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The ideal of justice as a theoretical reaction to loopholes on the regulation of the principle of freedom of contract in oil and gas construction contracts in Indonesia

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Abstract
This paper aims to find the ideal regulatory formula for freedom of fair contracting in Indonesia's oil and gas construction contracts. The phenomenon that appears from the dynamics of -the regulation of freedom of contract in oil and gas construction contracts shows that justice has not become a fixed point in contract negotiations, and if it is fair, it has not shown the balance between the two parties negotiating the contract. Empirical facts in several contract negotiations have become a lousy record in implementing oil and gas construction contract regulations. Using John Rawls's theory of justice and normative legal research methods are found: first, the ideal regulation of freedom of contract with justice must prioritise substantive justice by referring to the principles of balance and openness; second, in an ideal fair contract freedom arrangement, the intervention of political power needs to be eliminated so that the freedom to contract on oil and gas construction contracts does not create imbalances in the sense of justice based on egalitarian principles; Third, the regulation on freedom of equitable contracts in oil and gas construction contracts in Indonesia needs to embody the ethic of care which is the basis for non-legal aspects on the situated knowledge of oil and gas construction contract problems in Indonesia. The executor of the work will always experience imbalances and injustices, even though the contract exit mechanism, provisional sum, standardisation of maintenance, temporary stopping, and conformity between tender documents and contracts are ideal regulatory solutions.
So that policies for accelerating the development of oil and gas infrastructure will be constrained and result in less than optimal fulfilment of people's needs for oil and gas.

Keywords: Justice, freedom of contract, oil and gas construction, political law

Introduction

Oil and gas are essential human needs in their life activities. In a broader scope, the state as a community organisation has an obligation or ethical imperative to ensure the welfare of its people in meeting the needs, including the oil use and gas for these needs. In this position, the state is characterised as a *welfare* state with the principle of *staatsbemoeinis* – the active involvement of the state and government in the community socio-economic life to provide general welfare. It is known from the data that oil and gas has a significant contribution to the country's economy and makes it strategic in regulating legislation and a series of policies. The Indonesian government has carried out various legal efforts after the reformation by establishing Law No. 22 of 2001 concerning Oil and Gas and the establishment of the Executive Agency for Upstream Oil and Gas Activities; the exit of Indonesia from OPEC (Organization of the Petroleum Exporting Countries), the dissolution of BP Migas by the decision of the Constitutional Court; and the establishment of a Special Task Force for Upstream Oil and Gas Activities. This effort is a form of the government's seriousness in regulating the operation and supervision of the oil and gas sector.

In realising the strategic role of the oil and gas sector to meet the needs of the state industry and society, the Indonesian government's policies aim to increase the acceleration of oil and gas infrastructure development. It is intended to facilitate implementing oil and gas production operations to provide maximum benefits with a clear legal standing. For this reason, the thing that gets attention is the contract model for oil and gas construction services. Currently, Indonesia's oil and gas sector applies the EPCIC (Engineering Procurement Construction Installation and Commissioning) and O&M (Operation and Maintenance) construction contracts with the distribution of contract models on O&M contracts such as predictive maintenance preventive, corrective maintenance and general maintenance.

Referring to Article 1 paragraph (8) of Law Number 2 of 2017 concerning Construction Services, a construction work contract is understood as the entire contract document that regulates the legal relationship between service users and service providers in implementing construction services. From this definition, the construction contract agreement refers to applying legal principles, namely the 13 principles contained in Article 2 of the Construction Law as the basis for implementing construction services. In implementing this construction service, the principle of freedom of contract is one of the main principles governing the bargaining position between the parties making the contract. This principle aims to present a sense of justice for the bargaining position between the parties in a construction service contract agreement so that each party who makes the contract does not violate existing values. This equal bargaining position is considered capable of minimising and eliminating the abuse of position from parties who have a strong position against a weak party. Although the freedom of contract as regulated in the UNIDROIT Principles of International Commercial Contract (UPICC) has been applied in the implementation of oil and gas construction

services in Indonesia, the fact is that the regulation of freedom of contract with justice is still far from fair and does not reflect equality in the bargaining position in contracts with the result that inequality occurs. Profit. Another fact that becomes a problem in the regulation of freedom of contract is that the determination of the content of the contract is determined by the employer - the party who has a strong bargaining position - while the job executor is only tasked with reviewing to mitigate the risks posed in the implementation of oil and gas construction services.

