

LAW LIABILITY OF CONSTRUCTION FAILURE IN INDONESIA

By Jonaedi Jonaedi



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ABSTRACT

Construction is one of the important things in a country. It is a sector which has important role in developing the country. The building of house, road, bridge, irrigation dam and others are the example of the construction. However, the construction does not always go well, it may be failed sometimes. This article aimed to discuss about the law liability of the construction failure in Indonesia. The regulation about Construction Service had written on Law Regulation No.18/1999 and Government Regulation No.29/2000 along with the regulation of construction failure. The Law Regulation No.18/1999 then renewed to Law Regulation No.02/2017. This renewal happened because the construction service community worried about being sentenced regarding on the construction failure. Therefore, in Law Regulation No.02/2017, the criminal sanction for construction service community has been deleted. Thus, the construction failure could be brought to the legal system based on the construction work agreement between the service provider and service user.

Key words: law liability, construction failure, construction service, legal system

Cite this Article: Dr. Ismu Gunadi Widodo, Dr. Eddy Pranjoto W, Dr. Jonaedi Efendi, Law Liability of Construction Failure in Indonesia, *International Journal of Civil Engineering and Technology (IJCIET)* 9(11), 2018, pp. 2363–2371.

<http://www.iaeme.com/IJCIET/issues.asp?JType=IJCIET&VType=9&IType=11>

1. INTRODUCTION

The presence of Construction Service Regulation No.18/1999 in the Law Regulation of Republic Indonesia has been followed up by the Government Regulation No.28/2000 on Business and Community Role in Construction Service, Government Regulation No.29/2000 on Construction Service Implementation and Government Regulation No.30/2000 on the Implementation of Construction Service Development [1]. As mandated in Construction Service Regulation Article 31 Paragraph 3 and produced the legal products for Indonesian

society The Construction Services Development Board of Indonesia (LPJK) was made to be responsible on the implementation of construction regulation. Thus, the Department of Public Works created a structural unit of echelon I, namely The Development of Construction and Human Resources Board [1].

Construction service is a sector which has important role in Indonesia [2]. The development of the construction can be seen through this sector, such as the construction of normal and multi-storey building, apartment, shopping mall, residence, bridge, road, factory, dam, irrigation dam, power plants along with its transmission and distribution and other building constructions. The estimation budget on construction service in Indonesia for both public and private enterprise has larger amount every year. For instance, in 2003, the construction service fund has reached 159 trillion rupiah with 55% for private enterprise and 45% for public enterprise [2]. Therefore, in Susilo Bambang Yudhoyono and Jusuf Kalla regime, the infrastructure development has been planned earlier as a tool to push the economic growth. The Infrastructure Summit in the early year of 2005 had become the actual fact of Government's seriousness in forming the infrastructure in Indonesia [1].

Considering on the insufficiency of the valid data, the exact market value of construction service was difficult to define. It was also reflecting the unavailability of the appointed Department to monitor the whole construction activity. Indonesian construction service has developed along with the development in Indonesia even it had been flourished since the colonialism era. Historically, the Government of Dutch East Indies and England were established some of the important infrastructures in Indonesia, such the Daendels road which run across Java from the west coast at Anyer to the east coast at Panarukan. Moreover, the railway track right now was the production of the Dutch in colonialism era. Some evidences were found about the double track railway in some certain places. Ironically, in the post-independence and construction era nowadays, the length of the railway track is shrinking drastically.

The Infrastructure development which evoked the sector of construction service was continued to grow after Indonesia's independence. The sector of construction service was able to produce reliable business communities, from either the stated-owned enterprises of Indonesia (BUMN) or private enterprises. The name of *Waskita Karya, Hutama Karya, Adhi Karya, Nindya Karya, Wijaya Karya*, Residence Building, *Brantas Abipraya* and *Istaka Karya* in construction sector, and *Yodya Karya, Virama Karya, Bina Karya, Indah Karya* and *Indra Karya* as the construction plan and supervision service along with other stated-owned enterprises of Indonesia (BUMN) which involved in an integration job was known in public. While in private enterprises, *Jaya Konstruksi, Total Bangun Persada, Bumi Karsa*, was popular, had grown up and survived until now.

In its journey, the regulation of Construction Service had experienced some problems, such as the requirement of business which obligate the business enterprise having the Business Entity Certificate (SBU) and Expertise Certificate (SKA) or Job Skill Certificate (SKT) for individual expertise. These certificates were required to be registered in Construction Services Development Board of Indonesia (LPJK). However, the competition of the auction occurred due to some factors. From the observation, it was caused by the lack preparation of auction's committee to work professionally and to understand the procedure of the construction service. Further, the indication from the graduation of the auction's committee to have the procurement certificate followed by more than 400.000 people and only had 10% of people who passed for graduation.

