M / 2006 concerning the Stipulation of Granting Concessions for Toll Roads that are operated by Jasa Marga Company, 3 of which are the Toll Roads Jakarta-Bogor-Ciawi, Jakarta-Tangerang, and Prof. Dr. Ir. Soedijatmo, according to the Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) in 2018, has obtained a return on investment and a reasonable profit, based on the calculation of each section of the toll road, not using the bundling method to the toll roads. BPK recommends that it should not be necessary to continue granting concessions for the 3 toll roads, because they have fulfilled the investment and reasonable profit calculations as referred to in Article 50 Paragraph (6) of the Road Law. With these conditions creates problems in the legality of the toll road concession agreement (PPJT) which was made because it did not follow the mandate of the Road Law.

Research on PPP agreements related to toll road concessions has been carried out, such as: Previous research conducted by (1) Yiwen Zhang, et.al. which discusses “when the toll price is determined by private companies, when the contract renegotiation will take place, and when the government will provide support policies?”.<sup>12</sup> (2) Debopam Roy, et.al. discusses risks, all of which reflect the belief of policy makers that risk mitigation is required as stated in the agreement document, because the risks of PPP projects are much more complex than other

forms of contracts.<sup>13</sup> (3) Laure Athias, et.al. discusses the draft toll road concession agreement which has provisions for the validity of the contract clause both rigidly and flexibly.<sup>14</sup>

From the research above, no one has discussed specific PPPs regarding the reasons for the government to provide concessions to business entities for the management of toll road sections that have return on their investment and have obtained a reasonable profit and the legality of the PPP agreement related to the determination of granting concessions for the operational management of toll road sections that have fulfilled investment returns and get a reasonable profit.

This paper is here to discuss unsolved matters, including by the three previous researchers, considering that this research focuses on the reasons for granting toll road concessions by the government to business private sector and the legality of Toll Road Concession Agreement (PPJT) between the Government and Private Sector regarding the determination of granting concessions on toll roads. those who have met the return on investment and reasonable profits, such as the Toll Road of Jakarta-Bogor-Ciawi, Jakarta-Tangerang, and Prof. Dr. Ir. Soedijatmo. The purpose of this research is in accordance with the statement previously stated, (1) to examine the reasons for the government to give concessions to private sector for management of toll roads (2) to analyze the legality of the Toll road concession agreement (PPJT) between the government and private sector related to the provision of toll road concessions that have paid off investment and get a reasonable profit.

## 2. Literature Review

### 2.1. Law and Welfare State

The notion of a Welfare State in Indonesia is formulated in a short and abstract phrase 'to improve welfare for the general public, to create a smart national life' at the opening of the 1945 Indonesian Constitution, the fourth paragraph concretized in the articles of the 1945 Constitution, particularly as regulated in Chapter XIII (Education and Culture). and Chapter IV (Economy and Social Welfare).<sup>15</sup>

For the sake of realizing welfare, it must be started from upholding the rule of law, namely putting the law in the highest degree in state administration.<sup>16</sup> The rule of law also means providing space to place the highest level on the constitution as the most basic law, which binds legislators in creating rules.<sup>17</sup> As Friedrich J. Stahl stated that *rechtstaat* (rule of law), there are basic elements that must be fulfilled, namely human rights;<sup>18</sup> separation or distribution of powers to guarantee human rights; governance based on regulations; and administrative justice in disputes.<sup>19</sup> The rule of law also has a close relationship, namely laws created based on democratic principles (so that democracy is not used as a tool to enforce its own laws).<sup>20</sup> The principles that are built and upheld from a rule of law must refer to the sovereignty of the people, because human rights, rule of law, and people's sovereignty are

---

interconnected.<sup>21</sup> The rule of law also has a concept that is closely related to the rule of law, because according to Albert Venn Dicey the rule of law is a legal order. Rule of law consists of the supremacy of legal rules, in the sense that there is no arbitrariness, everyone is equal before the law.<sup>22</sup> Someone can be punished, if they break the law; equal position before the law, humans have the same portion before the law; and guaranteed human rights through law and jurisprudence.<sup>23</sup>

In absolute terms the constitution must be obeyed as long as the constitutional processes provide good reasons for protecting the freedoms of people's rights without violating the rights of others.<sup>24</sup>

Rachmat Safa'at explained that one of the important elements of the rule of law is the enforcement of democratic principles which are compounded by the 1945 Constitution, particularly Article 1 Paragraph (2) " Sovereignty shall be vested in the hands of the people and be executed according to the Constitution".<sup>25</sup> With these discussions, there is a correlation that the creation of a welfare state for its people must lay a legal foundation and be combined with democratic values based on people's sovereignty and its application in accordance with constitutional regulations.

## 2.2. Contract

Contract theory is a theory that analyzes the legal relationship between people and people; people with legal entities; legal entities with legal entities that need each other which give birth to a right and obligation to be fulfilled by both parties.<sup>26</sup> The agreement is deemed to have been formed when there is a meeting of the will between the parties who enter into the contract. Contract law is a part that is still related to responsibilities in the civil sphere,<sup>27</sup> so that the contract is made as an effort to prove the existence of a legal relationship that exists by the parties.

A contract is understood as an agreement or a set of promises. Promise is conceptualized as a manifestation of the intention to do something or not do something in a way that is determined, so that the parties justify what has been done.<sup>28</sup>

In an agreement, the parties agree to carry out their respective obligations, and promise to provide compensation in the event of a violation of the contents of the contract. David J. Mack provides the following definition of a contract, "*A contract is an agreement between two or more parties that creates an obligation on all parties to perform (or not perform) a particular action or set of related actions*".<sup>29</sup>

---

<sup>26</sup> Salim HS., and Erlies Septiana Nurbani, Application of Legal Theory in Dissertation and Thesis Research, Third Book, Raja Grafindo Persada, Jakarta, 2014, p 3.

<sup>27</sup> Principles of law, Managing Legal and Ethical Principles Revised Edition, 2009, doi:10.1016/b978-0-08-055741-0.50005-1, url to share this paper: sci-hub.se/10.1016/b978-0-08-055741-0.50005-1, p 36.

<sup>28</sup> Article 2 Paragraph (1) *Restatement*, which reads: "*A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made*".

<sup>29</sup> David J. Mack, "*Basics of United State Contract Law*", 2011, <https://www.slideserve.com/jena/basics-of-u-s-contract-law-powerpoint-ppt-presentation>, p 4.

The agreement is one of the aspects other than the law that gives birth to an engagement based on Article 1233 of the Civil Code, so that the engagement comes from a law or agreement. The elements contained in the engagement law:<sup>30</sup>

2.2.1. Legal subjects, which are contained in the engagement law, consist of creditors and debtors. Creditors are the parties entitled to the achievements of the debtors. Meanwhile, the debtor is the party who is obliged to fulfill his performance to the creditor. Legal subjects are not limited to person, but also legal entities (such as Company, Foundations, and Cooperatives) also have the ability to become legal subjects. Legal subjects are parties with rights and obligations, capable of taking legal actions.

2.2.2. Legal relations, support the consequences of the contribution of two or more parties in the context of attaching rights and obligations between each party. A legal relationship is a relationship created by the parties, which gives rise to law. The relationship will bind the parties to carry out obligations or fulfill the rights of the other party, reciprocally, in order to prevent abuse of the relationship that has been made.

2.2.3. Wealth, is a criterion used for a legal relationship so that the legal relationship is called an engagement. Furthermore, the relationship between the two parties must be a legal relationship that is included in the assets. The legal relationship that arises from the engagement in the form of matters and obligations must be valued in money or at least can be described as an amount of money.<sup>31</sup> Even, Yahya Harahap defines an agreement as a legal relationship of wealth or property between two or more people, which gives one party the power to gain performance and at the same time obliges the other party to adjust performance.<sup>32</sup>

2.2.4. The object of the engagement contains the rights and obligations of the parties based on Article 1234 of the Civil Code referred to as Performance, which is divided into three forms, namely giving something, doing something, or not doing something. Everything can be called a Performance, with the limitation that it is not against the law, public order, and honor, besides that the performance must be clearly determined, then with common sense and the consideration that the action ordered in the engagement is possible or capable of being done by humans.<sup>33</sup> In addition, the achievement must have benefits for creditors and can consist of an act or a series of actions.<sup>34</sup>

The agreement generally explains that the contents of the contractual obligations consist of implied requirements, fairness, implied requirements that are reconsidered, and terms in the transactional and relational contract. An implied requirement is an implied desire of the parties to a contract that is not expressly regulated (the parties' expectations of the contract). The division regarding transactional and relational is a transactional contract that explains the

---

<sup>30</sup> Muhammad Teguh Pangestu, Abd. Kahar Muzakir (Ed.), Principles of Contract Law, CV. Social Politic Genius (SIGn), Makassar, 2019, p 7.

