

# Granting of Toll Road Concession Concessions that have Returned on Investment and Obtained Reasonable Benefits

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## Abstract

The granting of toll road concessions is a form of cooperation between the government and private sectors in order to develop toll road infrastructure, in which the private sectors is given the right to manage and collect toll (money) from toll road users in order to return capital investment and obtain a reasonable profit from the return on investment. However, of course it will cause problems if the government gives concessions for toll road concessions that have return on investment and obtained a reasonable profit. This study aims to analyze the legal implications of granting concessions by the government to private sectors related to toll road concessions that have returned on their investment and obtained a reasonable profit; as well as analyzing the operational management of toll roads that have returned on investment and obtained a reasonable profit. Through normative juridical research, the collection of literature in the form of secondary data, it was found that the granting of concessions to toll road that had fulfilled returns on investment and reasonable profits is not in accordance with the constitution which could harm toll road users. Regarding the concession of toll roads that have returned on their investment and obtained a reasonable profit, they should be able to be designated as public roads. However, if it continues to function as a toll road with insufficient state financial considerations, it can be managed independently by the government by involving local governments and the institutions it has formed without having to give concessions to private sectors. It is hoped that with independent management by the government, the toll rates charged on toll road users are relatively cheaper.

**Kata Kunci:** Implication, Operation, Toll Road

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## 1. Introduction

Bentuk kerjasama untuk perusahaan jalan tol yang dilakukan oleh pemerintah dengan bantuan pihak swasta, melalui skema Kerjasama Pemerintah dan Badan Usaha (KPBU) para pihak membagi tanggungjawab dan risiko dalam berbagai aspek yang berbeda sesuai dengan kemampuan masing-masing, masing-masing pihak memberikan kontribusi untuk proyek dan membagikan hak masing-masing pada saat proyek selesai.

The type of cooperation for toll road concessions which is conducted by the government with the support of the private sector, through the Public Private Partnership (PPP) scheme the parties divide responsibilities and risks in various different aspects according to their respective capabilities, each party contributing to project and share each other's rights when the project is complete and the contract is over.<sup>5</sup> PPP are certain to be implemented with the existence of an agreement, the agreement name is The

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<sup>5</sup> Yin Wang, Evolution of Public Private Partnership Models in American Toll Road Development: Learning Based on Public Institutions' Risk Management, Internal Journal of Project Management, 33 (3), 684-696, 2015, doi:10.1016/j.ijproman.2014.10.006, p. 7.

Concession Agreement.<sup>6</sup> The very long term of toll road concession is an important one.<sup>7</sup> The purpose of granting long concessions is an effort to return the investment that has been issued, a reasonable profit over the return on investment, depreciation costs, operating costs and project maintenance costs.<sup>8</sup> However, calculating the concession period requires a good calculation,<sup>9</sup> so that it does not harm the people.

In Indonesia, the determination of the concession period made by the government to the private sector, namely Jasa Marga Corporation, is based on the Decree of the Minister of Public Works No. 242/KPTS/M/2006 concerning the Stipulation of Granting of Concessions for Toll Roads that are operated by Jasa Marga Corporation, even though the four out of the thirteen toll roads that have been granted concessions have return on their investment and obtained a reasonable profit, based on Report on the Results of Examination of Toll Road Operational Management Performance by Audit Board of the Republic of Indonesia,<sup>10</sup> namely the Toll Road of Jakarta-Bogor-Ciawi, Jakarta-Cikampek, Jakarta-Tangerang, and Prof. Dr. Ir. Soedijatmo. The standard for the expiration of the concession period is determined based on Article 50 Paragraph (6) of the Law Number 28 Year 2004 concerning Road Law (Road Law), namely that it has fulfilled investment returns and obtains reasonable profit, the purpose of this article is referred to the private party managing toll road sections based on government decisions. The

position of the government as a regulator that must be followed by the private sector.<sup>11</sup>

Research on PPP has been done a lot, such as: Research conducted previously by (1) Graeme A. Hodge, *et.al.*, gave constructive recommendations to the government to be more accountable and effective in managing PPP, because PPP implementation needs to be supervised to ensure the government maintaining the standard of effectiveness in its policies to harbored the desire to appear attractive to seek citizen's attention (a political show of ability) and the private sector by building infrastructure.<sup>12</sup> (2) Nutavoot Pongsiri, also recommends in his research to supervise the implementation of PPP, and ensure that the implementation is based on the effectiveness, fairness and openness of the PPP scheme they use, because in developing countries its implementation still needs improvement.<sup>13</sup> (3) Rhys Andrews, *et.al.*, discussing PPP positively, its implementation must be related to effectiveness, efficiency and justice, compared to cooperation between private parties whose implementation is less related to effectiveness and fairness.<sup>14</sup> However, the three studies discuss the Cooperation between the Government and Business Entities, without discussing the legal implications for the stipulation that the concession granting of toll road operational management has met a reasonable return on investment and profit.

This paper is here to discuss unsolved issues, including by previous researchers, considering that this research focuses on the legal implications of the

<sup>6</sup> Samuel Carpintero, Toll Roads in Central and Eastern Europe: Promises and Performance, *Transport Reviews*, 30 (3), 337-359, 2010, doi:10.1080/01441640903017380, p. 345.