Another problem was the implementation of the construction done and supervised by Regional Work Unit (SKPD) had some weak quality control or the apprehensive of work quality, and the construction timing that still requesting on schedule postponement. In

addition, the naming of the work unit which had its core in regional government was different from the mandate in Presidential Decree No.80/2003 for State Budget (APBN). Nevertheless, until this time, there is no instance which tries to fix and to straighten the problem and makes the implementation of the construction prone to the manipulations either in its planning or its application in the field.

2. THEORETICAL FRAMEWORK

Liability is the concept used for explaining the state role or cooperation to conform the law regulation or to take care of social aspects side from legal obligation. The presence of law liability forms the principles that include the liability based on the fault or known as fault liability, the reputable presumption of liability and the absolute liability [3]

The first is the principle of fault liability. It is the reaction against the absolute liability in primitive society which applied the formula of '*a man act at his peril*' in their legal system. This formula means that any kind of acts that harm people will be blamed as an outrage. In other words, a person has to be responsible for every possibility caused by his act in harming people [4]. Then, the legal system slowly starts to put attention on exculpatory considerations as the influence of moral philosophy from religious teaching. It tends to aim on the confession of moral culpability as the right basic for against the law. The absolute liability principle as a punishment to avoid the act of revenge is then changed into the liability based on the fault. Thus, the moral responsibility has changed into legal responsibility [3].

The second is the presumption of liability. The presumption of liability is the principle to burden the proof switch from plaintiff to defendant. But, if the defendant can proves that his side has already taken all the necessary actions to avoid the prejudice, then the absence of fault can occur [3].

The third is the absolute liability principle that views the fault as an irrelevant thing to be issued [3]. This principal is the heritage from the old legal system as the consequence of '*a man acts at his peril*' or '*he who breaks must pay*' formula. It means that everyone must be responsible for everything that he had done. In that era, the main legal job was to maintain the harmony between individuals by providing a solution that can prevent the act of revenge.

3. THE PROBLEM OF CONSTRUCTION SERVICE IN INDONESIA

The Construction Service in Indonesia still had many problems in its journey. The problem of cost overrun and the time delay were still dominating the implementation. Dipohusodo categorized the problem of the construction service process in two groups. The first group was the problem that related to the factor of cost, quality and time [5]. For example, the delayed job leading to the swollen cost and incompatible quality from the defined standard. The second group was related to the coordination and control system to all management functions, such as the lack integration among the taskmasters, the consultants, contractors, suppliers and the construction workers. Therefore, an engineer should be professional and able to make the right calculation for the technical area and the non-technical area related with the construction he is responsible of. An engineer should be able to minimize the risk to the zero-risk level for the slow progress and the incompatible standard quality. However, if these things are ignored, the construction service will be in danger.

Viral news on social media related to the collapse of Pasuruan – Probolinggo freeway had recently become the hot topic in society. The collapse of Pasuruan – Probolinggo freeway as the national project caused one person dead and the other one had serious injury. The temporary result of the investigation showed that there was problem in installation of the concrete buffer. The fourth concrete buffer was suddenly shaking and hitting the other three buffers and made the freeway collapse [6]. Another event attracting public attention was the

collapse of Mahakam II Bridge in East Kalimantan in November 2011. For this case, police had assigned a contractor as the suspected.

However, those events were not only happened in Indonesia, but also happened in other developed countries such the collapse of Montreal freeway overpass in Canada in 2006, written in nikifour.co.id [7]. It happened because the rebar support did not properly design and built with low quality concrete. The collapsed freeway construction had killed five people and six people had serious injury.

Construction failure was always identic with legal problem, especially the criminal law. If there is an incident happened or the building did not function properly, then it should be processed based on the criminal justice system. These consequences made the business communities, especially the consultant and the contractor reluctant to do the project. Then, it leads to the delay of the national development. Therefore, it is needed to know the position of the criminal law especially in the field of construction service.

One of the bad habit regarding on the construction failure of a project was the related parties were always had a way to secure and save their people rather than to solve the problems. Even the natural event had become the scapegoat to cover the human error in construction failure. All the parties should realize and started to follow the Law Regulation. Furthermore, all the parties that involved in the construction service should realize the importance of following the Law Regulation rather than being busy to safe their own lives and scarified the state and public materiality.

4. LIABILITY REGULATION FOR CONSTRUCTION FAILURE

4.1. Law Regulation of Republic Indonesia No. 18/1999

The construction failure was discussed in article 25, 26, 27, and 28 in the chapter IV of the Law Regulation No.18/1999 about the Construction Service [8]. The article 25, paragraph 1 read as the service user and the service provider should be liable for the building failure. Paragraph 2; the building failure that become the service provider's liability as referred to in paragraph (1) should be counted upon the final delivery of the construction work for a maximum of 10 (ten) years. Paragraph 3; the failure of building construction as referred to in paragraph (2) should be determined by the third party as the specialist appraiser.

