UTILIZATION OF TOLL ROAD SECTIONS AS STATE PROPERTY FOR MAXIMIZING PUBLIC WELFARE

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ABSTRACT

This study examines the usage of toll road sections that have fully recovered their investment as state-owned assets, and evaluate the compatibility of the Toll Road Concession Agreement (Perjanjian Pengusahaan Jalan Toll/PPJT) about granting concessions for the operation of these toll road sections that have paid off their investment. This research employs a normative juridical method, analyzing relevant literature on using toll road sections that have reached the return on investment as state-owned assets. The findings indicate that the State's utilization of these toll road sections does not uphold justice, as it fails to maximize the community's welfare. The PPJT on the concession of operating toll road sections that have paid off their investment differs from the utilization of state-owned assets as stipulated by existing regulations due to the imposition of general contributions and profit sharing. It is the government to consider the concession agreement to include toll road sections that have completed their investment to return into the government for maximizing public welfare.

Keywords: Toll Roads; Utilization; Investment; Justice; Indonesia

INTRODUCTION

State property refers to any items that are acquired or procured using funds from the State Budget (APBN) or obtained through legal means, as outlined in Government Regulation Number 28 of 2020 (PP 28/2020). This regulation specifically governs the management of State Property, detailing the rules and guidelines for its administration[1]. According to Black's Law, State Property can be interpreted as state property that can be utilized by the general public without restrictions on certain individuals and is not bound to power by one person (Frey

[1] See (Peraturan Pemerintah Nomor 28 Tahun 2020 Tentang Perubahan Atas Peraturan Pemerintah Nomor 27 Tahun 2014 Tentang Pengelolaan Barang Milik Negara/Daerah, 2020)

& Black, 1934). The relationship between the use of state property also requires accounting knowledge which contains company financial information and clear profit/loss information. (Tumarar et al., 2015) .

There is a cycle that begins with a need that is planned, and then the budget is made; procurement is realized; used, and utilized; security ; valued; transferred; destroyed; abolished; structured; and fostered, supervised, and controlled (Runiawati, 2017). The management of state property through the utilization cycle, classification is carried out into leases, loaned for use, cooperated utilization, build-to-use, and cooperation in the provision of infrastructure facilities (Fadeli, 2020). Parties working together to utilize state property should understand the importance of state/regional property as an integral part of state finances (Hartanto, 2019). The consequences of managing state property can potentially harm state finances if it is not managed carefully or even if there is a criminal intention to corrupt state finances; even though this is only a temporary benefit, it is distributed to other corrupt parties, and even interfere with international business transactions. (Rose-Ackerman, 1997) The use of State property as outlined in PP No. 28 of 2020 without altering the ownership status when it is not employed for the Ministry/Institution's responsibilities or for optimizing State Property is questionable in Indonesia.

Toll roads are part of the infrastructure, although sometimes they have to be operated by parties outside of the central and local governments as per the agreement for toll road concession (PPJT), when the concession period has expired, they will return to being owned by the Government.(Villalba-Romero et al., 2015) Meanwhile, according to the 1945 Constitution of the Republic of Indonesia , infrastructure is important to be controlled by the State because it is an important branch that is used as much as possible for the welfare of the people (UUD Negara RI Tahun 1945, 2000). Infrastructure has always been the essence of the growth and development of an economy (O'Neill, 2013). Infrastructure is also considered as an object belonging to the State, which is categorized as goods.

There are several forms of cooperation management, including utilization cooperation and infrastructure provision cooperation. Utilization collaboration is implemented to enhance non-tax state revenue/regional income and alternative sources of financing by utilizing state/regional assets by external parties conducted within a specified timeframe. On the other hand, infrastructure provision collaboration refers to a partnership between the Government and corporate entities involved in infrastructure provisioning endeavours, including construction work to build, manage, and maintain in order to benefit the infrastructure.[2].