<sup>7</sup> Wei Xiong, Bin Chen, Huanming Wang, Dajian Zhu, Public Private Partnership as Governance Response to Sustainable Urbanization: Lessons from China, *Habitat International*, 95, 102095, doi: 10.1016/j.habitatint.2019.102095, p. 3-4.

<sup>8</sup> Mario Arata, Marcello Petrangeli, Francesco Longo, Innovative Approach to Implement Road Infrastructure Concession Through Public Private Partnership Initiatives: A Case Study, *Transportation Research Procedia*, 14, 343-352, 2016, doi: 10.1016/j.trpro.2016.05.086, p. 352.

<sup>9</sup> Nevena Vajdic, Goran Mladenovic, and Cesar Queiroz, Probabilistic Approach to Evaluate Acceptable Toll Rates in Road Concessions, *Transportation Research Record: Journal of the Transportation Research Board*, 2670, 9-15, 2017, doi:10.3141/2670-02, p. 10.

<sup>10</sup> Audit Board of the Republic of Indonesia, 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, the Toll Road Regulatory Agency, and Toll Road Business Entities in DKI Jakarta, West Java, Central Java, and Banten for the Fiscal Year 2014-2016, Number 01/LHP/XVII/01/2018, p. 73.

<sup>11</sup> Suhaiza Ismail, Critical Success Factors of Public Private Partnership Implementation in Malaysia, *Asia Pacific Journal of Business Administration*, 5 (1), 2013, doi:10.1108/17574321311304503, p. 16.

<sup>12</sup> Graeme A. Hodge, Carsten Greve, Public – Private Partnerships: An International Performance Review, *Public Administration Review*, 67(3), 2007, doi:10.1111/j.1540-6210.2007.00736.x, p. 554.

<sup>13</sup> Nutavoot Pongsiri, Regulation and public-private partnerships, *International Journal of Public Sector Management*, 15(6), 487-495, 2002, doi:10.1108/09513550210439634, p. 492-493.

<sup>14</sup> Rhys Andrews, Tom Entwistle, Does Cross-Sectoral Partnership Deliver? An Empirical Exploration of Public Service Effectiveness, Efficiency, and Equity, *Journal of Public Administration Research and Theory*, 20(3), 679-701, 2010, doi: 10.1093/jopart/mup045, p. 693.

determination of the concession granting of toll road operational management that have meet investment returns and reasonable profits by the government to private sectors. The legal implication of this will the author rely on the 1945 Constitution (the Indonesian constitution). The purpose of this research is in accordance with the previously stated statements, (1) to analyze the legal implications of the determination of the granting of concessions by the government to private sectors related to toll road concessions that have returned their investment and obtained a reasonable profit; (2) analyze the operational management toll roads method that have returned their investment and obtained a reasonable profit.

The author will do this research with test by examining Article 33 of the 1945 Constitution (Indonesian Constitution) in the implementation of PPPs related to toll road concessions that have returned on investment and obtained a reasonable profit. The aim is to determine whether it is legal or not to give concessions even though the investment returns and reasonable profits have been paid off from a constitutional point of view. A qualification that determines whether an agreement is legal or not through Article 1320 of the Indonesian Civil Code. The hypothesis found is that for roads that have met the two elements previously mentioned there is no need to grant concessions, because they can harm the toll road users who must be charged with tariffs for using toll roads in continuously, of course something like this contrary to the constitution.

## 2. Literature Review

### 2.1. The Welfare State and 1945 Constitution of Indonesian

Jeremy Bentham promotes the idea that the government has the responsibility to guarantee the

greatest happiness (or welfare) of the greatest number of their citizens.<sup>15</sup> According to Bentham, the essence of happiness is enjoyment and a life free from misery.<sup>16</sup> The government's moral incapacity or evil sacrifice are the most serious dangers for the survival of the principle of the greatest happiness.<sup>17</sup> Happiness is usually determined through Genetic Endowment, Economic Factors, Socio-demographic influences, Culture and Religion, and Political Conditions.<sup>18</sup> This principle is considered the basic moral that should be owned by everyone, including the government and private parties, this moral also has a strong relationship with Bentham's principle of truth.<sup>19</sup> An action is said to be a moral right and a moral obligation if it promotes maximum happiness and minimal pain due to the influence of that happiness.<sup>20</sup>

If it is correlated with the rule of law, then before making certain rules, legislators must deepen the study of sustainable human beings,<sup>21</sup> and even explore what is needed by society.

*"...the provision of an equal quantity of happiness for every one of them impossible: it being rendered so, by its being matter of necessity, to make sacrifice of a portion of the happiness of a few, to the greater happiness of the rest."*<sup>22</sup>

The author interprets that a maximum happiness is very difficult to obtain, a detailed regulation is needed for everything, especially Indonesia which is a Civil Law, it is necessary to regulate a happiness sharing scheme without disturbing the happiness of other parties, if it is linked to PPP, the government should limit the benefits obtained by the private sector, not just being said to be reasonable profits without explaining clear limits of reasonableness. The rule of law can be said to have a good value, if the impact resulting from the

<sup>15</sup> Edi Suharto, Maps and Dynamics of Welfare State in Several Countries. The seminar "Reviewing the Relevance of Welfare State and Breakthroughs through Decentralization of Autonomy in Indonesia" which quoted the writings of Bessant, Judith, Tony Dalton and Paul Smith, Talking Policy: How Social Policy in Made, Crows Nest: Allen and Unwin, 2006.