Based on the background of this research, the problem in this research is formulated in the form of a question, namely, what is the ideal arrangement regarding the freedom of contracting justice in oil and gas construction contracts in Indonesia?

Literature Review

John Rawls's theory of justice is a theory of social justice that provides a basis for a sense of equality for society. In John Rawls's understanding, the main field of justice is the basic structure of society, and the main problem of justice is to formulate and provide reasons for a set of principles that must be met by a basic structure of a just society [1]. The principles of social justice then establish how the basic structure should distribute the prospect of obtaining essential goods. According to Rawls, basic needs include rights, freedom, power, authority, opportunity, income, and welfare. Thus, in the basic framework of the structure of society, primary goods can be viewed primarily as a means of pursuing goals and conditions for a critical and careful selection of one's goals and plans [2]. If applied to the facts of the basic structure of society, the principles of justice must do two things: first, the principles of justice must provide a concrete assessment of the fairness of institutions and institutional practices; second, the principles of justice must guide in developing policies and laws to correct injustices in the basic structure of certain societies [3].

Justice in Rawls's understanding is closely attached to the meaning of freedom in determining fundamental rights. In a more comprehensive understanding, justice is interpreted as the result of a fair agreement and bargaining because with the original position of the situation, everyone's relations are symmetrical so that this initial situation is fair between individuals as moral persons. It means that every person or citizen is obliged to obey an unjust rule even though it is built on a just constitution. John Rawls understands this problem with the concept of Original Position, Veil of Ignorance and Maximin Rule [4]. Original Position or initial Position is intended as an imaginary condition in which everyone is in an equal initial state. It is assumed that everyone has equal rights and access to choose the principles they will apply when they are returned to reality later in this initial state [5]. This original position helps make public policies, or for example, the constitution. Making a constitution illustrates that society, when the constitution was not made, was in a state of nature, in an equal condition, without class and hierarchy [6]. To achieve a situation that places everyone in the basic structure of society in the same position, they must abandon all particular knowledge. In such a situation, no one understands his position and knows the advantages of giving natural wealth and compensation. They also do not know what will happen to themselves or others. This kind of situation is called the veil of ignorance [7].

Veil of ignorance is a necessary condition so that the constitution, law or other public policies produced will be fair to every member of society. It is because everyone in the original position has equality and is unable to see reality because a veil of ignorance blocks so that the most rational decision making for the parties is the decision of the Maximin Rule, namely taking the maximum decision from the minimum choice. It implies a limitation of justice as "fairness", with the view that the government is responsible for caring for disadvantaged members of society [8]. Here, justice refers to the wise justice of each individual in the original human condition when they are in a standard starting line in a competition, not absolute equality in society by being levelled by a fully sovereign authority [9]. Therefore, Rawls rejects the utilitarian approach, which is very instrumental because it positions justice as a condition in which all people enjoy goodness and happiness equally in the life of the nation and state. For Rawls, justice as fairness is contractual, so it must be achieved in a rational, accessible, and democratic discourse. Through this discourse, people can arrive at understanding and implementing justice in their daily life.

According to Rawls, there are two concepts of justice, namely, the principle of the greatest equal liberty [10]. This principle includes freedom to participate in political life (right to vote, right to stand for election), freedom of speech (including freedom of the press), freedom of belief (including religious belief), freedom to be oneself (person), right to defend private property. Second, the second principle consists of two parts: the difference principle and the principle of fair equality of opportunity [11]. The principle of difference is that social and economic differences must be regulated to provide the most significant benefit to the most disadvantaged. The term socio-economic difference in the difference principle refers to inequality in a person's prospects to get the essential elements of welfare, income, and authority.