<sup>31</sup> Ridwan Khairandy, Indonesian Contract Law in a Comparative Perspective, UII Press, Yogyakarta, 2014, p 6.

<sup>32</sup> Yahya Harahap, Aspects of Agreement Law, Alumni, Bandung, 1986, p 4.

<sup>33</sup> Bambang D. Nugroho, Indonesian Civil Law: Integration of Continental European Law into Customary and National Law Systems, Refika Aditama, Bandung, 2017, p 108.

<sup>34</sup> Ridwan Khairandy, *Op.Cit.* p 8-9.

parties can realistically expect to deal with the possibility that there are, otherwise relational contracts.<sup>35</sup>

The contract or agreement that is said to be smart is a contract or agreement whose implementation is automatically effective when it has been signed by the parties, and its implementation does not depend on the country, but the parties must ensure the implementation of the contract.<sup>36</sup> In implementing a contract, the factor that must be taken into account in its making is the uncertainty of an event that will occur and may not occur. This uncertainty can occur because of one of the parties, a third party,<sup>37</sup> or other things that result in the need for an agreement to be continued or canceled.

The agreement must be carried out in good faith as Article 1338 Paragraph (3) of the Indonesian Civil Code. This good faith norm is one of the most important pillars of the Agreement Law.<sup>38</sup> The meaning of the agreement must be carried out according to propriety and justice.<sup>39</sup> This good faith is the main key to sticking to an agreement, so that an agreement will not be attached to the principle of *pacta sunt servanda* as long as the agreement is not attached by the principle of good faith.

The basic principle of Indonesian civil law explains that if an agreement is considered null and void, then the legal position of the parties must be returned to its original state, as if the agreement had never existed. The logical consequence is that no party may be harmed. "Returning to its original state" means that the legal act concerned by law is deemed never to have occurred, so it is logical that neither party may be harmed as a result of returning to its original state.<sup>40</sup> Therefore, an extension of a concession must be necessary for reasons that meet the standards of good faith and a Toll Road Concession Agreement is made.

### 2.3. Legality Term of Agreement

A contract can be said to be valid, if it fulfills Article 1320 of the Civil Code, as follows:

#### 2.3.1. Deal or Agree of the parties

Agree means that the legal subject implementing the agreement must agree, in this case what is meant by agreement is the parties agreeing on the main points of the agreement being executed. Willing by parties who agree, so the parties want something reciprocally. In short, an agreement is an equation or conformity with the wishes of the parties that occurs after going through the bidding and receiving process.<sup>41</sup> Therefore, according to the author, this event can be equated with the term transaction, which is an action that gives birth to an agreement.<sup>42</sup> In this case the transaction in question is reaching an agreement after going

---

<sup>35</sup> James Gordley, *Contract*, Oxford Handbooks Online, 2005, doi: 10.1093/oxfordhb/9780199248179.013.0001, url to share this paper: [sci-hub.se/10.1093/oxfordhb/9780199248179.013.0001](https://doi.org/10.1093/oxfordhb/9780199248179.013.0001), p 7-9.

<sup>36</sup> Max Raskin, *The Law of Smart Contracts*, SSRN Electronic Journal, 2016, doi:10.2139/ssrn.2842258, url to share this paper: [sci-hub.se/10.2139/ssrn.2842258](https://doi.org/10.2139/ssrn.2842258), p 310.

<sup>37</sup> Herlien Budiono, *Conditional Engagement and Some of Its Problems*, *Veritas et Justitia Journal*, Vol. 2, No. 1, 2016, doi: <https://doi.org/10.25123/vej.2067> <http://journal.unpar.ac.id/index.php/veritas/article/view/2067>, p 86.

<sup>38</sup> H. F. A. Vollmar, *Inleiding tot de Studie van het Nederlands Burgelijk Recht*, *Introduction to Civil Law Studies II*, Translation by I. S. Adi-wimarta, Rajawali, Jakarta, 1984, p. 164.

<sup>39</sup> R. Setiawan, *Principles of Engagement Law*, Binacipta, Bandung, 1979, p 64.

<sup>40</sup> Nindyo Pramono, *Problematic Decisions of Judges in Case of Agreement Cancellation*, *Journal of Mimbar Hukum*, University of Gadjah Mada, Vol. 22, No.2, 2010, doi: <https://doi.org/10.22146/jmh.16221>, <https://jurnal.ugm.ac.id/jmh/article/view/16221/10767>, p 232.

<sup>41</sup> Yasardin, *Sharia Contracting Freedom Principle*, Kencana Prenada Media Group, Jakarta, 2018, p 24.

<sup>42</sup> Budiono Kusumohamidjojo, *Guide to Designing Contracts*, Second Print, Grasindo, Jakarta, 2004, p 7.

through a series of offers and acceptance, until finally there is an appropriate middle value by the parties. The contract agreement can be canceled if there is a defect in the agreement, so that cancellation can be requested. Defect of will consists of mistake or error, coercion, deception, and abuse of circumstances.<sup>43</sup>

### 2.3.2. The ability of the parties to make an agreement

The skills or ability referred to are inseparable from the definition of the Civil Code, namely the ability of a legal subject to carry out legal actions. Adults according to the Civil Code are 21 years old or already married.<sup>44</sup> According to law, humans are the main legal subjects. Currently, legal subjects consist of: Human (*natuurlijke persoon*) and legal entity (*rechts persoon*).<sup>45</sup>

### 2.3.3. A Certain Thing or Object of The Agreement

Certain thing or object (*een bepaald onderwerp*), is a performance that is the principal in an agreement concerned. An agreement must clearly regulate the object of an agreement, namely determining the type or type of objects or goods in the agreement.<sup>46</sup> In this legal condition, this particular matter, is required to have reached an agreement regarding the specified action or thing.<sup>47</sup>

Certain things here are the objects of the contract, namely in the form of goods or services, or not doing something, depending on the things agreed upon.<sup>48</sup> The object stipulated in the contract or agreement must be clear, not obscure.<sup>49</sup> Apart from that, the object being promised must be certain.<sup>50</sup> Certainty can be in the form of tangible, intangible, movable, or immovable objects. Parts of the type of goods, quality, and quality of goods, factory made, from which country, quantity of goods, color of goods, and other specifications.<sup>51</sup>

A certain thing, if it is related to the object of the agreement, is sometimes interpreted as the subject of the engagement (*het voorwerp der verbintenis*), but sometimes it can be meant as the main performance (*het voorwerp der prestatie*). Then if it is linked to Article 1320 of the Civil Code, certain matters are the rights and obligations of both parties. Furthermore, in Article 1333 Paragraph (1) of the Civil Code in Dutch "*eene overeenkomst moet tot onderwerp hebben eene zaak welke ten minste ten aanzien hare sort bepaald is* (with translation: an agreement must have the principal of an object which can at least be determined of its type)." The term *Zaak* is narrowly defined as goods, whereas it is broadly called the subject matter. Then if the word "subject matter" is used in conjunction with the word "contract / agreement", it becomes the subject matter of the contract. The subject matter of the contract is a performance. Performance must be certain or at least it must be determined.<sup>52</sup>

<sup>43</sup> Ahmadi Miru, *Contract Law & Contract Design*, PT Rajagrafindo Persada, Jakarta, 2013, p 14-17.

<sup>44</sup> Yasardin, *Op.Cit.*, p 25.

<sup>45</sup> C.S.T. Kansil and Christine S.T. Kansil, *Principles of Legal Entity*, Pustaka Sinar Harapan, Jakarta, 2002, p 1.

<sup>46</sup> Yasardin, *Op.Cit.*, p 25.

<sup>47</sup> Louise E. Boone, and David L. Kurtz, 2006, *Contemporary Business, 11<sup>th</sup> Edition*, Introduction to Business: Contemporary, Translation by Ali Akbar Yulianto and Krista, Palupi Wuriarti (Ed.), Salemba Empat, Jakarta, 2007, p 208.

<sup>48</sup> C.S.T. Kansil and Christine S.T. Kansil, *Principles of Legal Entity*, *Loc. Cit.*

<sup>49</sup> Rina Antasari, Fauziah, and Muhammad Said Is (Ed.), *Business Law*, Setara Press, Malang, 2018, p 15.

<sup>50</sup> Yunirman Rijan, & Ira Koesumawati, NS. Budiana (Ed.), *Easy Ways to Make Letter of Agreement/Contract and Other Important Letters*, Zig Zag Media, Jakarta, 2009, p 10.