<sup>16</sup> Schmid, Von, Thoughts on State and Law in the 19th century, Pembangunan, Jakarta, 1961, p. 103-104.

<sup>17</sup> Fred Cutler, Jeremy Bentham and The Public Opinion Tribunal, Public Opinion Quarterly, 63(3), 321, 1999, doi: 10.1086/297723, p. 327.

<sup>18</sup> B.S. Frey, Economics of Happiness, Springer Briefs in Economics, 2018, doi:10.1007/978-3-319-75807-7\_3, p. 13.

<sup>19</sup> Philip Schofield, Jeremy Bentham on Utility and Truth, History of European Ideas, 41(8), 1125-1142, 2015, doi: 10.1080/01916599.2015.1077153, p. 1142.

<sup>20</sup> Marco E.L. Guidi, Jeremy Bentham (1748-1832). Handbook on the History of Economic Analysis Volume I, 2018, doi: 10.4337/9781785366642.00020, p. 95.

<sup>21</sup> J. S. Mackenzie, and F.C. Montague, A Fragment on Government, The Economic Journal, 1(2), 434, 1891, doi:10.2307/2956271, p. 436.

<sup>22</sup> Bentham, *Parliamentary Candidate's Proposed Declaration of Principles*. Dalam Johan E. Gustafsson, Bentham's Binary Form of Maximizing Utilitarianism, British Journal for The History of Philosophy, 26(1), 87-109, 2017, doi: 10.1080/09608788.2017.1347558, p. 2.

application of the rule of law itself is good, it generates a sense of happiness, and reduces suffering and vice versa is considered bad, if its application produces unfair consequences, losses and only increases suffering.<sup>23</sup> Bentham's previous principles led the author to the concept of the welfare state.

The notion of a Welfare State in Indonesia is formulated in a short and abstract phrase to "improve public welfare, to educate the life of the people" at the preamble of the 1945 Constitution, the fourth paragraph concretized in the articles of the 1945 Constitution, particularly as regulated in Chapter XIII (Education and Culture), and Chapter XIV (The National Economy and Social Welfare).<sup>24</sup> Article 33 of the 1945 Constitution explains that "*production which is carried out by all people under the leadership or ownership of members of the community, the welfare of society takes precedence*". For the sake of the realization of a welfare state, it must be started from upholding the rule of law, namely putting the law in the highest degree in state administration.<sup>25</sup>

In response to this, 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, especially Article 1 Paragraph (2) "Sovereignty is in the hands of the people and is implemented according to this Constitution".<sup>26</sup> With these discussions, the writer correlates that the creation of a welfare state for its people must lay a legal foundation and combine it with democratic values based on the sovereignty of the people and be carried out in accordance with constitutional regulations.

In this case the welfare state is a form of State protection for the community, through social development, social investment owned by the State, social services, and protection provided by the State in the form of broad and equitable social security.<sup>27</sup> So in this case the role of the government is needed

as a party given the mandate to provide welfare to the community, it is required to be careful in implementing a discretion, one of which is to determine a concession period given to private sectors to temporarily control the use of toll roads, because indeed this not explicitly regulated in statutory regulations. Determining the length of time for granting concessions presents a complexity, one of which must pay attention to the welfare of the community, such as determining the fees charged for toll road usage rates.<sup>28</sup>

## 2.2. Theory of Justice

The thoughts of John Rawls regarding justice, the idea of various principles of justice use his creation concepts, namely the original position and the veil of ignorance. According to him, the various human positions need to be returned to their original positions so that they can put aside differences in position, social status, level of intelligence, ability, strength, and so on. This original position refers to rationality, freedom and equality in regulating the basic structure of society.<sup>29</sup> The point of this original position is to equalize everyone regardless of their different positions.

The original position is expected to assuage human selfishness, egoist, and moralism, in order to arrive at a mutual agreement to realize the principles of justice. The condition that must be met to reach the original position is the "veil of ignorance".<sup>30</sup> Through this veil of ignorance, it is hoped that everyone will leave every difference in position by leaving their particular knowledge, so as to achieve a situation that puts everyone in the same position.<sup>31</sup> When everyone is covered by the veil of ignorance, Rawls tries to lead all of these people to understand the principle of fair equality, or what is called justice as fairness.<sup>32</sup>

The fair according to John Rawls has a connection with social justice, with the principles of social justice which consists of: providing a way to

<sup>23</sup> Lili Rasjidi & IB Wyasa Putra, *Law as a System*, Mandar Maju, Bandung, 2003, p. 117.

<sup>24</sup> IDG Palguna, *Welfare State Vs Globalization*, RajaGrafindo Persada, Depok, 2019, p. 153.

<sup>25</sup> See Article 1 Paragraph (3) 1945 Indonesian Constitution.

<sup>26</sup> Rachmat Safa'at, *Political Reconstruction of Food Law from Food Security to Food Sovereignty*, UB Press, Malang, 2013, p. 101.

<sup>27</sup> Edi Suharto, *Public Policy Analysis*, CV. Alfabeta, Bandung, 2012, p. 51.