In contrast, the term most disadvantaged refers to those who have the slightest opportunity to achieve the prospect of welfare, income and authority [12]. The principle of fair equality of opportunity means that socio-economic inequalities must be regulated in such a way as to open bridges and social standing for all under conditions of equal opportunity. People with the same skills, competencies, and motivations can enjoy the same opportunities.

Method

This research is qualitative research with normative legal research that examines regulations, legal rules and legal principles with a justice approach to the freedom of contracting with justice. The nature of the research used is descriptive analysis in which research data is collected, processed, analysed and presented in a scientific narrative by providing a comprehensive description of the ideals of regulating the freedom of contracting justice in oil and gas construction contracts in Indonesia. This study uses secondary sources with data collection techniques in the form of document studies and literature studies such as a) Law No. 2 of 2017 concerning Construction Services; b) Law No. 22 of 2001 concerning Oil and Gas; c) Regulation of the Minister of Energy and Mineral Resources No. 53 of 2017 concerning the organisation and work procedures of the Special Unit for Upstream Oil and Gas Business

Activities; e) Presidential Regulation No. 59 of 2008 concerning the ratification of the Statute of the International for the Unification of Private Law; f) Code of Civil law, and g) Guidelines for Working Procedures for Oil and Gas Decree No. PTK 007/SKKMA0000/2017/S0 (Revision 04). This document is research data that will be analysed with the theory of justice in a legal approach, namely analysing regulatory loopholes in the freedom of fair contracts that intersect with legal politics to find the ideal setting in the freedom of fair contracts on oil and gas construction contracts in Indonesia.

Discussion

Indonesia's oil and gas is a resource with great potential for the prosperity of the country. The country's prosperity through the contribution of oil and gas can be realised if the legal aspects of oil and gas construction are paid more attention to. The basic argument for this statement is that there are still many fair contracts for freedom of contract, which are considered detrimental to job executors who have a weak bargaining position in oil and gas construction contract agreements. This exploration of the problem is essential because it includes three fundamental principles. First, the egalitarian principle that everyone (in this case, the work executor) is equal under the law and has complete freedom in every agreement regardless of their bargaining position or position. Second, the principle of distributive justice is that the construction contract agreement is not intended to be a monopoly of profits for the employer (in this case Special Task Force for Upstream Oil and Gas). It refers to the state's role as mandated by the Special Task Force for Upstream Oil and Gas to ensure justice for everyone (work implementers) following applicable legal provisions, and the ethics of justice are no exception. In this principle, the contract has three purposes: to enforce a promise and protect the reasonable expectations that arise from it, prevent enrichment (efforts to enrich oneself) that is carried out unfairly or incorrectly, and prevent certain kinds of harm [13]. Third, the ethical principle of care is an alternative to ethical rules in breaking away from the intervention of normative ethics of rights (rigid law). It is intended so that the law does not become a single standard in realising justice for freedom of contract. However, a situated knowledge approach is needed in which the concrete situation experienced by the contractor in the construction contract agreement becomes the basis for fairer freedom of contract justice.

In order to examine the regulation regarding the freedom of a fair contract, it is necessary first to understand the principle of freedom contained in Article 1338 Paragraph (1) of the Civil Code. Lexically, this principle is explained as all agreements made legally valid as law for those who make them [14]. It means that everyone is free to agree with anyone, regardless of its content, its form, as long as it does not violate the law, public order and morality [15]. Freedom of contract includes the freedom to make and not to make a contract; the freedom to choose the party with whom he wants to contract; freedom to determine or choose the cause of the contract to be made; freedom to determine the object of the contract; freedom to determine the form of a contract; and the freedom to accept or deviate from the optional provisions of the law [16]. As a principle with the value of freedom, it is not necessarily absolutely free in its implementation and implementation. It means that the freedom of contract is subject to certain limitations; however, a person's general right to contractually bind himself or herself and accept appropriate obligations in return makes it a fundamental right, and as such, is entitled to a high degree of protection. Thus, the principle of freedom of contract becomes an essential principle of an agreement or contract. The existence of freedom of contract in this agreement gives birth to an agreement between the parties who promise [17].