<sup>51</sup> Eka Astri Maerisa, *Making Business Letters and Agreements*, Visimedia, Jakarta, 2013, p 6.

<sup>52</sup> Salle, Nurul Qamar (Ed.), *Contract Law Theory and Practice*, CV. Social Politic Genius (SIGn), Makassar, 2019, p

If it is related to Legal Certainty, the existence of this certain element can give rise to a guarantee of legal certainty if an agreement has clear provisions or at least the object in the agreement can be determined, this only prevents a fictitious agreement.<sup>53</sup>

#### 2.3.4. A Permissible Causa (The Halal or Lawful Cause)

The mention of “causa” comes from the translation of the word *oorzaak* in Dutch or the word *causa* in Latin which means that the cause in the agreement does not mean the cause of the parties to enter into the agreement, but also refers to the content and purpose of the agreement itself.<sup>54</sup> An agreement is required in accordance with law, decency, and public order, as regulated in Article 1337 of the Civil Code.<sup>55</sup>

Based on the provisions of Article 1320 of the Civil Code, R. Setiawan and Subekti explained that the first and second terms concerned the subject of the agreement, while the third and fourth terms were regarding the object of the agreement. There is a defect of will (wrong, coercion, deception) or inability to make the engagement resulting in the annulment of the agreement. Meanwhile, if the object of the agreement is not certain or cannot be determined or the cause is not halal or lawful the agreement is null and void.<sup>56</sup>

The author will do this research test with a qualification that determines whether or not an agreement is legal through Article 1320 of the Indonesian Civil Code. With this limitation, it seems that every toll road segment that has met a reasonable profit value and return on investment value, is not legal to continue into the agreement related to the determination of the granting of concessions for toll road sections and the management of toll roads is better returned to the government so that the people not burdened with financing for prolonged use of tolls.

### 3. Methods

The research applied is normative legal research, which is research that examines legal problems from the point of view of the created legal science.<sup>57</sup> The normative legal research method is intended to examine the reasons for the government giving concessions to private sector for the concession of toll roads that have paid off their investment and obtaining a reasonable profit, as well as reviewing the validity of toll road concession agreements that pay off investment returns and obtain a reasonable profit. This study uses secondary data consisting of legal materials.

The legal material analysis technique used in this research is qualitative normative analysis or also known as qualitative juridical analysis, where legal materials obtained through research are reviewed first to be systematically compiled and presented in the form of descriptive sentences.

<sup>53</sup> Frans Satriyo Wicaksono, *Panduan Lengkap Membuat Surat-Surat Kontrak*, Visi Media, Jakarta, 2008, p 17.

<sup>54</sup> R.M. Panggabean In Tri Wahyu Surya Lestari and Lukman Santoso, Comparison of the Terms of Legality of "Halal or Lawful Cause" in Conventional Agreements and Sharia Agreements, *Yudisia, Journal Pemikiran Hukum and Hukum Islam*, Vol. 8, No. 2, 2017, doi: <http://dx.doi.org/10.21043/yudisia.v8i2.3240>, <https://journal.iainkudus.ac.id/index.php/Yudisia/article/view/3240/2359>, p 287.

<sup>55</sup> Yasardin, *Op.Cit.*, p 25.

<sup>56</sup> R. Setiawan, *Principles of Engagement Law*, Binacipta, Bandung, 1987, p 57. And Subekti, *Legal agreement*, Intermedia, Jakarta, 1963, p 17.

<sup>57</sup> Hadin Muhjadi and Nunuk Nuswardani, *Contemporary Indonesian Law Research*, Genta Publishing, Yogyakarta, 2012, p 9.



Furthermore, the collected legal data / materials are analyzed based on the applicable laws and regulations as well as the opinion of experts or legal principles, theories, doctrines. Then it can be described deductively, namely by starting from a study of general matters towards specific matters.

#### 4. Results

4.1. Government's reason for giving concessions to Private Sector is for the management of toll road sections

PPPs have usually been recognized as an important financing mechanism for the government, and they provide public infrastructure and public services at large. In particular, in several years, to mitigate the tightening of fiscal budget constraints. The government started to collaborate with private sector to provide public roads through PPP whose benefits include increased efficiency and improved service quality.<sup>58</sup> According to Vincent, PPP develops new ways of providing goods and services that will generate the smallest amount of government investment with the least government risk. In essence, the term “PPP” describes a contractual scenario in which the public and private sectors complete a project which later benefits the community.<sup>59</sup>

Toll roads that are built under the PPP scheme, make the government offer the private sector (it can also be state-owned enterprises) an ownership concession that gives the (private) operator the right to generate revenue from ownership. In return, the private sector designs, finances and operates road infrastructure assets, and also benefits from the available supply of roads (toll payments), and related services that result from assets.<sup>60</sup>

Governments that often lack financial and human resources have decided to cooperate with the private sector to help develop infrastructure, among other projects. PPP encourages the government and the private sector to work together, innovate, and collaborate with the ultimate goal of working as a reciprocal result of a project's success.<sup>61</sup> The PPP context is not only seen from the existence of tariffs or returns on investment to the private sector, but focuses on public-private cooperation which is bound in a cooperation contract agreement.<sup>62</sup>

---

<sup>58</sup> Jinbo Song, Yunpeng Zhao, Lulu Jin, Yan Sun, *Pareto Optimization of Public-Private Partnership Toll Road Contracts with Government Guarantess*, Elsevier, *Transportation Research Part A: Policy and Practice*, 117, 158-175, 2018, doi:10.1016/j.tra.2018.08.019, url to share this paper: sci-hub.se/10.1016/j.tra.2018.08.019, p 158.

<sup>59</sup> Vincent J. Napoleon, Diana V. Vilmenay, Nia Newton, *The Use Of Public-Private Partnerships As A Model For The Delivery Of Goods And Services To The Government-Is This A New Concept In Government Contracting?*, *Journal of Law & Commerce*, Heinonline, Vol. 35:119, No.2, 2017, doi: <https://doi.org/10.5195/jlc.2017.122>, <http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/122>, p 121.

<sup>60</sup> Demi Chung and Daviv A. Heinsher, *Modelling Risk Perceptions of Stakeholders in Public-Private Partnership Toll Road Contracts*, *ABACUS*, Vol 51, No 3, 437-483, 2015, doi: 10.1111/abac.12052, url to share this paper: sci-hub.se/10.1111/abac.12052, p 440.

<sup>61</sup> John Forrer, James Edwin Kee, Kathryn E. Newcomer, Eric Boyer, *Public-Private Partnerships and the Public Accountability Question*, *Public Administration Review*, 70(3), 475-484, 2010, doi:10.1111/j.1540-6210.2010.02161.x, url to share this paper: sci-hub.se/10.1111/j.1540-6210.2010.02161.x, p 477. Dalam Vincent J. Napoleon, Diana V. Vilmenay, Nia Newton, *Op.Cit.*, p 122.

<sup>62</sup> Yusid Toyib, Riant Nugroho, and Yolanda Indah Permatasari (Ed.), *Transformation of Indonesia's Public Private Partnership*, Elex Media Komputindo Copmany, Jakarta, 2018, p 33.

The construction of toll roads carried out under the PPP scheme can provide benefits for both parties,<sup>63</sup> in accordance with the principle that provides reasons for division of labor, differences in interests and benefits obtained by both parties through an agreement or agreement to sacrifice something to get something valuable, which comes from the genius of both parties in fulfilling needs. Adam Smith in measuring the level of luxury or wealth or welfare of a country through the mobilization of capital, so that in this case the author views the cooperation with the private sector in the construction of toll roads greatly helps improve the welfare of a country.<sup>64</sup> The road, which is equipped with toll road access, is one form of public works that must be established and maintained. The presence of the private sector in toll road infrastructure development is very good and helps the government in facilitating the realization of efficient and innovative state management.<sup>65</sup>

Provision of infrastructure through development is needed in order to accelerate economic growth, improve a prosperous society, and realize better public services. In addition, the involvement of the private sector is a new step (innovation) in carrying out infrastructure development which will create even better public services.<sup>66</sup>

Another reason the government gives toll road concessions to private sector is expected to have a very positive impact because it contains three aspects, namely efficiency; technology, innovation, know-how; and financial benefits. This aspect of efficiency is created due to several factors:

- 4.1.1. Increase in financial engineering by reducing the Weighted Average Cost of Capital (WACC) or Weighted Average Cost of Capital.<sup>67</sup>
- 4.1.2. Focus on the level of cost effectiveness, especially costs related to labor and materials.
- 4.1.3. Commercial approach to problem solving.
- 4.1.4. Intensive to increase efficiency, performance, and stimulate innovation.
- 4.1.5. The creation of distance between the Government and service providers which causes infrastructure provision to be not politically oriented.
- 4.1.6. Better governance in increasing transparency, competition, accountability, and increasing value for money (*VfM*).