<sup>28</sup> I D. G. Palguna, *Op.Cit.*, p. 74.

<sup>29</sup> Pan Mohammad Faiz, *John Rawls's Theory of Justice*, *Journal of Konstitusi*, Vol. 6, No.1, 2009, doi: 10.2139/ssrn.2847573, p. 140.

<sup>30</sup> Damanhuri Fattah, *Theory of Justice According to John Rawls*, *Journal of TAPIS*, Vol. 9, No. 2, 2013, <https://doi.org/10.24042/tps.v9i2.1589>, p. 42-44.

<sup>31</sup> *Ibid.*

<sup>32</sup> Pan Mohammad Faiz, *Loc.Cit.*

determine to decide right and obligation in basic social institution and determine the appropriate distribution of benefits and burdens of social cooperation.<sup>33</sup> If the social justice that Rawls aspires to be fulfilled, then society will be well organized. Society is well organized if it is not only designed to advance the goodness of its members, but is also effectively regulated in the public's conception of justice. This means that an organized society is a society that (1) everyone who accepts and knowing that others people receive justice of principle, and (2) Social Institutions are generally satisfactory and are generally known to fulfill this principle.<sup>34</sup>

When everyone has understood the concept of the original position, then two main principles of justice will be introduced. First, everyone has the equal rights to the broadest basic freedoms compatible with the other people's freedom. Second, social and economic inequality need to be regulated so that the most disadvantaged people get the maximum benefit, and all positions must be open to all people in a condition of equal opportunity.<sup>35</sup> In addition, health insurance is the focus of regulating social and economic inequality.<sup>36</sup>

The first principle is known as the equal liberty principle, for example political liberty, freedom of speech and expression. Meanwhile, the second principle is the difference principle and the equal opportunity principle.<sup>37</sup>

The principle of difference implies that social and economic differences are measured in order to provide the greatest benefit or advantage for the most disadvantaged (weak people). The term "socio-economic difference" refers to the unequal prospects of a person or more for welfare, income, and authority. Meanwhile, the term "the least fortunate" refers to those who have the least opportunity and authority. Then the "Equal Opportunity Principle" implies that socio-economic inequality must be

regulated in such a way as to provide a bridge and social position for all in order to create equal opportunities. It is hoped that people with the same skills, competencies and motivation can enjoy the same opportunities.<sup>38</sup> When these principles face each other, what must be prioritized is the first principle, namely the principle of equal liberty, then the second principle by preceding the equal opportunity principle, then the difference principle.<sup>39</sup>

Justice in law is divided into two things, namely justice according to legislation (legal justice) or justice in practice (practical justice). Justice based on legislation is based on written law and is in the statutory text.<sup>40</sup> This view of justice has a correlation with Bentham's utilitarianism, namely that welfare must be maximized subject to equal freedom, fair equality of opportunity, and minimum social needs that satisfy human beings.<sup>41</sup>

Justice can be created when everyone is guaranteed the same freedom and the same political status; equality of opportunity in economic and social competition (which is inevitable) will be distributed evenly in a free society; and Inequality in profits (for example the economy).<sup>42</sup>

Although basically the principle of justice in the contractual perspective belongs to Rawls which states that "principles accepted by free and rational people, interested in advancing their own interests will accept the initial position of equality defined by the policies of their association", is an opinion which is somewhat biased, because it deviates slightly from Rawls's previous ideas.<sup>43</sup> In the end, the principle of justice as fairness is intended to strive for social unity and social stability.<sup>44</sup>

Now everyone is expected to cling to the concept of justice, because in social life there must be

<sup>33</sup> John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, USA, 1971, p. 4.

<sup>34</sup> *Ibid.*, p. 5.

<sup>35</sup> Pan Mohammad Faiz, *Loc.Cit.*

<sup>36</sup> Damanhuri Fattah, *Loc.Cit.*

<sup>37</sup> Pan Mohammad Faiz, *Loc.Cit.* dan Damanhuri Fattah, *Loc.Cit.*

<sup>38</sup> Damanhuri Fattah, *Loc.Cit.*

<sup>39</sup> Pan Mohammad Faiz, *Op.Cit.*, p. 141.

<sup>40</sup> Inge Dwisvimiari, *Justice in Philosophy of Law Perspective*, Journal of Dinamika Hukum, Vol.11, No.3, 2011, doi:http://dx.doi.org/10.20884/1.jdh.2011.11.3.179, p. 529.

<sup>41</sup> Thaddeus Metz, John Rawls, Justice as Fairness: A Restatement, *The Philosophical Review*, 111(4), 2002, doi:10.2307/1556442, p. 619.

<sup>42</sup> Thomas Nagel, John Rawls and Affirmative Action, *The Journal of Blacks in Higher Education*, (39), 82, 2003, doi:10.2307/3134387, p. 82-84.

<sup>43</sup> Philip Pettit, *A Theory of Justice? Theory and Decision*, 4(3-4), 311-324, 1974, doi:10.1007/bf00136652, p. 312.