Observing the empirical facts on implementing the principle of freedom of contract in Indonesia's oil and gas construction contracts, several problems lead to injustice. At the contractual stage related to construction contract rules, several problems were standard agreements and exoneration clauses [18], amendments without the Indonesian language, backdate calendaring on works. At the stage of implementing contract rules, problems that occur are delays in billing, arrangement of advances, use of contract money and differences in tender documents, independent contractors, amendment processes, unilateral terminations, work freezes and the imposition of sanctions on losses in disputes with Contractor Partnership Contract or Special Task Force for Upstream Oil and Gas. The condition of this problem is a weak bargaining position of the contractors or work implementers and the multi-interpretation contract rules made by the work implementer, namely the Special Task Force for Upstream Oil and Gas.

Regarding this empirical fact, when referring to Article 1338 Paragraph (1) of the Civil Code concerning the principle of freedom of contract, several findings can be said to be a grey space in that principle. It becomes the cause of injustice, among others, first, the freedom to choose the party with whom he wants to make a contract implying the bargaining position of the employer, in this case, Special Task Force for Upstream Oil and Gas can exercise arbitrariness in determining with whom he wants to enter into a contract agreement. In a stronger bargaining position, there is always the possibility of inequality of justice because as an employer, Special Task Force for Upstream Oil and Gas can transfer the risks of the oil and gas construction services business and all insecurity to the employer to obtain maximum profits. Another possibility is that the selected work executor is not based on normative rules following the feasibility and capabilities in selecting oil and gas construction work clients and is more based on nepotism or mere capital interests. Second, the freedom to determine or choose the cause of the contract to be made; freedom to determine the contract object; the freedom to determine the contract form and the freedom to accept or deviate from the provisions of the law, which are optional in lexical interpretation tend to deviate from the provisions of the law. In negotiating oil and gas construction contracts, the possibility of having an optional can lead to a political game of law - where primary law according to the provisions of the law is ignored, and optional ones that are not primary sources are used as legal standing points in negotiating oil and gas construction contracts.

Another thing that is a serious concern is whether the cancellation of the contract takes into account the conditions of loss experienced by the work implementer considering that the implementing party is not in a position to determine the content of the contract, the object of the contract and the type of deviation from the law. In the powerlessness of the bargaining position, if the implementing party cancels the

construction contract agreement, the provisions following PTK 007 Rev.04 will be applied. Therefore, to achieve the goal of freedom of contract, the parties to the contract must have a balanced bargaining position. Freedom of contract will exist if the parties have economic and social balance [19].

All forms of injustice in contract freedom in oil and gas construction contracts cannot be separated from the legal politics in Indonesia. In short, legal products are born from politics. In the changing political atmosphere, legal products also influence and change. To understand injustice and normative justice in the matter of freedom of contract, the initial analysis that becomes the essential point of the whole is how Indonesia's Position in formulating its legal politics is. Indonesia has systematically compiled its legal politics with an ideological basis as an independent post-colonial state, namely the recht idea - the legal ideals contained in the constitution and the preamble to the 1945 Constitution [20]. It means that legal politics is a legal policy that is in line with the community's needs and produces justice for all elements of society. In other words, the non-legal aspect of society is a determining factor in the formation and content of a written law.

Even though the political law basis is aimed at the benefit of the community, the conception and political power are crucial factors in the politics of law formation, the politics of law determination and the politics of the application and enforcement of the law, concerning the function of institutions and the guidance of law enforcers to determine the direction, form and content of the law to be formed, the law that applies in its territory and regarding the direction of development of the law that is built to achieve the state's goals [21]. In this space of political power, transactions of political interests often occur to influence the government in its formation and the consequences according to the holder of power. Therefore, political forces in state political institutions such as political parties are likely to have influence and intervene in the making of legislation. The intervention of political interests in the management and utilisation of strategic state resources such as oil and gas will have the potential for management and utilisation that do not reflect the community's interests and tend to ignore the principles of law and justice for the job executors and employers. The characteristics of legal politics also colour the determination of justice in the regulation of freedom of contract. The application of freedom of contract is often accompanied by several conditions based on the legal politics of each country [22]. In applying freedom of contract in construction service contracts, the principle that is more concerned is legal certainty, the principle of good faith. Therefore, the value of the rule of justice has not and is insufficient to become its legal standing.

