March-April 2020
ISSN: 0193-4120 Page No. 10288 - 10294

Anomaly of Certainty and Utilization in the Government-SOE Cooperation Scheme on Infrastructure Development

Andriani Latania Triramdhani, Doctor of Law Program, Padjadjaran University, Bandung, Indonesia
Nia Kurniati, Faculty of Law, Padjadjaran University, Bandung, Indonesia

Article Info
Volume 83
Page Number: 10288 - 10294
Publication Issue:
March - April 2020

Article History
Article Received*: 24 July 2019*
Revised*: 12 September 2019*
Accepted*: 15 February 2020*
Publication*: 12 April 2020*

Abstract:
Infrastructure development is the driving wheel of the economy and is also the spearhead of national development. However, efforts to encourage the acceleration of infrastructure development have a very fundamental weakness namely dependence on the availability of funding for infrastructure projects. Referring to the awareness of the capital requirements, in order to achieve the target of the implementation of infrastructure projects, the Government has launched infrastructure development using the mechanism of Public-Private Partnership (PPP). Based on the PPP scheme, the Government is not in an absolute position to conduct financing through the State Budget and Expenditure Budget, but the funding can come from business entities that are cooperating with the Government. The implementation of infrastructure development that has been formally limited, namely economic infrastructure and social infrastructure. In this study, the object of study is directed explicitly at infrastructure development proposed by SOEs. However, in general, researchers try to conduct a critical study of the legality of the Assignment Letter given to State-Owned Enterprises (SOEs) by the Government directly to carry out the construction of the infrastructure. The problem that arises from the Task Letter is the emergence of anomalous legal norms from relevant laws and regulations. This research was conducted using the normative juridical method using a conceptual approach and a critical approach based on secondary data through library research.

Keywords*: Infrastructure; Rule of Law; State-Owned Enterprises; Usefulness.*

1. INTRODUCTION

The idea of a rule of law state, as contained in Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia, has the consequence that the administration of government must be based on law (Muntoha, 2009). Therefore, in addition to having obligation to determine the policy of social life, according Padmo Wahyono, the government also has the duty to assess the implementation of state life is a field that has to do with the survival of state organizations, which includes the establishment of legislation mechanisms as a continuation of basic laws written and unwritten, investigating the articles, how it is applied, the atmosphere of mysticism, the formulation of the statutory text, the atmosphere of the creation of the statutory text, the information relating to the process of its formation, all of which relate to the arrangements contained in the constitution regarding state organization. In this field, it should be noted several stages of the implementation of the provisions concerning state organizations that are affected by circumstances and time (Wahyono, 1986).

Based on the policy, then in general, the state function consists of two types of state functions, namely the function of determining state policy and the function of carrying out predetermined policies. State policies that have been selected/determined and formulated in legal products, in their implementation, we are confronted with legislative-forming institutions that act as institutions that are

authorized to hold such restrictions (Wahyono, 1986).

In the further development of the history of the rule of law, where the latest evolution of the rule of law raises the concept of welfare state (welvare staats) which demands the state to expand its responsibilities to include the socio-economic problems faced by many people, personal role to control the livelihoods of life many people were eliminated. This development gave legislation to interventionist countries in the XX century. Even the State needs and must intervene in various socio-economic problems to ensure the creation of shared prosperity in society (Muntoha, 2013).

Achieving the goal of the state as an ultimate goal from the function of the administration of the country, power, and authority of the state has become widespread, especially in many interests that were previously held by private individuals, now, the government is holding these interests because they have become the public interest. The task of government in the welfare state by Lemaire is referred to as "*bestuurszorg*," which is the task and function of carrying out public welfare. *Bestuurszorg* covers all fields of society that make the government actively participate in human association. *Bestuurszorg* is the duty of the government "welfare state" as a modern law state that pays attention to the interests of all the people and who has abandoned the principle of *staatsonthounding*. It can be said that the existence of *bestuurszorg* is a sign that states that there is a welfare state (Utrecht, 1962).

In connection with these state activities, it is clear that the need for organizing the fields of government that carry out the duties and functions of the administration of the state which in daily practice requires a large organizing system, due to direct contact with the needs of the wider community. In achieving the goal of state life, it must involve the state administration in carrying out its very complex public service tasks, broad scope, and entering all sectors of life. The field of state administration has the discretion in determining policies. However, its attitude must be morally and legally accountable (Marbun, *et al.*, 2001).