<sup>44</sup> John Rawls, *Justice as Fairness: Political Not Metaphysical, Equality and Liberty*, 145-173, 1991, doi:10.1007/978-1-349-21763-2\_10, p. 166.

at least some relationships that require the concept of justice.<sup>45</sup>

After gaining enlightenment through the elaboration of the theory of justice, the author feels that this theory is a very suitable theory to be juxtaposed with the welfare state theory in determining the legal implications of granting toll road concessions that have paid off investment returns and obtained a reasonable profit. Justice must be limited by the Pancasila (the basic foundation of Indonesian philosophy) democratic system, and social justice belonging to Pancasila, and will not exceed what has been regulated in the constitution and the foundation of the Republic of Indonesia.

### 3. Methods

The research applied is normative juridical research, which is research that examines legal issues from a legal perspective in depth on the created legal norms.<sup>46</sup> The normative legal research method is intended to examine the legal implications of granting toll road concessions that have returned their investment and have obtained reasonable profit. 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 descriptive sentences.

Furthermore, the compiled legal material is 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 to specific matters.

### 4. Results

#### 4.1. Legal Implications of The Determination of The Granting of Concessions by Government

<sup>45</sup> John Rawls, *Justice as Fairness*, *The Philosophical Review*, 67(2), 164, 1958, doi:10.2307/2182612, p. 194.

<sup>46</sup> Hadin Muhjadi and Nunuk Nuswardani, *Contemporary Indonesian Law Research*, Genta Publishing, Yogyakarta, 2012, p. 9.

<sup>47</sup> Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, *Social Service Review*, 67(1), 16–39, 1993, doi: 10.1086/603963, p. 36.

<sup>48</sup> Miriam Budiardjo, *Fundamentals of Political Science*, Revision edition, Gramedia, Jakarta, 2008, p. 55-56. In, Oman Sukmana, *Concept and Design of the Welfare State*, *Jurnal of Sospol*, Vol. 2(1), 2016,

to Private Sectors Related to Toll Road Concessions that Have Returned Their Investment and Obtained a Reasonable Profit

PPP can be said as the entry of parties that give priority to profit in a project aimed at the welfare of society. This process has occurred in America, namely the change from non-profit to profit in the implementation of the Welfare State.<sup>47</sup> Welfare seems so important in a country. Then it is said that even without ideology, a country must fulfill important elements, namely: implementing order, striving for people's welfare and prosperity, defense, and upholding justice.<sup>48</sup>

Government implementation based on the welfare state is carried out as the best possible counterweight, such as modifying economic income without hindering private sectors from doing business; protect the workforce without reducing employment; limit investor exploitation without triggering investor flight; imposes a tax on profits to finance the public interest without interfering with strikes on growth or incentives to invest. Governments should seek to regulate and exert social and political control on economies that are too fleeing, shunning, circumventing, or deviating from these rules.<sup>49</sup> The state really needs to intervene in terms of political and economic relations for the benefit of each individual so that their rights are fulfilled without having to take the rights of others.<sup>50</sup>

In order to create a welfare state in addition to the above elements, it turns out that public policies aimed at the welfare of the people are also an important thing.<sup>51</sup> The main function of the welfare state is the provision of welfare to society. The notion of welfare is basically related to the proportion of

<http://eprints.umm.ac.id/57994/7/Sukmana%20%20negara%20kesejahteraan%20kegagalan%20pasar%20kegagalan%20negara.pdf>, p. 108.

<sup>49</sup> David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, *European Journal of Sociology*, 55(03), 327–364, 2014, doi: 10.1017/s0003975614000162, p. 346.

<sup>50</sup> Fraz-Xaver Kaufmann, *Towards a Theory of the Welfare State*, *European Review*, 8(03), 291–312, 2000, doi: 10.1017/s1062798700004920, p. 294.

<sup>51</sup> Agus Suryono, *Public Policy for People's Welfare*, *Jurnal of Ilmiah Ilmu Administrasi*, Vol.6, No.2, 2014, doi: <https://doi.org/10.31334/trans.v6i2.33.g30>, p. 99.

justice for all people.<sup>52</sup> The ideas contained in the fourth paragraph of the Preamble of the 1945 Constitution are related to the elements of social welfare, the formation of Indonesia which is based on the Constitution must advance public welfare, educate the nation's life.<sup>53</sup>

Basically, the principle of a welfare state cannot be interpreted as a state that dumps business actors, or makes people dependent on the government, because they always rely on government assistance. But the level of concern of the government to maintain social relations between the state, the market (through business actors), families (citizens), and including voluntary groups (volunteers).<sup>54</sup> The author will describe the consequences of state which upholds the principles of the welfare state, should regulate to provide a sense of welfare to each party.

Furthermore, business actors residing in a country adhering to the principle of welfare are required to run their business not only with their own business interests, but also taking into account the interests of the community. The government must act fully in the interests of society; therefore, it must maximize social welfare, one of which is by carrying out economic efficiency.<sup>55</sup> This is even more so if the business actor is given the authority by the government to build public facilities, and/or the business actor is a state-owned enterprise (BUMN). Both the interests of the business actors and the interests of the community need to be woven harmoniously. It is hoped that from these ethical actions the business actor will have the freedom to act in his business, the business actor will be free from the shadow of feeling bad, because in addition to prioritizing business interests, also heeding the interests of the community, and fulfill its obligations to society.<sup>56</sup> Political and economic aspects are needed because the ability to issue policies rests with

the government, especially directing PPP to be more profitable for business actors and society.<sup>57</sup>