Both forms of cooperation have a relationship with toll road concession agreements because each has a close relationship with conducting high-scale business, namely utilizing state property in the form of infrastructure. Toll road concession has been limited in accordance with the concession period given, and this is in accordance with what is stated in Law Number 38 of 2004 concerning Roads, especially Article 50 Paragraph (6), namely the concession is considered to end with the calculation if it has fulfilled the return on investment issued by the business entity and has also obtained a reasonable profit.[3]. The PPP project tender that will be selected is a business entity that has determined a fairly long period because, can be more profitable for the business entity to collect a reasonable return on investment. (X. Q. Zhang & AbouRizk, 2006). The Government prefers the concession period, which is not too long because it can weaken the public interest. (Ng et al., 2007). The duration of the concession is established by combining the construction period with the operating period of the toll road section for toll collection. (Ye & Tiong, 2003).

In reality, there are several toll road sections that have fulfilled the concession period as stated in Section 50, Paragraph (6) of the Road Law, which is still managed by toll road business entities, even though based on the 2018 BPK Audit Report, three certain segments of toll roads have been identified as having achieved the desired return on investment and generating satisfactory profits (BPK, 2018). Three of the 13 toll road sections have completed their concession period, namely the Jakarta-Bogor-Ciawi, Jakarta-Tangerang, and Prof. Dr Ir. Soedijatmo Toll Roads, as stipulated in the Minister of Public Works Decree No. 242/KPTS/M/2006 concerning the Determination of Concession Granting for Toll Road Sections operated by PT Jasa Marga (BPK, 2018).

This paper discuss toll road sections that have fulfilled the concession period but are still managed by parties outside the State or region, whether it contrary to laws and regulations in Indonesain legal system. Several studies discussed legal issues related to the use of toll roads, including, firstly, the Effects of Concession Period Structure on BOT Road Contracts journal

[2] See (Peraturan Presiden RI Nomor 38 Tahun 2015 Tentang Kerjasama Pemerintah Dengan Badan Usaha Dalam Penyediaan Infrastruktur, 2015).
[3] I*bid*.

investigates the comparison of socially optimal toll prices during the private and public operation periods, road quality, and concession periods under the concession structure (SPCS) and two concession structure periods (TPCS). Secondly, the Analysis of Delegation of Road Capacity Pricing Decisions and Franchises in Toll Road BOT Projects, examines the comparison of socially optimal contract variables, toll prices, road capacity, road quality, and the concession period between the Government and the private sector.

RESEARCH METHOD

This study uses the normative juridical method, by using statutory approach. Several literatures are analyses to support the argument that utilization of toll section after paid off their investment for better contribution to welfare of people.

RESEARCH OUTCOME AND DISCUSSION

3.1. Toll Road Sections That Have Successfully Generated A Return On Investment Is Being Considered For Their Incorporation As State-Owned Assets.

Toll roads are a part of the national road and transportation network, and they are classified as public roads where users are obligated to pay tolls (article 1 number 1).[4] Toll roads are part of the infrastructure, can be done through government and business entities' cooperation or Public Private Partnership (PPP). Through the PPP scheme for toll road concessions, this paper specializes in the type of Build Operate Transfer (BOT) or Operation Maintenance (OM); Business entities are granted a specific duration to operate toll roads, and once this allotted period concludes, the toll road is returned to the Government. The toll road concession encompasses a broader scope, including financing, construction, operation, and/or maintenance of toll roads (Hanaoka & Palapus, 2012). Meanwhile, according to Article 50 Paragraph (2) of the Road Law, toll road concessions encompass various activities such as funding, technical planning, construction, operation, and/or maintenance.

The BOT (Build-Operate-Transfer) model can be divided into two distinct phases: development and operation, culminating in the transfer of the toll road back to the Government. During the development phase, the business entity constructs roads that fulfil the Government's

[4] See (Peraturan Pemerintah RI Nomor 15 Tahun 2005 Tentang Jalan Tol, 2005)

specifications in terms of capacity and quality. Subsequently, in the operation phase, the business entity starts collecting tolls as a means to recover the invested capital while generating reasonable profits. Once the concession period concludes, the Government assumes ownership and responsibility for operating the road going forward. (Y. Zhang et al., 2018). Meanwhile, OM is only in the form of operation and maintenance of toll roads based on a predetermined period.