<sup>63</sup> Sapri M., Hariati A.H., Sheau Ting L., and Sipan I., Public Private Partnership Benefits in Delivering Public Facilities in Malaysia, MATEC Web of Conferences, 66, 00014, 2016, doi:10.1051/matecconf/20166600014, url to share this paper: sci-hub.se/10.1051/matecconf/20166600014, p 1-3.

<sup>64</sup> Smith, Adam., 2009, *An Inquiry into the Nature and Causes of the Wealth of Nations, The Wealth of Nations* sebuah penyelidikan tentang sifat dan sebab kekayaan bangsa-bangsa, Translention by Haz Algebra, Manado, CV. Global Indo Kreatif, 2019, p 10-11, 18, 19, 21, 345, 678-679.

<sup>65</sup> Bon-Gang Hwang, Xianbo Zhao, Mindy Jiang Shu Gay, Public private partnership projects in Singapore: Factors, critical risks and preferred risk allocation from the perspective of contractors, International Journal of Project Management, 31(3), 424-433, 2013. doi: 10.1016/j.ijproman.2012.08.003, url to share this paper: sci-hub.se/10.1016/j.ijproman.2012.08.003, p 424.

<sup>66</sup> Housing Fund Management Center, Ministry of Public Work (PUPR) Launches Infrastructure Investment Consulting Service Site, Yusid Toyib, *et.al., Op.Cit.*

<sup>67</sup> WACC is a method of measuring the expected rate of return for equity owners and creditors, by multiplying the debt ratio by the rate of return on debt plus the equity ratio times the rate of return on the cost of equity. Vide Yusid Toyib and Riant Nugroho, *Op.Cit.*, p 220. Then, WACC is determined according to the ratio of equity and loans to be used, the loan interest rate, besides that in carrying out WACC considerations, it includes indicators of Internal Rate of Return (IRR), Net Present Value (NPV), and Debt Service Coverage. Ratio (DSCR), *Vide* State Minister for Chairperson of the National Development Planning Agency, Preparation of the Baubau Port PPP Project Transaction Documents, Sulawesi Tenggara, Report of OBC, [https://www.bappenas.go.id/files/pkps/pelabuhan\\_baubau/Reviu%20kajian%20Awal%20Prastudi%20Kelayakan%20\(Ouline%20Business%20Case\).pdf](https://www.bappenas.go.id/files/pkps/pelabuhan_baubau/Reviu%20kajian%20Awal%20Prastudi%20Kelayakan%20(Ouline%20Business%20Case).pdf), Sulawesi, Diakses pada August 31<sup>st</sup>, 2020, Presiden Republik Indonesia, p 16 and 63.

#### 4.1.7. Uncover hidden costs.<sup>68</sup>

One significant advantage of engaging a business entity is its flexibility. Collaboration can offer public sector regulators the opportunity to improve service delivery and facility management. In addition, involving business entities can help mobilize private capital, facilitate development and accelerate the implementation of infrastructure projects as well as filter out less productive projects.

Like the interviews that the author conducted, usually the cause of the effect of the concession period or the initial toll tariffs is because the government makes a unilateral decision to expand the scope of the agreement, add objects to be made, create interchanges, or other things which of course require additional costs on investment, consequently can even extend the concession period.<sup>69</sup> This reason can be considered as a coercive condition in an agreement

This coercive situation results from unexpected, unregulated, or prevented work,<sup>70</sup> and is not a direct result of a breach of obligations by one party<sup>71</sup> (government or private), and without the will or interference of the party in power (government).<sup>72</sup> In a contract that contains a force majeure clause, one party frees the other party from obligations. In smart contract, since the clause is compiled, when a force majeure occurs, the parties allocate to find solutions to minimize risk.<sup>73</sup> The presence of this force majeure is in anticipation of uncertainty and disputes that occur in contract execution.<sup>74</sup> The clause in the agreement regarding force majeure usually allows an extension of the time or duration to carry out the obligations in the contract or even the suspension of the performance of the contract during the force majeure period.<sup>75</sup>

In Government Regulation Number 15 of 2005 concerning Toll Roads (PP Tol Road), namely in Article 51, for toll roads whose concession period has expired based on careful considerations, the Minister can re-assign these roads to toll roads, with the consideration that state financial savings for operation and maintenance; and / or to increase the capacity and development of the toll road concerned.

#### 4.2. The Legality of the PPP agreement related to the granting of toll road concessions that have paid off investment returns and obtained a reasonable profit

<sup>68</sup> Yusid Toyib and Riant Nugroho, *Op.Cit.*, p 13.

<sup>69</sup> Interview with Agung Laksana Pranata, Legal and Compliance Group Head, Jakarta, October 20<sup>th</sup>, 2019.

<sup>70</sup> Carter B. Casady & David Baxter, Pandemics, public-private partnerships (PPPs), and force majeure | COVID-19 expectations and implications, *Construction Management and Economics*, 1–9, 2020, doi: 10.1080/01446193.2020.1817516, url to share this paper: [sci-hub.se/10.1080/01446193.2020.1817516](https://doi.org/10.1080/01446193.2020.1817516), p 2.

<sup>71</sup> Marel Katsivela, Contracts: Force Majeure Concept or Force Majeure Clauses? *Uniform Law Review - Revue de Droit Uniforme*, 12(1), 101–119, 2007, doi:10.1093/ulr/12.1.101, url to share this paper: [sci-hub.se/10.1093/ulr/12.1.101](https://doi.org/10.1093/ulr/12.1.101), p 102.

<sup>72</sup> Federica I Paddeu, A Genealogy Of Force Majeure In International Law, *British Yearbook of International Law*, 82(1), 381–494, 2012, doi: 10.1093/bybil/brs005, url to share this paper: [sci-hub.se/10.1093/bybil/brs005](https://doi.org/10.1093/bybil/brs005), p 394.

<sup>73</sup> Eric Tjong Tjin Tai, Force Majeure and Excuses in Smart Contracts, *SSRN Electronic Journal*, 2018, doi: 10.2139/ssrn.3183637, url to share this paper: [sci-hub.se/10.2139/ssrn.3183637](https://doi.org/10.2139/ssrn.3183637), p 10.

<sup>74</sup> A. Samer Ezeldin, and Amr Abu Helw, Proposed Force Majeure Clause for Construction Contracts under Civil and Common Laws, *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 10(3), 04518005, 2018, doi:10.1061/(asce)la.1943-4170.0000255, url to share this paper: [sci-hub.se/10.1061/\(ASCE\)LA.1943-4170.0000255](https://doi.org/10.1061/(asce)la.1943-4170.0000255), p 1.

<sup>75</sup> John R. Clark, Can I Get Force Majeure from a Novel Coronavirus? *Air Medical Journal*, 2020, doi:10.1016/j.amj.2020.04.019, url to share this paper: [sci-hub.se/10.1016/j.amj.2020.04.019](https://doi.org/10.1016/j.amj.2020.04.019), p 235.

The legality of the agreement in general as regulated in the Civil Code in Article 1320 Number 4 regulates the existence of a halal or lawful cause as a condition for the legality of the agreement. Article 1320 Number 4 of the Civil Code has a fairly broad limitation aspect; therefore, the author will specify it only against the limits determined by written rules (written law) to determine whether or not the Halal or Lawful cause of an agreement is fulfilled. Toll Road Concession Agreement which is the object of the author's research is related to toll roads that have paid off their investment returns and obtained a reasonable profit. Referring to Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) Number 01/LHP/XVII/01/2018 dated January 10<sup>th</sup>, 2018, there is 1 toll road section that has paid off its investment return and obtained a reasonable profit in 1997, namely the Prof. Dr. Ir. Sedijatmo. In addition, based on the Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) in 2018, there are 2 toll roads that have paid off their investment and received a reasonable profit before 2020, namely the Jagorawi toll road segment completed its concession in 2018 and the Tangerang toll road section completed its concession in 2013. In addition, there are 3 sections. Toll roads that have paid off their investment and get a reasonable profit before 2040, namely the Jakarta Cikampek toll road concession completed in 2021, the JORR toll road concession completed in 2028 and the Cikampek-Padalarang toll road concession completed in 2035.