Based on the description above, it is based on the principle of the rule of law, especially in the welfare state model - as contained in Paragraph IV of the 1945 Constitution of the Republic of Indonesia, the government can extend its scope of power and authority to enter into the realm of private law which intersects with the public interest. That is, the Government - based on the principle of the rule of law - is expected to act actively to achieve general welfare.

Based on the description above, efforts to achieve these objectives require the application of a careful and appropriate strategy and need optimization of the use of all real economic potential. High, sustainable, and inclusive economic growth will be achieved with the support of comprehensive reform (the Ministry of National Development Planning/Head of National Development Planning Agency of the Republic of Indonesia, 2014). In the framework of the formulation and implementation of national development strategies, various policies are developed, which can be hierarchically grouped into three levels of policy, namely strategic policy, managerial policy, and technical policy (Mustopadidjaja, 1996). Thus, a national development strategy implies an arrangement aimed at achieving and shaping the national economy/development.

Therefore, a national development policy requires a strategy that reflects the existence of legal certainty. The legal certainty in the design and planning of national development should not be relied on for a momentary interest. As expressed by John Pieres, who stated with the current model, the direction of development is only based on party ideology. Every change of president, the direction of development will also change. The government in solving problems is only temporary, not long term (Tohadi, 2015). Thus, the Government in 2016 issued Presidential Regulation Number 3 of 2016 concerning the Acceleration of the Implementation

of National Strategy Projects which was later amended through Presidential Regulation Number 58 of 2017 concerning Amendments to Presidential Regulation Number 3 of 2016 concerning the Acceleration of the Implementation of National Strategy Projects, and was last amended by Regulation President Number 56 Year 2018 concerning Second Amendment to Presidential Regulation Number 3 Year 2016 concerning the Acceleration of the Implementation of the National Strategy Project (Perpres No. 3/2016 jo. Perpres No. 58/2017 jo. Perpres No. 56/2018).

The above provisions are a form of regulation that focuses on national infrastructure development. This has become important because there has been an urban infrastructure deficit limiting the ability of Indonesian cities to reduce poverty and expand prosperity. The quality of urban infrastructure in Indonesia is still poor, and access to essential services such as clean water, sanitation, electricity, and transportation is generally limited and uneven (Samad, *et al.*, s.a.). However, issues relating to the provision of infrastructure for public use become a dilemma when it comes to the ability to finance infrastructure development.

The availability of adequate infrastructure is crucial to encourage investment and spur economic growth under government targets. Considering the limited financial capacity of the government in financing infrastructure development, it is necessary to develop a mechanism that can provide an opportunity for the private sector to participate in infrastructure development through a scheme of government cooperation with business entities known as Public-Privat Partnership/PPP (Irawan, 2016).

Based on the scheme, it is a contrario description with the meaning of the concept of the welfare state, where the state cq the government through the idea can intervene through rules against business actors. However, through the PPP scheme, what happens is the government invites business actors to be actively involved in infrastructure development that is determined as an acceleration of strategic projects.

Moving on from the government's weak point, the government issued Presidential Regulation No. 38 of 2015 concerning Government Cooperation with Business Entities (Perpres No. 38/2015) which was then followed up with the emergence of the Minister of National Development Planning Regulation/Head of the National Development Planning Agency of the Republic of Indonesia Number 4 Year 2015 concerning Procedures for Implementing Government Cooperation with Business Entities in Providing Infrastructure (PPN Permen No. 4/2015), and also strengthened by Regulation of the Head of Government Goods/Services Procurement Policy Number 19 of 2015 concerning Procedures for Implementing Business Entities in Collaboration with Government and Business Entities in the Provision of Infrastructure (Perka LKPP No. 19/2015).

One of the rationales for the emergence of Perpres No. 38/2015, as contained in the Consideration for the Letter b, is "*that to accelerate infrastructure development, it is necessary to take comprehensive steps to create an investment climate, to encourage the participation of business entities in the provision of infrastructure and services based on sound business principles.*" Then, it becomes natural when Perka LKPP No. 19/2015 contains a set of technical rules regarding how the PPP scheme is implemented in the realm of Government Goods/Services Procurement Law.