This PPP involves several parties who have different main objectives, and the Government has the aim of maximizing profits for social welfare to the community, the business entity aims to maximize the profits generated on investment from toll road concessions, and the road users who have the aim of minimizing the unequal distribution of profits between road users travelling from different origins to destinations (Chen & Subprasom, 2007). The concession period plays a crucial role in ensuring that the interests of all parties involved are effectively addressed and fulfilled.

During the concession period, toll roads were indeed private goods; however, according to Article 33 of the 1945 Constitution of the Republic of Indonesia, toll roads are an important branch of the State that is used with the aim of promoting the well-being of the people, so the infrastructure is included in the classification of public goods. When a toll road section is in a condition that has been proven to have fulfilled the concession period, but toll road concessions are still being carried out with the same tariff as before (the tariff determination is not relevant), it is very detrimental to toll road users, so that the implementation of PPP is inconsistent as stipulated in Paragraph (2) of Article 33 of the 1945 Constitution of the Republic of Indonesia (Heru Sugiyono, Abdul Rachmad Budiono, Sihabudin, 2021).

Specifically in Indonesia, as stated in Paragraph (6) of Article 50 of the Road Law, a concession period is granted for toll road concessions with the limitation that the investment value used for toll road concessions is met and a justifiable profit on the invested capital. The granting of a concession period or a limited period, whether predetermined by the tender owner or still negotiable (Carbonara et al., 2014). It requires a good and correct calculation of the concession period(Lv et al., 2015) to fulfil the two elements previously mentioned with the ability to pay from toll road users. A shorter concession period may lead to higher investment implementation and attract more investors, but it can also result in higher toll tariffs imposed on toll road users, while a concession period that is too long can result in reduced economic benefits from projects that even harm the Government.(Khanzadi et al., 2012) .

Upon the completion of the concession period, the concession rights for toll roads are typically returned to the Government. However, the business entity has the option to request an extension of the concession period to continue generating additional profits; of course, this is contrary to the public interest that the Government must fulfil, the welfare of the people as road users (Feng et al., 2019). The possibility of this can be caused because the fair phase is very difficult to define and is considered a grey zone that needs to be defined; the determination of the concession period and the corresponding benefits scheme is a challenging task due to the multitude of hidden risks and uncertainties that lie ahead in the process. (X. Zhang, 2009).

Also, upon the conclusion of the concession period, the Toll Road Regulatory Agency offers recommendations to the Minister of Public Works and Public Housing (PUPR) for consideration, which may include: a) the requirement for operational and maintenance costs; and/or b) the expansion of capacity and development of the respective toll road; and/or c) supporting the utilization of other toll roads that are currently financially unviable and entrusted by the Government to state-owned enterprises (BUMN) (Peraturan Pemerintah RI Nomor 30 Tahun 2017 Tentang Jalan Tol, 2020). The inclusion of point 'c)' is not specified in Government Regulation Number 15 of 2005 concerning toll roads; the option point certainly needs to be considered property because applying toll rates to road users outside the road that has been passed can result in losses to toll road users. Therefore tariff setting should not increase every year, a maximum of the toll fee when it is still in the concession period.

Regarding toll road segments that have fully recouped their investments, let alone have benefited from the management of the toll road, the concession period should also be ended. It is no longer necessary to make PPJT between the Government and the Business Entity, but it is left to the Government to consider the fate of the toll road. If, in this case, the toll road remains a toll road and is then managed by a business entity (BUMN, BUMD, or BUMS with the legal entity) for all or part of the reasons referring to the latest Toll Road PP, a novel regulatory framework is necessary to govern the administration of toll roads that have achieved investment returns and satisfactory profits. Typically, the Government grants concessions to business entities due to a lack of financial resources and manpower for managing toll road operations. By engaging external entities, such as businesses, to operate and maintain toll roads, the Government aims to save state finances while simultaneously enhancing the capacity and development of toll road segments, ultimately contributing to the realization of a prosperous society (Sugiyono et al., 2020).