If it is related to legal politics, it can be understood that if there is a tendency that law is created in the framework of facilitating and supporting politics, as a result all regulations and legal products that are considered unable to bring about political stability and economic growth must be changed or abolished. As a political product, law can be used as a justification tool for the ruler's political vision. In fact, legislative activities contain more political decisions than laws, so that the legislative body is closer to politics than to the law.<sup>58</sup> Therefore, every regulation that is created must comply with the 1945 Constitution as the Indonesian constitution. The constitution as the most important basis which also includes aspects of welfare in it, according to the author's view, fulfills what Catherine O'regan says, namely the constitution consists of '3R', namely Responsibility, Respect, and Right.<sup>59</sup>

The determination of the granting of toll road concession is closely related to the existence of the political authority not only in the legislative sense but also in the executive sense, because the determination of a concession that is not explained in detail regarding each calculation (the calculated aspects) determines the time period of concessions, this is certainly against the principles of openness and the welfare of the people. The impression that the granting of concessions only collects the maximum profit and neglects the welfare of the people born from Article 33 of the 1945 Constitution.

Many aspects which are necessary for legislators to consider welfare, not only constitutionality but also wisdom, justice, and

<sup>52</sup> Rachmat Safaát, *Political Reconstruction of Food Law from Food Security to Food Sovereignty*, UB Press, Malang, 2013, p. 95.

<sup>53</sup> I D. G. Palguna, *Welfare State Vs Globalization*, RajaGrafindo Persada, Depok, 2019, p. 134.

<sup>54</sup> Mary Daly, and Jane Lewis, *The concept of social care and the analysis of contemporary welfare states*, *The British Journal of Sociology*, 51(2), 281–298, 2000, doi: 10.1111/j.1468-4446.2000.00281.x, p. 296.

<sup>55</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, p. 2.

<sup>56</sup> A. Ridwan Halim, *The Law of Karma in the World of Business (An Ethical Analysis of Ethics)*, without publisher name, Jakarta, 1988, p. 27.

<sup>57</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, p. 120.

<sup>58</sup> Abdul Latif and Hasbi Ali, *Politics of law*, Fifth printing, Sinar Grafika, Jakarta, 2018, p. 195.

<sup>59</sup> Ronald Dworkin, Francois Du Bois (Ed.), *The Practice of Integrity: Reflections on Ronald Dworkin & South African Law*, Faculty of Law University of Cape Town, Juta & Co. Ltd, 2005, p. 86.

appropriateness of restrictions, and the specific nature of these restrictions, need to be considered.<sup>60</sup>

The granting of toll road concessions returned on investment and obtained reasonable profit contrary to the principle of the power of state control over sectors production which are important for the prosperity and welfare of the people. The meaning of "state control" as referred to in Article 33 Paragraph (2) of the 1945 Constitution derives from the conception of the sovereignty of the Indonesian people over all sources of wealth "earth (land), water and natural resources contained therein", including the definition of public ownership by the collectivity of the people for the sources of the said wealth. The people collectively constructed by the 1945 Constitution mandates the state to establish policies (*beleid*) and actions of arrangement, regulation, management, and supervision for the greatest possible benefit of the people's welfare.

The granting of concessions for the operational management of toll road sections that have returned on investment and obtain reasonable profit is an arrangement that does not reflect an objective to prosper the people and is contrary to the basic principles and values contained in Article 33 Paragraph (2) of the 1945 Constitution. One of the reasons for the condition of the community which is still below the poverty line is that the management of important production sectors is no longer aimed at the prosperity of the people. The practice of privatization of production sectors, which should have been controlled by the state, is a concrete form of the act of transferring production sectors no longer controlled by the state, so that the impact is that many people are still in poverty line positions.

Everything related to the wealth of resources in Indonesia should only be intended for the only beneficiary, namely the community.<sup>61</sup> This thinking is linear with the formulation of Article 33 Paragraph (2) of the 1945 Constitution which regulates in principle the resources in Indonesia which are only intended for the prosperity of the people, not for others. Every binding norm must guarantee the realization of justice, certainty, and benefit, so that

the community can feel the impact of the value of the legal objectives. Fulfilling the welfare of society carried out by the state is an enforcement of the values of justice.

The responsibility of the state for the sectors of production that its controls is an absolute thing to be realized in improving the welfare and prosperity of the community. This accountability can be realized through various aspects, including through clear regulations (legal certainty) that lead to benefits that can be received by the community. The state's function in implementing Article 33 Paragraph (2) of the 1945 Constitution can be carried out properly.

Toll roads as public facilities that act in the name of community's interests are often privatized through methods that can deceive the community, such as stipulating the granting of concessions for the operational management of toll road sections that have return on their investment and obtained reasonable profit. Such conditions neglect the guarantee and protection of the interests of the community. In fact, guarantee of legal certainty is very necessary to be upheld, because legal certainty is part of the Indonesian constitution.<sup>62</sup> In the provisions of Article 28D paragraph (1) of the 1945 Constitution states that, "Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law". This provision according to the author shows that everyone, including people who are members of a community group is guaranteed by the constitution to get guarantees and protection for public facilities on behalf of the community, so that anything that is on behalf of the community is actually a constitutional right of society that cannot be disturbed by private interests or certain group. The involvement of the private sector in PPP plays an important role,<sup>63</sup> both positive and negative, which of course depends on the implementing principles of the private sector in running its business. Therefore, in the author's view, toll road concessions are more directed at inter-individual or inter-party practices that prioritize the maximum benefit for certain groups even though they are detrimental to the state and the

<sup>60</sup> Ronald Dworkin, Arthur Ripstein (Ed.), *Contemporary Philosophy in Focus*, Cambridge University Press, UK, 2007, p. 109.