But then, legal problems arose when the infrastructure development was carried out using a PPP that was implemented by the Government with one of the BUMNs owned by the Government. If it is reviewed in a normative juridical manner, then there is a legal basis through Article 66 paragraph (1) of Law Number 19 Year 2003 concerning State-Owned Enterprises (Law No. 19/2003) which confirms "*The government can give special assignments to SOEs to carry out the public benefit function while still taking into account the aims and objectives of SOE activities*." Where then, in Article

66, paragraph (2) of Law No. 19/2003 has excluded from the scope of the Government Goods/Services Procurement Law.

Based on the descriptions above, the researcher proposes a problem as a research limitation, how is the position of the Letter of Assignment to SOEs in carrying out infrastructure development through PPP schemes assessed under the idea of legal idea (*idee des Recht*)?

2. RESEARCH MATERIALS AND METHOD

This research uses the normative juridical method by using secondary data obtained from literature studies. In this study, also used 2 (two) approach models, namely conceptual approach and critical approach.

3. RESULT AND DISCUSSION

3.1. Theoretical and Conseptual Foundations

3.1.1. *Idee des Recht*

Gustav Radbruch is a German politician and legal scholar who was influenced by Neo Kantianism paradigm of Baden scholar, where he tried to overcome the dualism between "exist" (*sein*) and "should" (*sollen*), which descended on Neo-Kantianism systems. Others, by accepting that there is a field that contains elements from both areas, namely the field of culture. According to Gustav Radbruch, the field of culture lies between the realm of natural reality, which belongs to the "existing" domain, and the area of values which belongs to the "must" field. Further explained, the field of culture is not only located between two fields but combines the two areas as well, because the culture is nothing but the embodiment of values in natural reality, namely, inhuman concrete life (Huijbers, 2014).

Gustav Radbruch, in constructing his teachings, explained by presenting three theses, *first*, rejecting the concept of absolute priority in dissolving the contradictions of legal certainty and justice, making Gustav Radbruch's legal philosophy a choice outside the concepts of Legal Positivism and Natural Law Theory. This is because traditional Natural Law theory gives absolute priority to justice, whereas Legal Positivism, in contrast, asserts absolute priority in favor of legal certainty, claiming the validity of the law of law which is separate from its moral quality; *second*, conditional priority interpretation supports legal certainty, Radbruch takes changes in the law in modern times which divides into several issues, namely the problem of finding absolute justice, the victory of statutory law in a democratic rule of law, and the separation of law and morality; and *third*, setting limits when unjust laws lose their validity, must be interpreted as a result of the Nazi experience of 1933-1945. At that time, Gustav Radbruch was forced to realize that even the legal system based on the law must be limited, especially by utilizing justice to detect and delegitimize extreme injustice and to maintain the legal system in close relations with morality (Saliger, 2004).

3.1.2. Anomaly of Legal Principles

In the daily life of the Indonesian people, empirically anomalies of justice and inelasticity of the law can be felt empirically in the hands of judges, giving rise to the image that law is not a means to achieve justice. This happens because it cannot be released from the implementation of the dominant positivist paradigm as the basis for modern legal education, which is the opposite of traditional law. The existence of doctrines or legal teachings based on the use of the positivism paradigm as a basic concept such as the adage of law and justice, which states the principle that all people are equal before the law and the principle of justice for all is the ideal perception in theory and good as the ideal of justice. However, this ideal view cannot be realized into reality, because in the practice of law, there is neutrality or it can be said that justice, according to positive law is only a utopian sentiment (Rizal, 2015).

In practice in the courtroom, the gaps must be handled by the judge. The nature of the action to overcome this gap is called legal discovery (rechtsvinding). This gap, in the eyes of adherents of legism, is an anomaly in law enforcement. Anomaly

is a bad thing because it has the potential to weaken legal authority. For this reason, the judge is advised not to maintain the anomaly. If an anomaly occurs, that cannot be tolerated anymore, and the legislator must revise the law through the legislative review process (Hidayat, 2013).