Toll roads are owned by the Government or state-owned property or state property that is utilized for the well-being and advancement of its citizens. One of the state-owned goods is road infrastructure which is used as a road link or mobility access and facilitates distribution or other economic processes. Roads as state property have valuable benefits to bring profits to the Government for the welfare of its people. These state-owned goods can be utilized cyclically without changing ownership statuses, such as rental, borrow-use, utilization of collaboration, build-operate-transfer, build-transfer-operate, cooperation in infrastructure provision, and limited cooperation in infrastructure financing vide article 1 (Peraturan Pemerintah Nomor 28 Tahun 2020 Tentang Perubahan Atas Peraturan Pemerintah Nomor 27 Tahun 2014 Tentang Pengelolaan Barang Milik Negara/Daerah, 2020)

Toll roads whose concession period has expired but has been extended are considered state property management. Hence, as per the legal framework, the toll road concession agreement has transformed into an agreement for the utilization of state-owned assets. The author excludes the notion of cooperation in infrastructure provision due to the absence of explicit regulations that govern the management of toll road sections that have already recouped their investments, besides that the provision of infrastructure refers to building, managing, and/or maintaining infrastructure, so that the provision of infrastructure still tends to stick to build but not manage (operate) and maintain.

The detailed regulations regarding the operation and maintenance of state-owned assets are stipulated in Government Regulation No. 28 of 2020. Then the conditions for implementing cooperation in utilization are regulated, namely (vide article 33)(Peraturan Pemerintah Nomor 28 Tahun 2020 Tentang Perubahan Atas Peraturan Pemerintah Nomor 27 Tahun 2014 Tentang Pengelolaan Barang Milik Negara/Daerah, 2020):

a. Unavailability or insufficient availability of APBN funds to meet operational costs. Maintenance and/or repairs as required.
b. Cooperation partners can be selected through tender or direct appointment. (As for the direct appointment given to SOEs, ROE, or a subsidiary of an SOE, which is equivalent to SOE based on the laws and regulations).

c. The utilization cooperation partners are required to pay an annual contribution during the specified operating period and share the profits from the utilization cooperation with the state general treasury account.
d. The amount of payment of fixed contributions and profit sharing resulting from cooperation in utilization is determined from the results of team calculations (specifically for roads consisting of goods managers, regional heads consisting of governors/regents/mayors)
e. During the period of operation, the utilization cooperation partner is prohibited from pledging the state property, which is the object of the utilization cooperation.
f. The duration of special infrastructure cooperation is limited to a maximum of 50 years, with the possibility of extension.
g. Suppose the cooperation partner is an SOE. ROEs or a subsidiary of an SOE that is treated equally based on government regulations governing the procedures for the participation and administration of state capital in SOEs and Limited Companies, the permanent contribution and profit sharing can be determined at a maximum of 70% of the team's calculation results. (The determination of the amount is carried out taking into account the financial capacity of SOEs or ROEs).
h. The amount of payment of fixed contributions and profit sharing must obtain approval from the goods manager; this refers to the individual who holds the official authority and responsibility for formulating policies and guidelines, as well as overseeing the management of state-owned assets (for state property) and the regional head (for the regional property).

This scheme is almost similar to PPP, that us the 'business entity is changed to 'another party' referring to Government Regulation No. 28 of 2020. If we consider the definition of utilization cooperation, it entails the utilization of state-owned assets by external entities for a specified period with the aim of augmenting state revenues; it is not local taxes/income and other sources of financing. The purpose of cooperating between the Government and other parties is to increase state revenues that are not derived from taxes or regional income, as well as other revenues.

3.2. Conformity of Utilization of State Property with PPJT Related to Granting Concessions to Toll Road Sections That Have Paid Investment Returns to Business Entities

PPJT is a contractual arrangement between the Minister of Public Works and Public Housing (PUPR) and a corporate entity. The agreement is based on the mutual understanding that the concession may involve aspects such as financing, technical planning, construction, operation, and/or maintenance.