Regarding justice, two things that need to be considered are justice that comes from the transaction of rights and is stated in normative written law and justice that comes from the substance of concrete conditions (situated knowledge) in which a legal event takes place with the ethical imperative of caring. Justice is not merely a matter of normative law, but more than that, it is a moral imperative that grows from an ethical basis, namely the virtues of friendliness, readiness and concern for welcoming others in a more vulnerable situation or position. In this case, justice is commutative. The regulation on freedom of contract with justice has contradictory arguments. It is a contradiction because this freedom does not refer to its highest value, namely authenticity, but refers to a vital subject's power or dominant position in contract negotiations. It indicates the possibility of fraud, injustice in the negotiation process of oil and gas construction contracts.

Freedom means acting according to his wishes, not putting external pressure on the process, or authenticity, which sees how far the actions of an employer and job executor are congruent with their beliefs and desires, even though they are under pressure from outside. It can be seen in the definition of Article 1601 B of the Civil Code that it is as if only the implementing party binds themselves and must excel, while both the work implementer and the employer bind themselves to each other by fulfilling their obligations and obtaining their rights. In Article 1338 Paragraph (1) about Civil Code, the principle of freedom of contract explains that as long as it does not violate the law, everyone is free to agree with anyone, regardless of its content and form [23]. However, if it is traced to the principle's scope, as stated by Sutan Remy, there is a tendency to violate the law because it is made in an optional form. This contradictory argument in the principle of freedom of contract gives employers legal freedom (Special Task Force for Upstream Oil and Gas) to determine with whom arbitrarily, cause, object, the form of the contract according to their interests or benefits without paying attention to the fundamental rights of the job executor. Even if the employer has legal standing or justice based on the results of the agreement with the job executor, this justice does not entirely fulfil the fundamental rights of the job executor. As a result of its determination, the management and utilisation of oil and gas resources do not benefit the community's life.

Justice is upstream of the law, and justice also leads to the law. It also means that justice shows justice as an attribute of law and as an act of determining the right to punishment [24]. If the justice referred to in the regulation of freedom of contract is the result of fair agreement and bargaining because of the actual situation of symmetrical relations between all people, then the results obtained can be unequal or unfair with the argument that there is total compliance that is binding on the law. A law that is unfair but procedurally legal is considered to meet the values of justice because it involves the implementing parties of oil and gas construction work with a bargaining process [25]. Fair is not a procedural issue in following the applicable normative legal rules (Civil). However, fairness is also meant by taking into account the situation or taking into account non-legal aspects that grow and whose substance affects the implementation of construction contracts in their management and utilisation in a rational, honest, non-discriminatory manner based on conscience and care. With substantive justice, freedom of contract can provide a sense of justice and accelerate the development of oil and gas infrastructure so that the wider community can enjoy it for their daily needs.

In this substantive justice, the ideal freedom of contract arrangement in oil and gas construction contracts is possible [26]. Some of the primary arguments are. First, substantive justice stems from a sense of injustice caused by procedural rules or merely normative law. From this situated knowledge, balance and openness become basic principles that want to release the implementing party from the burden of obligations that bind him and release the employer from the burden of obedience to political power so that he stands

in a balanced and equal position as himself by leaving himself (the existence of legal subjects). Balanced means that facticity in legal historicity and bureaucratic background inherent in job executors and employers are eliminated to become fully intact subjects in construction contract negotiations. Another meaning of this principle is the balance between the ability of service providers or work implementers with their workloads which are evaluated somewhat based on their feasibility to provide opportunities for proportional distribution of employment opportunities for service providers or work implementers.