The halal or lawful cause as a condition for the legality of the agreement in the Toll Road Concession Agreement (PPJT) will be correlated with the formulation of Article 33 of the 1945 Constitution. Article 33 of the 1945 Constitution is a guideline that guides the formulation of economic policies that must be followed by the government,<sup>76</sup> in terms of guiding the direction of the Indonesian economy, which includes infrastructure development, also must comply with Article 33 of the 1945 Constitution

Regarding the 4 conditions mentioned in article 1320 of the Civil Code, two conditions are subjective conditions and the two following conditions are objective requirements.<sup>77</sup> If the objective conditions in the agreement are not fulfilled, then the Agreement is null and void or the agreement has been canceled since the beginning, the law considers the agreement never existed. If the subjective conditions are not fulfilled, the agreement can be canceled or as long as the agreement has not been annulled or has not been canceled by the court, the agreement concerned will still be valid.<sup>78</sup>

Referring to the aspect of general welfare in PPP implementation<sup>79</sup> and related to the burden borne by the community because it is required to continue paying toll rates, even though it should have been when the return on investment and obtaining a reasonable profit has been met, the toll rates charged to toll road users must be lower or even free. By continuing to implement road concessions that have met the aspects of return on investment and fair profits,

---

<sup>76</sup> Fadli Zon, M. Iskandar, and Susanto Zuhdi, Review of Legal History Article 33 of the 1945 Constitution as an Economic Ideology, *Jurnal of Negara Hukum*, Vol. 7, No. 1, 2016, doi: 10.22212/jnh.v7i1.925, <https://jurnal.dpr.go.id/index.php/hukum/article/view/925>, p 124.

<sup>77</sup> Subekti, *Op.Cit.*, p 17.

<sup>78</sup> Retna Gumanti, Legality of the Agreement (Judging from the Civil Code), *Journal of Pelangi Ilmu*, Vol. 5, No. 1, 2012, <http://ejournal.ung.ac.id/index.php/JPI/article/view/900>, p 4.

<sup>79</sup> Mark A. Moore, Anthony E. Boardman, Aidan R. Vining, Analyzing risk in PPP provision of utility services: A social welfare perspective, *Utilities Policy*, 48, 210–218, 2017, doi: 10.1016/j.jup.2017.08.008, url to share this paper: [sci-hub.se/10.1016/j.jup.2017.08.008](https://sci-hub.se/10.1016/j.jup.2017.08.008), P 8.

it will burden the people. Of course, this is inconsistent with the implementation of the law as regulated in Article 33 of the 1945 Constitution.

The preamble of the 1945 Constitution paragraph IV reads, namely "*Subsequent thereto, to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, therefore the National Independence of Indonesia shall be composed in a Constitution of the State of Indonesia, which is structured in a form of the State of the Republic of Indonesia, with people's sovereignty based on the belief in One and Only God, just and civilized Humanity, the Unity of Indonesia and a Democratic Life guided by wisdom in Deliberation/Representation, and by realizing social Justice for all the people of Indonesia*"

Article 33 of the 1945 Constitution is a guideline for the government in realizing a populist economy. The sector must fulfill the elements, namely that the economy is structured as a joint effort based on the principle of kinship, the production sectors which are important to the state and control the livelihood of the people in general controlled by the state, and the earth, water and all the wealth contained therein shall be controlled by the state and used for the greatest prosperity of the people.<sup>80</sup> Then it is completed with Article 27 Paragraph (2) Jo. Article 34 of the 1945 Constitution, namely the state in carrying out the mandate of Article 33 of the 1945 Constitution must develop a cooperative spirit; develop BUMN; ensure the use of the earth, water and all the wealth contained therein for the greatest prosperity of the people; fulfill the right of every citizen to get a decent job and livelihood; and caring for the poor and neglected children.<sup>81</sup>

Welfare is one of the important aspects contained in the 1945 Constitution. As a *groundnorm*, every law enforcement should obey and obey and refer to the 1945 Constitution, including Article 1320 of the Civil Code, especially on "Halal or lawful Causes". The toll road concession agreement (PPJT) between the government and business entities that do not refer to Articles 33 and 34 of the 1945 Constitution can certainly not fulfill the welfare values as stated in the Indonesian Constitution.

Black Law also has a definition of welfare, "welfare conditions in any case; prosperity ", welfare is then general welfare (public welfare)," public health, peace, morals, security ", while Public Welfare (public / community welfare)," the overall condition of welfare in matters of health, security, order, morality, economy, and politics. " It even added "a social security system that provides assistance to those in need financially such as meal vouchers and family allowances".<sup>82</sup>

---

<sup>80</sup> Article 33 of the 1945 Constitution, provides assistance that: 1. The economy shall be structured as a joint enterprise by virtue of the principles of kinship (asas kekeluargaan). 2. Production sectors important for the state and vital for the livelihood of the people at large shall be controlled by the state. 3. The land and waters and the natural wealth contained in it shall be controlled by the state and utilized for the optimal welfare of the people. 4. The national economy shall be conducted by virtue of economic democracy under the principles of togetherness, efficiency with justice, sustainability, environment insight, autonomy, as well as by safeguarding the balance of progress and national economic unity.

<sup>81</sup> Revisond Baswir, People's Economy vs. Neoliberalism, Journal of Gema Keadilan, Vol. 2, No. 1, 2015, doi:<https://doi.org/10.3592/2>, <https://ejournal2.undip.ac.id/index.php/gk/article/view/3713/2082>, p 1.

<sup>82</sup> Bryan A. Garner (Eds.), *Black Law's Dictionary, 8<sup>th</sup> Edition*, West Group, Saint Paul, Minnesota, 1999, p 4924.

Based on the Social Welfare Law "Social Welfare is a condition for the fulfillment of the material, spiritual and social needs of citizens in order to live properly and be able to develop themselves, so that they can carry out their social functions".<sup>83</sup>

Referring to Articles 33 and 34 of the 1945 Constitution and the Fourth Paragraph of the Preamble of the 1945 Constitution, the aim of managing toll road infrastructure must be solely for the welfare of all Indonesian people, because basically PPP is part of government projects as well,<sup>84</sup> including by lowering toll rates or even changing become a public road without tolls on the Jakarta-Bogor-Ciawi Toll Road, Jakarta-Tangerang Toll Road, and Prof. Dr. Ir. Soedijatmo Toll Road, and in 2021 the Jakarta-Cikampek Toll Road Section should also have completed its concession period.

PPP is basically a government project as well, so the government must strictly limit the total profit that will be obtained by the private sector in undertaking exploitation of infrastructure (PPP agreement).

Marilang said that "The right to control the state towards mining, both in the form of policy making, regulating, managing, and managing and supervising mining goods is solely oriented towards efforts to realize the welfare of all Indonesian people."<sup>85</sup> The logical construction is an analogy writer in toll road concessions, that since the planning of toll road construction, design, construction, operation, maintenance and supervision of toll road concessions are carried out solely for the welfare of all Indonesian people, so that the calculation of concession period, investment calculation, and fair profit should be determined as best as possible. Toll road concession agreements must also refer to people's welfare.

In the toll road concession agreement (PPJT), Toll Road Section in the table the government provides a concession period of 40 years (starting January 1<sup>st</sup>, 2005), if calculated based on the Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) in 2018, it means that the toll road concession period has expired and remains active in collecting tariffs for toll road users for 2 years ago for the Jakarta-Bogor-Ciawi Toll Road, 7 years ago for the Jakarta-Tangerang Toll Road, 23 years ago for Prof.Dr.Ir.Soedijatmo Toll Road, even though if the three agreements have been reviewed, they should have been completed without excessive overhead to the head office of Jasa Marga Company (as The Private Sector in PPP) and the Jakarta-Cikampek Toll Road Section will be completed in 2021, with the table provided by Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) in 2018, as following:<sup>86</sup>

---

<sup>83</sup> Article 1 Number 1, Law of the Republic of Indonesia Number 11 of 2009 concerning Social Welfare, State Gazette of the Republic of Indonesia of 2009 Number 12, Supplement to the State Gazette of the Republic of Indonesia Number 4967.

<sup>84</sup> Anthony E. Boardman, and Aidan R. Vining, *The Political Economy Of Public-Private Partnerships And Analysis Of Their Social Value*, *Annals of Public and Cooperative Economics*, 83(2), 117–141, 2012, doi: 10.1111/j.1467-8292.2012.00457.x, url to share this paper: [sci-hub.se/10.1111/j.1467-8292.2012.00457.x](http://sci-hub.se/10.1111/j.1467-8292.2012.00457.x), p 135.