As stipulated in Presidential Regulation No. 38/2015, especially Article 38, prior to PPJT between the Government and the Business Entity, a pre-qualification stage will be carried out, followed by an auction or direct appointment of State-Owned Enterprises engaged in the road sector. The object set forth in the PPJT includes all of constructing, operating, and maintaining; or only part of constructing along with operating and maintaining; or only operating and maintaining.

The concession's scope is determined by the terms outlined in the contractual agreement. Subsequently, the concessionaire is obligated to fulfil these requirements. By operating the designated facility, they are authorized to collect toll fees from users throughout the concession period, which serves as compensation for the incurred investment costs and reasonable profits, as stated in Article 38.(Peraturan Presiden RI Nomor 38 Tahun 2015 Tentang Kerjasama Pemerintah Dengan Badan Usaha Dalam Penyediaan Infrastruktur, 2015).

The amount of investment value and the toll tariff applied to users are important aspects in determining the duration of the concession agreement (Thomas Ng et al., 2007) in connection with the conclusion of the concession period when the investment has been fully recovered and a reasonable profit has been obtained, as specified in Article 50 Paragraph (6) of the Road Law. When the concession period has ended, there is a transfer of state property, namely toll roads, to the Government, so that in this case, the business entity can no longer collect tolls from toll road users, as well as the operation and maintenance activities wholly shift to the Government (X. Zhang et al., 2016). The law should be obeyed and implemented as an effort to create justice in various matters, including for the Government that implements the concession agreement with the business entity. Once a satisfactory return on investment and profit has been achieved, the concession must be terminated. If it has been terminated, then the Government still wants to consider continuing cooperation with the same or different business entities to cover the Government's financial inability to carry out the operation and maintenance of toll road sections whose concession period has ended or even is deemed necessary to increase capacity and/or improve the quality of these toll roads, the Government needs to enter into a new agreement with new clauses.

Regulations will be obeyed if the legal norms contain justice and moral content so that if the rules are fair and moral, they must be followed (Rosana, 2014). Government compliance, also in terms of following the rule of law, is a major concern in providing justice for the community (Hakim, 2015). In addition, because everyone is equal before the law, the burden of responsibility is also attached to every act he does, including legal actions (Joseph, 1977). Therefore, to prevent losses to the community as toll road users, there should be firm steps from the Government to increase legal awareness, namely by responding that toll road that has finished their concession period, if they want to do an extension, must consider it as best they can. Logically, if you decide to continue with the toll road concession, it can harm the community. This action is not following the provisions of Article 33 of the 1945 Constitution of the Republic of Indonesia.

The mandate contained in the constitution absolutely must be followed, including Article 33 of the 1945 Constitution of the Republic of Indonesia, which regulates that the state control every branch of production that is important for the State and controls the livelihood of many people, besides that infrastructure, is indirectly mentioned in the word 'Bumi' in the sentence "The state exercises control over the Earth, water, and their inherent natural resources, utilizing them for the utmost welfare of the population."(Ansari, 2017)

The current regulations in Indonesia pertaining to roads, toll roads, and infrastructure provision in Public-Private Partnerships (PPPs) do not specifically address toll roads that have fully recouped their investments and achieved a reasonable profit. Moreover, there is a phrase that causes a multi-interpretation, namely 'reasonable' or 'fair.'Reasonableness or fairness is very difficult to determine limits, reasonable according to the Government, but not necessarily reasonable according to business entities, as well as according to toll road users, each has a perception of fairness.

Government Regulation Number 28 of 2020 regulates toll road sections whose return on investment has been paid off and can be extended through the concept of utilizing state property. This is expected to be more beneficial to the people because the business entity that utilizes the managed infrastructure will contribute to the Government and also share profits.