On the other hand, the principle of openness refers to a position without intervention, without domination, without regard to the bargaining position of both parties to share information, concepts, understanding contractual clauses so that transparency can be realised and give confidence to both parties to be able to carry out their obligations optimally with full responsibility. Responsibility and integrity obtain certainty and fairness of their rights and make corrective efforts to avoid deviations due to the emergence of intervention and domination of the influence of the bargaining position in the negotiation of oil and gas construction contracts [27]. On this basis, the regulation of freedom of contract must pay more attention to the substance and concrete situation of a construction contract by prioritising the principles of balance and openness.

The ideal arrangement on oil and gas construction contracts can be made with several arrangements that pay more attention to the normative juridical aspects of contract documents and practical juridical aspects in the implementation of contract rules such as the use of the contract exit mechanism - to provide certainty of the time of contract issuance and the clarification process of standard contract forms. Along with the norms to anticipate any discrepancies between contracts and tender documents [28]. Another thing is the provisional sum arrangement in which only the unit price is bound in the contract, while the volume of work stated in the BQ document is sufficient to estimate the quantity to provide ease of flexibility when changes occur in the execution of work. Applying the SPK system by basing its signing on the financial authority level may also be an ideal solution regarding amendments to reduce the contract administration process and its implementation. This solution thinking can be ideal by mapping the main problems and their derivatives on the contract rules and implementing the construction contract rules. However, the idea of regulating freedom of contract is not just a matter of replacing or improving mechanisms and systems that are detrimental or unfair.

Moreover, the type and logic of justice that forms the philosophical framework of the principle of freedom of contract needs to be radically and changed to provide the basis for an egalitarian bargaining position for employers and job executors in construction contracts so that they are neutral from the intervention of political power, integrity and responsibility [29]. His responsibility is to comply with the law's mandate and stand on self-authenticity, namely an ethical attitude based on conscience, care and virtue. Changing is also intended not to provide space or loopholes for the employer's bargaining position's abuse and domination of power, which is more potent in normative juridical law. Even though they are in a 'binary opposition' position in oil and gas construction contracts, the employer, namely Special Task Force for Upstream Oil and Gas and the work implementers, namely the construction service contractors, are elements of accelerating the development of oil and gas infrastructure. By carrying out their respective responsibilities, the proper management and utilisation of oil and gas resources for the welfare of the people can be realised.

Conclusion

The oil and gas sector is a strategic sector with a positive contribution to the country's Gross Domestic Product (GDP). For this reason, it is necessary to accelerate the development of oil and gas infrastructure so that the distribution of oil and gas utilisation runs smoothly to meet the needs of people's lives. In implementing this strategic policy of the oil and gas sector, oil and gas construction services as the executor of work need to get justice in regulating the principle of freedom of contract. Empirical facts show that job executors experience injustices due to a low negotiating bargaining position by referring to Article 1338 Paragraph (1) of the Civil Code both in contract rules' contractual and implementation stages. Some of the problems that cause injustice include standard agreements and clauses of exoneration of amendments without the use of Indonesian language, backdate dating at the start of work in the contractual stage and delays in billing, arrangement of advances, use of contract money, differences in tender documents, independent contractors, the amendment process, unilateral termination. There is a work freeze and sanctions on losses in disputes with Contractor Partnership Contract and Special Task Force for Upstream Oil and Gas in the implementation stage of contract rules. It is necessary to have an ideal arrangement regarding the freedom of contract To solve the problems in oil and gas construction contracts and injustice. This ideal arrangement needs to revise the type of justice used in the construction contract. Namely not only using the point of view of procedural justice - as the result of the agreement between Special Task Force for Upstream Oil and Gas as the employer and the contractor as the executor of work but also prioritising substantive justice by paying attention to situated knowledge that grows and develops in concrete conditions of contractual creation and implementation of contractual rules (non-legal aspects). By changing this logic of justice and eliminating the intervention of political power to employers in oil and gas construction, the regulation on freedom of contract in oil and gas construction in Indonesia can provide a perfect sense of justice for job executors. It will ultimately accelerate the development of oil and gas infrastructure. Thus, the fulfilment of needs by utilising oil and gas can provide welfare for the Indonesian people, and the function of the state as a *welfare* state can be realised.

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