Meanwhile, according to Shidarta, formal state law produces laws that are dominated by coercive rules (orders and prohibitions). Law is regulatory, and there is indeed a gap for the parties to ask for permission or dispensation to deviate from the provisions of the regulation. The law does not like the occurrence of deviations because more and more variations occur (the ability to do something that is generally prohibited; or not doing something that is usually ordered) indicates anomalies in the law. Anomalies that are too many are damaging the legal joints. In short, it's better not to make a rule of law if the majority of the rule of law is, in fact, violated (ineffective on the ground). Legal anomalies can, of course, be done legally, for example, through the discretion of officials who face the constraints of the weaknesses of the legislation when dealing with reality on the ground. The official must answer the problem, and with his discretionary authority, he then makes policy rules. Thus, policy regulations are legal and commonly accepted in government practices everywhere (Shidarta, 2018).

Based on the description above, then the legal anomaly is a legitimate condition that appears as something legal and officially based on applicable regulations; however, the situation is essentially a deviation from an existing condition and is also a product of statutory regulations.

3.2. Analysis

Based on the descriptions above, there is a deviation of law which is seen as something legal, because it is accommodated through official legal instruments. Since the issuance of Perpres No. 3/2016 confirms that the National Strategic Project is a project implemented by the Government, Regional Government, and/or business entity that has strategic characteristics to increase growth and equitable development to improve community welfare and regional development. "*Ministers/heads of institutions, governors, and regents/mayors provide permits and non-licensing requirements for the implementation of the National Strategic Project under their authority*," as contained in Article 3 of Perpres No. 3/2016. Besides, the Minister or head of the institution as the Person in Charge of the National Strategic Project proposes the completion of permits and non-licensing needed to start the implementation of the National Strategic Project since the enactment of this Presidential Regulation. Licensing and non-licensing required to start the implementation of the National Strategic Project as intended, namely: (a). Location Determination; (b). Environmental Permit; (c). Borrowing and Use of Forest Areas Permit; and/or (d). Building permit. While the Governor or regent/mayor as the Person in Charge of the National Strategic Projects in the regions provides permits and non-permits needed to start the implementation of the National Strategic Project under their authority.

Based on Perpres No. 3/2016, then followed up with the issuance of Presidential Instruction No. 1 of 2016 concerning the Acceleration of National Strategic Project Implementation (Inpres No. 1/2016) which confirms that projects implemented by the government, regional governments, and/or business entities that have strategic characteristics to increase growth and equitable development in order to improve community welfare and regional development.

In Inpres No. 1/2016 instructed officials named for (1). Resolving problems and obstacles in implementing the National Strategic Project; (2). Providing support in accelerating the implementation of the National Strategic Project, including taking discretionary efforts to overcome concrete and urgent problems; (3). Refine, revoke, and or replace, provisions of laws and regulations that do not support and hinder the acceleration of the implementation of the National Strategic Project; and (4). Prepare legislation and/or policies needed to

accelerate the implementation of the National Strategic Project.

Use of Article 66 of Law No. 19/2003 juxtaposed with Perpres No. 38/2015, and manifested by a legal instrument namely the Assignment Letter, which is only given on the emergence of a request from the SOE, raises not only the antinomy of legal norms, but also raises anomalies of legal principles when clashed with the Legal regime of Government Goods/Services Procurement as regulated in Presidential Regulation Number 16 Year 2018 concerning Procurement of Government Goods/Services (Perpres No. 16/2018).

As explained at the beginning of this study, concerning the pattern of government performance to improve general welfare, legal certainty is needed. That is, the government implementing national development requires regulations that justify and legitimize the government's legal actions. However, Article 66 of Law No. 19/2003 - although in a positive form, it refers to the principle of expediency.

In fact, it is clear that the legal basis for government law was constructed through Inpres No. 1/2016 which is the legitimacy to break through the laws and regulations that hinder or hinder the acceleration of strategic projects. So, in this case, the Government has a view that based on the principle of expediency, a legal certainty can be exceeded.

However, when referring to the views of Gustav Radbruch as the originator of the ideals of the law (idee des Recht), explaining that the choice in resolving conflicts of law and justice certainty given to the law should be enacted and guaranteed by such state power, even when it is unjust and failing in the interests of the people, unless the conflict with achieving justice is so endurable the level of the law becomes, in the “false law” effect and must, therefore, produce justice (Haldemann, 2005). Gustav Radbruch further emphasized that when conflicts continue to occur, *First*, the conflict of justice and legal certainty (*Rechtssicherheit*) really cannot be resolved, allowing only conditional priorities. *Second*, that these conditional priorities operate in support of legal certainty. *Third*, that the primacy of legal certainty is revoked, when injustice becomes unbearable (Haldemann, 2005).