<sup>85</sup> Marilang, *The ideology of the Welfare State Constitution: The State's Right to Control over Mining Goods*, *Journal of Konstitusi*, Vol. 9, No. 2, 2012, doi: <https://doi.org/10.31078/jk%25x>, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/131/130>, p 271.

<sup>86</sup> Audit Board of the Republic of Indonesia (BPK), *Report on the Results of Examination of Toll Road Operational Management Performance on Traffic Smoothness and Tariff Policy at the Ministry of Public Works and Public Housing, Toll Road Regulatory Bodies, and Toll Road Business Entities in DKI Jakarta, West Java, Central Java, and Banten Year 2014-2016 Budget*, Number 01/LHP/XVII/01/2018, p 73.

No.	Name	Year of Completion of Concession (Net Present Value >0)
1.	Jakarta-Bogor-Ciawi	2018
2.	Jakarta-Tangerang	2013
3.	Jakarta-Cikampek	2021
4.	Prof. Dr. Ir. Soedijatmo	1997

Table Expired Toll Road Concession Period Based on BPK calculations (Table 3.22 in Audit Board of the Republic of Indonesia (BPK) Toll Road Operational Management Performance Audit Report (LHPOJT BPK) in 2018)

The linkage of Article 33 of the 1945 Constitution is very strong with the fifth principle of Pancasila (Indonesian Basic Principle) "Social Justice for All Indonesian People".<sup>87</sup> Social justice is a characteristic of a just and prosperous society. Happiness for everyone, no exploitation, no oppression and humiliation, everyone is happy, enough clothing and food. Justice has to do with the welfare that can be created through people's representation (The Government). However, the government must have a democratic understanding that is able to bring about social welfare. Therefore, all are connected in implementing the best common welfare.<sup>88</sup> It is necessary to renegotiate between the government and concession rights holders so that toll road concessions lead to prosperity.<sup>89</sup>

## 5. Discussion

Some of the problems of the shortcomings of the scheme found in PPP implementation, are inadequate feasibility studies or unrealistic revenue estimates and bad legal frameworks. Feasibility studies are very important because they provide a list of things to do to get the business going. Also, they identify logistical and other related business issues, develop marketing strategies to convince investors to invest in the project, and serve as a solid basis for developing a business plan. As part of the feasibility study, strong emphasis should be placed on estimating revenue and costs.<sup>90</sup> It is also necessary to carry out an adequate feasibility study, a realistic determination of income, and a good legal framework as an effort to grant an appropriate concession period.

Often the government in carrying out a policy is not right on target and does not even learn from the problem, when they realize that there has been a delay in harmonizing the programs that have been implemented. Evaluation is needed from the community regarding all input from the community for government consideration through feedback on the implementation, results and impact of government programs.<sup>91</sup>

<sup>87</sup> C.S.T. Kansil, *Pancasila and the UUD 1945 Pancasila Moral Education*, Pradnya Paramita, Jakarta, 1985, p 30.

<sup>88</sup> *Ibid.*, p 76-77.

<sup>89</sup> Carlos Oliveira Cruz, and Rui Cunha Marques, *Infrastructure Public-Private Partnerships Decision, Management and Development*, 2013, doi:10.1007/978-3-642-36910-0, url to share this paper: sci-hub.se/10.1007/978-3-642-36910-0, p 156.

<sup>90</sup> Mahran Zatar, *Pitfalls Of Public Private Partnership*, Unpublished dissertation, UMI *Dissertation Publishing*, Arlington, Faculty of Civil Engineering, Texas University, 2014, p 21.

<sup>91</sup> Marco, Antonio Albornoz, Michel Becker, Ade Cahyat, Peter Cronkleton, Wil de Jong, Kristen Evans, Dante Fuentes, Christian Gonner, Rolando Haches, Michaela Haug, Ramses Iwan, Godwin Limberg, Moira Moeliono, and Eva Wollenberg, Tiene Gunawan (Ed.), 2007, *Towards Wellbeing in Forest Communities: A Handbook for Local Governments*, Translation by Sugeng Hariyanto, Center for International Forestry Research (CIFOR), Bogor, p 71.

One of the government programs is in infrastructure projects, namely the granting of a concession period from the PPP which is clearly stated by the Audit Board of the Republic of Indonesia (BPK) as having fulfilled the concession period using the calculation method individually for each of toll road. Therefore, community aspirations are needed in order to provide better consideration for the Government. In connection with what was previously said, the concept of a welfare state inherent in Indonesia has a responsibility to the state through the government to develop policies in the welfare fields and improve the quality of good public services through the provision of various facilities needed by the community.<sup>92</sup>

The author views toll road concession agreement (PPJT) with the aim of providing a concession period without considering investment and profit calculations which have an impact on increasing the duration of payment of toll road rates as a violation of the provisions of Article 33 of the 1945 Constitution, so that the legality of the agreement as stipulated in Article 1320 of the Civil Code, especially regarding Halal or Lawful causes, are not fulfilled.

The granting of too long concession terms for toll roads that have met investment returns and obtaining reasonable profits has harmed the interests of the people and does not pay attention to people's welfare, and seems to prioritize private interests.

If it is related to the halal or lawful causal violation, then the agreement does not fulfill an objective requirement in the legality terms of the agreement as referred to in Article 1320 of the Civil Code, then the toll road concession agreement (PPJT) is null and void by law.

## 6. Conclusion

The reason the government has granted toll road concessions to business entities is because the government lacks funding sources and human resources in managing toll road operations. The government hopes to save state finances for operation and maintenance as well as to increase the capacity and development of the toll roads concerned for the realization of welfare for the community.

The toll road concession agreement (PPJT) is related to the provision of toll roads that have paid off their investment and have met reasonable profits, such as the Jakarta-Bogor-Ciawi toll road, Jakarta-Tangerang toll road and Prof. Dr. Ir. Soedijatmo toll road, did not meet the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code regarding halal or lawful causes. This policy is not in line with the mandate of Article 33 of the 1945 Constitution regarding the prosperity of the people. If halal or lawful causal requirements are not fulfilled, The toll road concession agreement (PPJT) related to toll roads that have paid off their investment returns and have met reasonable profits will be null and void. For the sake of creating people's prosperity as mandated by the 1945 Constitution, 3 toll roads that have paid off their investment returns and have met reasonable profits, such as the Jakarta-Bogor-Ciawi toll road, the Jakarta-Tangerang toll road and Prof. Dr. Ir. Soedijatmo was handed over and re-managed by the government by imposing cheap toll road rates or being diverted into public roads.

## REFERENCES

### Laws and Regulations

---

<sup>92</sup> A. M. Fatwa, Portrait of the Constitution Post Amendment to the 1945 Constitution, Kompas Media Nusantara Company, Jakarta, 2009, p 177.



1945 Constitution.

Law of the Republic of Indonesia Number 11 of 2009 concerning Social Welfare, State Gazette of the Republic of Indonesia of 2009 Number 12, Supplement to the State Gazette of the Republic of Indonesia Number 4967.

Law of the Republic of Indonesia Number 38 of 2004 concerning Roads, State Gazette of the Republic of Indonesia of 2004 Number 132, Supplement to the State Gazette of the Republic of Indonesia Number 4444.

Civil Code (Burgerlijk Wetboek).

Government Regulation of the Republic of Indonesia Number 15 of 2005 concerning Toll Roads, State Gazette of the Republic of Indonesia of 2005 Number 32, Supplement to State Gazette of the Republic of Indonesia Number 4489.

Presidential Regulation of the Republic of Indonesia Number 38 of 2015 concerning Government Cooperation with Business Entities in Provision of Infrastructure.

Minister of Public Works Decree No. 242/KPTS/M/2006 concerning the Stipulation of Granting of Concessions for Toll Roads that are operated by Jasa Marga Company.

### **Books**

A. M. Fatwa, Portrait of the Post-Amendment of the 1945 Constitution, Kompas Media Nusantara Company, Jakarta, 2009.

Adi, Rianto., Social and legal Research Methods, Granit, Jakarta, 2004.

Antasari, Rina. Fauziah., and Said Is, Muhammad (Ed.), Business Law, Setara Press, Malang, 2018.

Boone, Louise E., and Kurtz, David L., 2006, *Contemporary Business, 11<sup>th</sup> Edition*, Pengantar Bisnis: Kontemporer, Translation by Yulianto, Ali Akbar., Krista., Wuriarti, Palupi (Ed.), Salemba Empat, Jakarta, 2007.

C.S.T. Kansil and S.T. Kansil, Christine., Principles of Legal Entity, Pustaka Sinar Harapan, Jakarta, 2002.

C.S.T. Kansil, Pancasila and the 1945 Constitution of Pancasila Moral Education, Pradnya Paramita, Jakarta, 1985.