<sup>61</sup> See Article 33 1945 Constitution Indonesia.

<sup>62</sup> John Braithwaite, Rules and Principles: A Theory of Legal Certainty, SSRN Electronic Journal, 2002, doi: 10.2139/ssrn.329400, p. 44.

<sup>63</sup> Caiyun Cui, Yong Liu, Alex Hope, Jianping Wang, Review of studies on the public-private partnerships (PPP) for infrastructure projects, *International Journal of Project Management*, 36(5), 773-794, 2018, doi: 10.1016/j.ijproman.2018.03.004, p. 17.

citizens.

#### 4.2. Analyzing the Operational Management Toll Roads Method that Have Returned Their Investment and Obtained Reasonable Profit

Operational management or operation of toll roads during the concession period provided by the government to private parties as concessionaire to collect toll roads based on tariff that has determined, in order to return investment and reasonable profit on investment return.<sup>64</sup>

Toll Road Operational Management, is one of the Toll Road Concession functions. Critical Success Factors or factors that critically determine the success of PPP consist of appropriate risk allocation and sharing, consortium of private parties, political support, public support, transparent procurement, favorable legal framework, stable macro-economic conditions, reliable competitive procurement, strong commitment from the government and private sector, the economic capacity of the private sector, technological innovation, open and constant communication, clarity of roles and responsibilities between parties, detailed project planning, provision of guarantees by the government.<sup>65</sup> The legal framework is an important part, therefore it is able to answer the ways of managing toll road operations through existing regulations in Indonesia.<sup>66</sup>

According to the PPP scheme, business entities (private parties) undertaking toll road concessions, whether undertaking all or part of toll road concessions, are stipulated through a toll road concession agreement, with the following regulations: "Auctions can include part or all of the toll road concessions scope. Business entities that obtain right to implementing toll road concession

rights based on the results of the auction shall enter into a toll road concession agreement with government".<sup>67</sup> It is authentically explained that "What is meant by part of the scope of toll road operation is that it can be in the form of the whole development, as well as operation and maintenance, or part of the construction and operation and maintenance, or operation and maintenance only".<sup>68</sup>

As understood, "Toll road operation includes funding, technical planning, construction implementation, operation and/or maintenance".<sup>69</sup> The operation of toll roads consists of toll road collection, use, temporary closure, acquisition and operation after the concession period, as well as other businesses that are in accordance with the aims and objectives of toll road operation".<sup>70</sup> According to article 39 Government Regulations Number 15 of 2005 Concerning Toll Roads, what is meant by toll collection is the collection of fees or rates that have been determined by toll road users.

The purpose of toll road management is to realize equitable development and its results as well as balance in regional development with due regard to justice, which can be achieved by fostering a road network whose funds come from road users. The purpose of toll road operation is to increase the efficiency of distribution services in order to support increased economic growth, especially in areas with high levels of development.<sup>71</sup>

The toll road operation can be carried out if it has been "functional enough to the technical and administrative provisions as a public road as stipulated by the Ministerial and related ministerial regulations; and feasible to function with regard to the toll system provisions covering toll collection

<sup>64</sup> 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, p. 106.

<sup>65</sup> Caiyun Cui, *et.al.*, *Op.Cit.*, p. 12.

<sup>66</sup> *Ibid.*, p. 12.

<sup>67</sup> Article 51 Paragraph (2) and (3), 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.

<sup>68</sup> Explanation, Article 51 Paragraph (2), 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.

<sup>69</sup> Article 19 Paragraph (1), 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.

<sup>70</sup> Article 36, 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.

<sup>71</sup> Article 2 Paragraph (1) and (2), 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.

systems and equipment for operating facilities as stipulated in a Ministerial Regulation.<sup>72</sup>

The toll road operation period is deemed to have been completed, if it has fulfilled Article 50 Paragraph (6) of the Road Law, namely that it has met the return on investment and obtained a reasonable profit.

In the event that the toll road concession period has been completed, it is determined to be a public road upon recommendation from Toll Road Regulatory Agency (BPJT) to the Minister for Public Works and Human Settlements (PUPR Minister).<sup>73</sup> Toll roads whose concession period has been completed can still function as toll roads by the Minister of PUPR on the recommendation of BPJT in terms of: "a. consider state finances for operation and maintenance; and/or b. to increase the capacity and development of the toll road concerned, the tariff rate for the toll road is based on the need for operation and maintenance costs and to increase the existing capacity and development of the toll road concerned".<sup>74</sup> BPJT (Toll Road Regulatory Agency), is an agency formed by the Minister of PUPR, is under, and is responsible to the Minister of PUPR.<sup>75</sup>

#### 4. Discussion

The granting the concessions of the toll road that have returned their investment and obtained reasonable profit by the government to private sectors does not reflect justice and welfare for the community and is not in accordance with the mandate of Article 33 paragraph (2) of the 1945 Constitution. The return on investment has returned and obtained reasonable profit for free or at low rates the toll tariff, but in fact, the opposite happens that toll road users are charged with a tariff which is still expensive and tends to increase.