As per the definition provided in Article 1 Number 10 of Government Regulation No. 28 of 2020, utilization refers to the utilization of state-owned assets that are not utilized for the execution of ministries/agencies' duties and functions without altering their ownership status, according to the Indonesian Dictionaries that utilization is a way to generate a use, benefit, and profit. [5] It focuses on efforts to generate a benefit or profit for the object being utilized, in this case referring to toll roads whose concession period has ended but is still managed by the private sector. Furthermore, in Article 1 Number 13 of the same regulation, there is a sentence to increase state revenue, while the use of state property is intended as an object that is utilized by other parties to provide benefits to the State, thus referring to Article 33 of the 1945 Constitution of the Republic of Indonesia, it will be used for people's prosperity.

PPJT regarding the granting of toll road concessions whose investment returns have been paid off to business entities is not in accordance with the utilization of state property, therefore the PPJT should be discontinued and then revised into an agreement for the use of state property. The agreement carried out by the Government is legal because it is made by an authorized official or holder of power, but it still must follow the standards determined by the laws and regulations.

The crucial aspect of this study is that infrastructure provision through the Public-Private Partnership (PPP) scheme can take place both within the concession period and beyond its expiration. Naturally, the ambiguity surrounding toll road sections that have been granted concessions must be carefully evaluated by the business entity, taking into account factors such as the duration of the concession, tariff rates, and potential profits to be obtained. So, it is impossible to miss too far or even to require an extension of the concession period because this can harm the interests of the community related to public welfare.

In practice, the development of toll roads requires operational costs, maintenance, and even capacity expansion, which is sometimes difficult for the Government to meet. Therefore the Government must partner with the private sector.In the administration of toll roads, it is anticipated that the Government will gain advantages beyond tax revenues, specifically through

[5] Departemen Pendidikan Nasional, Kamus Besar Bahasa Indonesia, Edisi 4, Gramedia Pustaka Utama, Jakarta, 2013, 1700, p. 873.

general contributions and profit sharing derived from the utilization of state-owned assets. Infrastructure is part of the property of the State, while other parties or business entities only utilize it to operate, maintain, or carry out other activities.

There is a limit in the form of a concession period that is limited to return on investment and reasonable profits in toll road concession, while in cooperation on the use of state property in the form of contributions (wages) to the Government and profit sharing with other parties. Then the naming of the parties, namely in the concession of toll roads, the position of business entities, in the cooperation in the use of state property, changes to 'other parties. There are wages for the use of state property every year from other parties to the State during the cooperation agreement. Reasonable profits are not only obtained by business entities/other parties, such as toll road concessions but are distributed to the Government and other parties as agreed.

CONCLUSION

Collaboration in utilizing state-owned assets, specifically in the form of toll road sections, represents a crucial and appropriate approach to be implemented for sections that have fully recovered their investments and generated profits. The mechanism of this cooperation is almost the same as the toll road concession which carried out during the concession period, but after the concession period ends, due to the repayment of investment and reasonable profits, the toll road as state property can be utilized so that the State gets additional benefits for the utilization by other parties. The benefits are in the form of wage contributions paid annually during the cooperation period to the Government, in addition to the profit sharing that be shared between the Government and other parties as agreed in the cooperation agreement.

PPJT is a legal agreement according to law for toll road sections that are still in the concession period. On the other hand, if the PPJT has been fulfilled, then the PPJT is still ongoing, then this is contrary to the Road Law and has the potential to harm toll road users because it is subject to relatively expensive tariffs. The PPJT is inconsistent with Article 33 of the 1945 Constitution of the Republic of Indonesia, which focuses on the welfare of the people. Therefore, in order to continue to legalize toll roads that have paid off their investment so that they are still managed by other parties, a new agreement must be made under the name of the Cooperation Agreement for the Utilization of State Property while the object of the agreement is the toll road section. By referring to PP No. 28 of 2020, it is be more profitable for the Government because in addition to obtaining contributions, the Government also gets a profit sharing, in this case, as mandated by the 1945 Constitution of the Republic of Indonesia, the profits will be used as much as possible for the welfare of the people.

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