Garner, Bryan A. (Eds.), *Black Law's Dictionary*, 8<sup>th</sup> Edition, West Group, Saint Paul, Minnesota, 1999.

Gordley, James., Contract, Oxford Handbooks Online, doi:10.1093/oxfordhb/9780199248179.013.0001, url to share this paper: sci-hub.se/10.1093/oxfordhb/9780199248179.01, 2005.

H. F. A. Vollmar, Inleiding tot de Studie van het Nederlands Burgelijk Recht, Introduction to Civil Law Studies II, Translation by I. S. Adi-wimarta, Rajawali, Jakarta, 1984.

Harahap, M. Yahya., Aspects of Agreement Law, Alumni, Bandung, 1986.

Khairandy, Ridwan., Indonesian Contract Law in a Comparative Perspective, UII Press, Yogyakarta, 2014.

Kusumohamidjojo, Budiono., Guide to Designing Contracts, Second printing, Grasindo, Jakarta, 2004.

Maerisa, Eka Astri., Making Business Letters and Agreements, Visimedia, Jakarta, 2013.

Marco; Albornoz, Antonio; Becker, Michel; Cahyat, Ade; Cronkleton, Peter; Jong, Wil de; Evans, Kristen; Fuentes, Dante; Gonner, Christian; Haches, Rolando; Haug, Michaela; Iwan, Ramses; Limberg, Godwin; Moeliono, Moira; Wollenberg, Eva; and Gunawan, Tiene. (Ed.), Towards

- Welfare in Forest Communities: A Handbook for Local Government, Translated by Hariyanto, Sugeng., Center for International Forestry Research (CIFOR), Bogor, 2007.
- Marzuki, Peter Mahmud., Legal Research, Predana Media, Jakarta, 2005.
- Miru, Ahmadi., Contract Law & Contract Design, Rajagrafindo Persada Company, Jakarta, 2013.
- Muhjadi, Hadin. and Nuswardani, Nunuk. Contemporary Indonesian Law Research, Genta Publishing, Yogyakarta, 2012.
- Nugroho, Bambang Daru., Indonesian Civil Law: Integration of Continental European Law into Customary and National Legal Systems, Refika Aditama, Bandung, 2017.
- Pangestu, Muhammad Teguh., Muzakkir, Abd. Kahar (Ed.), Principles of Contract Law, CV. Social Politic Genius (SIGn), Makassar, 2019.
- R. Setiawan, Principles of Engagement Law, Binacipta, Bandung, 1987.
- Rijan, Yunirman; Koesoemawati, Ira; and NS. Budiana. (Ed.), asy Ways to Make Letter of Agreement / Contract and Other Important Letters, Zig Zag Media, Jakarta, 2009.
- Salim H.S., and Nurbani, Erlies Septian., Application of Legal Theory in Dissertation and Thesis Research, Second Book, Raja Grafindo Persada, Jakarta, 2014.
- Safaát, Rachmat., Reconstruction of Food Law Politics from Food Security to Food Sovereignty, UB Press, Malang, 2013.
- Salle and Qamar, Nurul. (Ed.), Contract Law Theory and Practice, CV. Social Politic Genius (SIGn), Makassar, 2019.
- Subekti, Agreement Law, Intermedia, Jakarta, 1963.
- Toyib, Yusid; Nugroho, Riant; and Permatasari, Yolanda Indah. (Ed.), *Transformation of Indonesia's Public Private Partnership*, Elex Media Komputindo Company, Jakarta, 2018.
- Wicaksono, Frans Satriyo., Complete Guide to Making Contract Letters, Visi Media, Jakarta, 2008.
- Yasardin, Freedom of Sharia Contracting Principle, Kencana Prenada Media Group, Jakarta, 2018.

### Journal

- A. Samer Ezeldin, and Amr Abu Helw, Proposed Force Majeure Clause for Construction Contracts under Civil and Common Laws, *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 10(3), 04518005, 2018, doi:10.1061/(asce)la.1943-4170.0000255, url to share this paper: [sci-hub.se/10.1061/\(ASCE\)LA.1943-4170.0000255](https://doi.org/10.1061/(ASCE)LA.1943-4170.0000255).
- Andy Wallace, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Jürgen Habermas, *Ethics*, 108(3), 622–625, 1998, doi:10.1086/233838, url to share this paper: [sci-hub.se/10.1086/233838](https://doi.org/10.1086/233838).
- Anthony E. Boardman, and Aidan R. Vining, The Political Economy Of Public-Private Partnerships And Analysis Of Their Social Value, *Annals of Public and Cooperative Economics*, 83(2), 117–141, 2012, doi: 10.1111/j.1467-8292.2012.00457.x, url to share this paper: [sci-hub.se/10.1111/j.1467-8292.2012.00457.x](https://doi.org/10.1111/j.1467-8292.2012.00457.x).
- Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, *American Political Science Review*, 91(02), 245–263, 1997, doi: 10.2307/2952354, url to share this paper: [sci-hub.se/10.2307/2952354](https://doi.org/10.2307/2952354).
- Bon-Gang Hwang, Xianbo Zhao, Mindy Jiang Shu Gay, Public private partnership projects in Singapore: Factors, critical risks and preferred risk allocation from the perspective of contractors, *International Journal of Project Management*, 31(3), 424–433, 2013. doi:

- 10.1016/j.ijproman.2012.08.003, url to share this paper: sci-hub.se/10.1016/j.ijproman.2012.08.003.
- Carlos Oliveira Cruz, and Rui Cunha Marques, Infrastructure Public-Private Partnerships Decision, Management and Development, 2013, doi:10.1007/978-3-642-36910-0, url to share this paper: sci-hub.se/10.1007/978-3-642-36910-0.
- Carter B. Casady & David Baxter, Pandemics, public-private partnerships (PPPs), and force majeure | COVID-19 expectations and implications, Construction Management and Economics, 1–9, 2020, doi: 10.1080/01446193.2020.1817516, url to share this paper: sci-hub.se/10.1080/01446193.2020.1817516.
- Cornelius Ruiters and Maselaganye Petrus Matji, Water institutions and governance models for the funding, financing and management of water infrastructure in South Africa, Water SA, 41(5), 660, 2016, doi:10.4314/wsa.v41i5.09, url to share this paper: sci-hub.se/10.4314/wsa.v41i5.09.
- Debopam Roy, Satyanarayana Kalidindi, and A. Soundararajan, Risk Allocation in Concession Agreements for PPP Road Projects in India Urbanization in Asia, 119–136, 2013, doi:10.1007/978-81-322-1638-4\_7, url to share this paper: sci-hub.se/10.1007/978-81-322-1638-4\_7.
- Demi Chung and Daviv A. Heinsner, Modelling Risk Perceptions of Stakeholders in Public-Private Partnership Toll Road Contracts, ABACUS, Vol 51, No 3, 437-483, 2015, doi:10.1111/abac.12052, url to share this paper: sci-hub.se/10.1111/abac.12052.
- Eric Tjong Tjin Tai, Force Majeure and Excuses in Smart Contracts, SSRN Electronic Journal, 2018, doi: 10.2139/ssrn.3183637, url to share this paper: sci-hub.se/10.2139/ssrn.3183637.
- Fadli Zon, M. Iskandar, and Susanto Zuhdi, Review of Legal History Article 33 of the 1945 Constitution as an Economic Ideology, Journal of Negara Hukum, Vol.7, No.1, 2016, doi:10.22212/jnh.v7i1.925, https://jurnal.dpr.go.id/index.php/hukum/article/view/925.
- Federica I Paddeu, A Genealogy Of Force Majeure In International Law, British Yearbook of International Law, 82(1), 381–494, 2012, doi: 10.1093/bybil/brs005, url to share this paper: sci-hub.se/10.1093/bybil/brs005.
- Herlien Budiono, Conditional Engagement and Its Issues, Veritas et Justitia Journal, Vol. 2, No. 1, 2016, doi: https://doi.org/10.25123/vej.2067 http://journal.unpar.ac.id/index.php/veritas/article/view/2067.
- Jinbo Song, Yunpeng Zhao, Lulu Jin, Yan Sun, *Pareto Optimization of Public-Private Partnership Toll Road Contracts with Government Guarantess*, Elsevier, *Transportation Research Part A: Policy and Practice*, 117, 158-175, 2018, doi:10.1016/j.tra.2018.08.019, url to share this paper: sci-hub.se/10.1016/j.tra.2018.08.019.
- Jingfeng Yuan, Wenying Ji, Jiyue Guo, Mirosław J. Skibniewski, Simulation-based dynamic adjustments of prices and subsidies for transportation PPP projects based on stakeholders' satisfaction, *Transportation*, 2018, doi:10.1007/s11116-018-9940-1, url to share this paper: sci-hub.se/10.1007/s11116-018-9940-1.
- John Forrer, James Edwin Kee, Kathryn E. Newcomer, Eric Boyer, Public-Private Partnerships and the Public Accountability Question, *Public Administration Review*, 70(3), 2010, 475-484, doi:10.1111/j.1540-6210.2010.02161.x, url to share this paper: sci-hub.se/10.1111/j.1540-6210.2010.02161.x. Dalam Vincent J. Napoleon, Diana V. Vilmenay, Nia Newton, The Use Of Public-Private Partnerships As A Model For The Delivery Of Goods And Services To The