Another aspect of creating social welfare is by enforcing the law that is just, so that it is hoped that it can create happiness and well-being.<sup>76</sup> The author views law enforcement not only narrowly at the judiciary, but when the law is made, the role of the community really needs to be heard as an evaluation material for the legal products that will be produced. Public legal awareness is one of the important foundations besides public trust in creating legal order.<sup>77</sup>

Justice for toll road users as those who are charged with tolls should not be ruled out, because there are three important actors in PPP apart from the government and the private sector, there is one important sector, namely Society and Citizens.<sup>78</sup>

The stipulation of the granting of concessions for the operational management of toll road sections that have return on investment returns and obtained reasonable profit, has the potential for abuse and embezzlement of important production sectors deemed important by the state for the prosperity of the people. This is because toll roads that have already return on their investment and have obtained reasonable profit should have changed their function the toll roads to become public roads but because of the determination of the granting of concessions, the impact of the community's rights has been deprived of the use of toll roads as part of important production sectors regulated in Article 33 Paragraph (2) the 1945 Constitution.

Justice must be upheld, if the implementation of justice is obstructed and does not materialize it will torment the people who seek justice, moreover what is obstructed or not materialized is a fundamental

<sup>72</sup> Article 37, 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.

<sup>73</sup> Article 50, 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.

<sup>74</sup> Article 51, 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.

<sup>75</sup> Article 1 Number 4, 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.

<sup>76</sup> AM. Mujahidin, Justice Restoration in the Reform Era Towards Community Welfare, *Majalah Varia Peradilan*, XXVI (301), Ikatan Hakim Indonesia, 2010, p. 72

<sup>77</sup> Sactjipto Rahardjo, Let the Law Flow: A Critical Note of Human Struggle and the Law, *Kompas*, Jakarta, 2007, p. 21. Dalam *Ibid*.

<sup>78</sup> Ieva Meidutė, and Narimantas Kazimieras Paliulis, Feasibility Study of Public-Private Partnership, *International Journal of Strategic Property Management*, 15(3), 257–274, 2011, doi: 10.3846/1648715x.2011.617860, p. 266.

interest.<sup>79</sup> "Fundamentals" can be correlated with "constitution" if they are linked to "regulation". Because basically the constitution is the most basic law or fundamental law.<sup>80</sup>

Disobedience to the constitution can torment a society seeking justice. In implementing the welfare state and principles of justice that lead to the welfare of the community, the task of the legal profession is very heavy. They must continuously touch with the values that develop in society, be part of these developments. The legal profession cannot exclusively and freely determine legal values or norms, because the professional ethics of parties related to law must integrate by integrating with the wider community, so that values that are considered good by society must also be used as a measure in professional ethics, and vice versa.<sup>81</sup>

The essence of justice according to John Rawls, provides an opportunity for each party to obtain the rights that should be owned by everyone, including the right to welfare. Justice is a natural thing that must be accepted by every human being, and must put aside selfishness (or selfishness above the group). Each party must have their respective principles that lead to selfishness, it is necessary to create moral persons and equalize each party so that each principle can be implemented without having to eliminate the rights of the other party based on the principle of benefit.

Regarding the management of toll roads that have already returned their investment and obtained reasonable profit, they should be designated as public roads. However, if it continues to function as a toll road with consideration of state finances for operation and maintenance; capacity building and development of the toll road concerned, can be managed independently by the government by involving local governments and the institutions it has formed without having to give concessions to private sectors. Thus, the toll road tariffs charged to users are relatively cheap and the community is not disadvantaged.

## 5. Conclusion

The legal implications of the determination of the granting of concessions by the Government to Private Sectors related to toll road concessions that

have returned on their investment and get reasonable profit, are not in accordance with the constitution as disregarded for article 33 paragraph (2) of the 1945 Constitution and are detrimental to toll road users because they must pay relatively expensive toll rates. Regarding toll roads that have returned their investment and obtained a reasonable profit, the government should be able to manage it by themselves by involving local governments and the institutions it has formed so that there is no need to give concessions to private sectors to manage them. However, if the government is forced to give toll road concessions to private sectors with consideration of insufficient state finances, the government must make careful calculations when conducting a feasibility study, so that the investment return value, reasonable profit value, management cost value, operation cost value, and the value of maintenance costs can be determined in advance, especially for toll roads where investment returns have returned and have obtained reasonable profit. It is hoped that with careful calculations by the government, a shorter concession period and cheaper toll rates can be determined so as not to harm the toll road users.

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<sup>79</sup> Muhammad Nuh, *Legal Profession Ethics*, CV. Pustaka Setia, Bandung, 2011, p. 284

<sup>80</sup> Kirk W. Junker, *Constitution, Futures*, 38(2), 2006, doi: 10.1016/j.futures.2005.04.018, p. 225.

<sup>81</sup> Suparman Marzuki, *Ethics and Code of Ethics for the Legal Profession of Law*, FHUII Press, Yogyakarta, 2017, P. 21.

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