If you pay attention to the opinion of Gustav Radbruch, then it can be concluded that when there is a conflict between the principle of legal certainty with the principle of justice, then the principle of justice must take precedence. So even though, Gustav Radbruch is still classified in the understanding of positivism, still prioritizing the principle of justice which is loaded with abstract norms. Therefore, for Gustav Radbruch, both legal certainty and justice are two elements that are absolute, while the benefit itself is a relative element.

4. CONCLUSION

The configuration of the regulations mentioned above gave rise to an unfair business competition condition. Thus, it is possible that a state of monopoly by a private company may be raised against private businesses that are required to comply with the provisions of the Law for the Procurement of Goods/Services, while not for SOEs. SOEs will be able to easily surpass the regulations regarding the Procurement of Goods/Services when they can construct that infrastructure development is included in the acceleration criteria of national projects.

REFERENCES

1. Haldemann, Frank. (2005). Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law. Ratio Juris 18(2).
2. Hidayat, Arif. (2013). Penemuan Hukum Melalui Penafsiran Hakim dalam Putusan Pengadilan. Jurnal Pandecta 8(2).
3. Huijbers, Theo. (2014). Filsafat Hukum dalam Lintasan Sejarah. Yogyakarta: Kanisius.
4. Irawan, Towaf Totok. (2016). Kajian Potensi dan Peluang Pembangunan Infrastruktur di Sektor Sosial dengan Skema KPBU. Jurnal Riset Manajemen dan Bisnis 1(2).

March-April 2020
ISSN: 0193-4120 Page No. 10288 - 10294

5. Kementerian Perencanaan Pembangunan Nasional/Kepala Perencanaan Pembangunan Nasional Republik Indonesia. (2014). Rencana Pembangunan Jangka Menengah Nasional 2015-2019, Buku I Agenda Pembangunan Nasional.
6. Marbun, SF., et al. (2001). Dimensi-Dimensi Pemikiran Hukum Administrasi Negara. Yogyakarta: UII Press.
7. Muntoha. (2009). Demokrasi dan Negara Hukum. Jurnal Hukum 16(3).
8. ------. (2013). Negara Hukum Indonesia Pasca Perubahan UUD 1945. Yogyakarta: Kaukaba.
9. Mustopadidjaja. (1996). Kebijaksanaan dan Strategi Pembangunan Nasional dalam PJP II dan REPELITA VI. Kursus Reguler Angkatan XXIII SESKO ABRI 1996/1997, Bandung, 8 November 1996.
10. Rizal, Ami. (2015). Kajian Kritis tentang Cita Keadilan: Suatu Pendekatan Filosofi Hukum terhadap Penegakan Hukum dalam Konteks Positivisme Yuridis. Padjadjaran Jurnal Ilmu Hukum 2(1).
11. Saliger, F. (2004). Content and Practical Significance of Radbruch's Formula. Проблемифілософіїправа II.
12. Samad, Tiamur, et al. (s.a.). Kisah Perkotaan di Indonesia: Peran Kota dalam Pembangunan Ekonomi Berkelanjutan. Jakarta: World Bank Group.
13. Shidarta. (2018). Pembiaran, Impunitas, dan Anomali Hukum. <https://business-law.binus.ac.id/2018/04/22/pembiaran-impunitas-dan-anomali-hukum/>. 30 Agustus 2019.
14. Tohadi. (2015). Memperkuat Legalitas Sistem Perencanaan Pembangunan Nasional (SPPN): Reformulasi Penyusunan RPJP Nasional dan RPJM Nasional atau Revitalisasi GBHN? Diskusi "Mencari Format Revitalisasi GBHN Pasca Perubahan UUD 1945," Departemen Kaderisasi Cendekiawan Muda Ikatan Cendekiawan Muslim se-Indonesia (ICMI) dan Pusat Pengkajian Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI), Jakarta, 11 Juni 2015.
15. Utrecht, E. (1962). Pengantar Hukum Administrasi Negara Indonesia. Jakarta: Ichtiar Baru.
16. Wahyono, Padmo. (1986). Indonesia Negara Berdasarkan atas Hukum. Jakarta: Ghalia Indonesia.