- Government-Is This A New Concept In Government Contracting?, *Journal of Law & Commerce*, Heinonline, Vol. 35:119, No.2, 2017, doi: <https://doi.org/10.5195/jlc.2017.122>.
- John R. Clark, Can I Get Force Majeure from a Novel Coronavirus?, *Air Medical Journal*, 2020, doi:10.1016/j.amj.2020.04.019, url to share this paper: [sci-hub.se/10.1016/j.amj.2020.04.019](http://sci-hub.se/10.1016/j.amj.2020.04.019).
- Jutta Limbach, The Concept of the Supremacy of the Constitution, *The Concept of the Supremacy of the Constitution. Modern Law Review*, 64(1), 1–10, 2001 doi:10.1111/1468-2230.00306, url to share this paper: [sci-hub.se/10.1111/1468-2230.00306](http://sci-hub.se/10.1111/1468-2230.00306).
- Karen E. Linkletter, Joseph A. Maciariello, Genealogy of a social ecologist, *Journal of Management History*, 15(4), 334–356, 2009, doi:10.1108/17511340910987284, url to share this paper: [sci-hub.se/10.1108/17511340910987284](http://sci-hub.se/10.1108/17511340910987284).
- Laure Athiasa, and Stéphane Saussier, Contractual Flexibility or Rigidity for Public Private Partnerships? Theory and Evidence from Infrastructure Concession Contracts, *SSRN Electronic Journal*, 2007, doi: 10.2139/ssrn.828944, url to share this paper: [sci-hub.se/10.2139/ssrn.828944](http://sci-hub.se/10.2139/ssrn.828944).
- LiYaning Tang, Qiping Shen, Eddie W.L. Cheng, A review of studies on Public–Private Partnership projects in the construction industry, *International Journal of Project Management*, 28(7), 683–694, 2010, doi:10.1016/j.ijproman.2009.11.009, url to share this paper: [sci-hub.se/10.1016/j.ijproman.2009.11.009](http://sci-hub.se/10.1016/j.ijproman.2009.11.009).
- Mahrar Zatar, *Pitfalls of Public Private Partnership*, Dissertation not published, UMI *Disertation Publishing*, Arlington, *Faculty of Civil Engineering University of Texas*, 2014.
- Marel Katsivela, Contracts: Force Majeure Concept or Force Majeure Clauses? *Uniform Law Review - Revue de Droit Uniforme*, 12(1), 101–119, 2007, doi:10.1093/ulr/12.1.101, url to share this paper: [sci-hub.se/10.1093/ulr/12.1.101102](http://sci-hub.se/10.1093/ulr/12.1.101102).
- Marilang, The ideology of the Welfare State Constitution: The State's Right to Control over Mining Goods, *Journal of Konstitusi*, Vol. 9, No. 2, 2012, doi: <https://doi.org/10.31078/jk%25x>, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/131/130>.
- Mark A. Moore, Anthony E. Boardman, Aidan R. Vining, Analyzing risk in PPP provision of utility services: A social welfare perspective, *Utilities Policy*, 48, 210–218, 2017, doi: 10.1016/j.jup.2017.08.008, url to share this paper: [sci-hub.se/10.1016/j.jup.2017.08.008](http://sci-hub.se/10.1016/j.jup.2017.08.008).
- Max Raskin, The Law of Smart Contracts, *SSRN Electronic Journal*, 2016, doi:10.2139/ssrn.2842258, url to share this paper: [sci-hub.se/10.2139/ssrn.2842258](http://sci-hub.se/10.2139/ssrn.2842258).
- Nindyo Pramono, Problematika Judge's Decision in Case of Agreement Cancellation, *Journal of Mimbar Hukum*, Faculty of Law, University Gadjah Mada, Vol. 22, No.2, 2010, doi:<https://doi.org/10.22146/jmh.16221>, <https://jurnal.ugm.ac.id/jmh/article/view/16221/10767>.
- Peter F Drucker, Friedrich Julius Stahl: His Conservative Theory of The State, *Society*, 39(5), 46-57, 2002, doi: 10.1007/bf02717544, url to share this paper: [sci-hub.se/10.1007/bf02717544](http://sci-hub.se/10.1007/bf02717544).
- Principles of law, *Managing Legal and Ethical Principles Revised Edition*, 26–44, 2009, doi:10.1016/b978-0-08-055741-0.50005-1, url to share this paper: [sci-hub.se/10.1016/b978-0-08-055741-0.50005-1](http://sci-hub.se/10.1016/b978-0-08-055741-0.50005-1).
- Ramli, Muhammad Afzal, and Gede Tusan Ardika, Critical Study of the Various Concept of the Rule of Law, *Journal of Ilmu Hukum*, Vol 10, No. 2, 2019, doi:<https://doi.org/10.31764/jmk>, <http://journal.ummat.ac.id/index.php/JMK/article/view/1969/pdf>.

- Randy E. Barnett, Constitutional Legitimacy, *Columbia Law Review*, 103(1), 111, 2003, doi:10.2307/1123704, url to share this paper: sci-hub.se/10.2307/1123704.
- Retna Gumanti, Legality of the Agreement (Judging from the Civil Code), *Journal of Pelangi Ilmu*, Vol. 5, No. 1, 2012.
- Revrisond Baswir, People's Economy vs. Neoliberalism, *Journal of Gema Keadilan*, Vol. 2, No. 1, 2015, doi:https://doi.org/10.3592/2, https://ejournal2.undip.ac.id/index.php/gk/article/view/3713/2082.
- Sapri M., Hariati A.H., Sheau Ting L., and Sipan I., Public Private Partnership Benefits in Delivering Public Facilities in Malaysia, *MATEC Web of Conferences*, 66, 00014, 2016, doi:10.1051/mateconf/20166600014, url to share this paper: sci-hub.se/10.1051/mateconf/20166600014.
- T. R. S. Allan, Dworkin And Dicey: The Rule of Law As Integrity, *Oxford Journal of Legal Studies*, 8(2), 266–277, 1988, doi:10.1093/ojls/8.2.266, url to share this paper: sci-hub.se/10.1093/ojls/8.2.266.
- Tri Wahyu Surya Lestari and Lukman Santoso, Comparison of the Terms of Legality of "Halal Cause" in Conventional Agreements and Sharia Agreements, *Yudisia Journal of Pemikiran Hukum and Hukum Islam*, Vol. 8, No. 2, 2017, doi:http://dx.doi.org/10.21043/yudisia.v8i2.3240, https://journal.iainkudus.ac.id/index.php/Yudisia/article/view/3240/2359.
- Vincent J. Napoleon, Diana V. Vilmenay, Nia Newton, *The Use Of Public-Private Partnerships As A Model For The Delivery Of Goods And Services To The Government-Is This A New Concept In Government Contracting?* *Journal of Law & Commerce*, Heinonline, Vol. 35:119, No.2, 2017, doi: https://doi.org/10.5195/jlc.2017.122. http://jlc.law.pitt.edu/ojs/index.php/jlc/article/view/122.
- Yiwen Zhang, Zhuo Feng, Shuibo Zhang, The effects of concession period structures on BOT road contracts, *Transportation Research Part A: Policy and Practice*, 107, 106–125, 2018, doi: 10.1016/j.tra.2017.11.018, url to share this paper: sci-hub.se/10.1016/j.tra.2017.11.018.

### Article

- Audit Board of the Republic of Indonesia (BPK), Report on the Results of Examination of Toll Road Operational Management Performance on Traffic Smoothness and Tariff Policy at the Ministry of Public Works and Public Housing, Toll Road Regulatory Bodies, and Toll Road Business Entities in DKI Jakarta, West Java, Central Java, and Banten Year 2014-2016 Budget, Number 01/LHP/XVII/01/2018, Jakarta, January 10<sup>th</sup>, 2018.
- Mack, David J., *Basics of U.S. Contract Law*, October 2011.