Article 26, paragraph 1; If the building failure was caused by the construction planner's or supervisor's mistake and proved to cause damage to other party, then the construction planner and supervisor should be liable based on the field of profession and subjected to pay compensation. Paragraph 2; if the building failure was caused by the contractor's mistake, and it proved to cause damage to other party, the contractor should be liable based on the field of profession and subjected to pay compensation.

Article 27, In case of building failure due to the service user's mistake in managing the building and proves to cause damage on other party, the service user should be liable and subjected to pay compensation.

Article 28, The conditions regarding on the period and specialist appraiser as referred to in article 25, liability of the construction planner, contractor, and supervisor as referred to in article 26 and the service user's liability is referred to in article 27 should be regulated further in Government Regulation.

While the sanction was written in the chapter X in article 41, 42, and 43 of the Law Regulation No.18/1999 about the Construction Service. The article 41 reads as the organizer of the construction could be subjected to the administrative and or criminal sanctions for violation of this Law [8].

Article 42, paragraph 1; the administrative sanctions as referred to in article 41 that could be subjected to the service provider are; a written warning, temporary suspension of the construction work, restriction on business and or profession activities, freezing on business and or profession licenses, retraction on business and or profession licenses. Paragraph 2; the administrative sanctions as referred to in article 41 that could be subjected to the service user are; a written warning, temporary suspension of the construction work, restriction on business and or profession activities, temporary prohibition on using the construction result, freezing on business and or profession licenses, retraction on business and or profession licenses. Paragraph 3; the provision regarding on the management and application of the administrative sanctions as referred to in paragraph (1) and paragraph (2) should be regulated further in Government Regulation.

Article 43, paragraph 1; whoever engages on the construction's work planning without complying with the technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 10% (ten percent) of the contract value.

Paragraph 2, whoever engages on the construction's work implementation in contradiction to or not in accordance with the determined technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 5% (five percent) of the contract value.

Paragraph 3, whoever engages in supervising the construction's work implementation and deliberately gives opportunity to other people who implement a construction work to do a deviation of the technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 10% (ten percent) of the contract value.

4.2. Government Regulation of Republic Indonesia No.29/2000

The construction failure was discussed in chapter V, article 31, 32, 33, and 34, of the Government Regulation of Republic Indonesia No.29/2000 about the Implementation of Construction Service [9]. Article 31; Construction failure is a condition of construction result which not in accordance with the work specification as agreed upon the partial or whole construction work's contract as a consequence of the service user's or service provider's mistake.

Article 32, paragraph 1; construction planner is free from the liability to change or fix the work failure as referred to in article 31 which caused by the failure of the construction service user, contractor, and supervisor. Paragraph 2; contractor is free from the liability to change or fix the work failure as referred to in article 31 which caused by the failure of the construction service user, construction planner, and construction supervisor. Paragraph 3; construction supervisor is free from the liability to change or fix the work failure as referred to in article 31 which caused by the construction service user, construction planner, and contractor. Paragraph 4; construction service provider is obliged to change and fix the construction work failure as referred to in article 31 which caused by the failure of the service provider with own expenses.

Article 33, Government is authorized to take a certain action due to the construction work that caused damage or interference to public safety.

Article 34, construction failure is a condition of non-functional building in partial or whole aspect of technic, benefit, occupational safety and health, and or public safety as an impact of the service provider and or the service user after the final delivery of the construction.

4.3. The Deletion of Criminal Sanction in Law Regulation No.2/2017 on Construction Service

Through the discussion on March 2016 until December 2016, the People's Representative Council (DPR) had validated the draft bill of Construction Service (RUU). The Law Regulation No.2/2017 of Construction Service had changed the Construction Service of Law Regulation No.18/1999 that had been valid for about 17 years long. This regulation had arranged and accommodated the legal necessary of empirical practice in society and legislation dynamic based on the management of construction service. The complex development of construction service and the higher level of construction service competition, either in national or international, were needed a legal protection. The legal protection had function to guarantee the legal and business certainty in construction service, especially the protection for service user, service provider, construction worker, and construction service community. One of the recent change in Law Regulation No.18/1999 was the deletion of criminal requirement. It happened because the construction service perpetrator was afraid of being criminalized while doing the construction projects, especially the government project. This fear then impacted on the minimum number of Regional Budget (APBD) and State Budget (APBN) realization. Hence, it was emphasize more to the administrative sanctions and the civil aspect.

The deletion of criminal requirement in Law Regulation No.2/2017 has been designed on behalf of the national business community and has purpose to realize the Government projects. It could be seen on the number of State Budget in 2017 for about 377, 8 trillion rupiah for road construction, bridge, airport, harbor, railroad, and terminal. Thus, it was unfortunate if the fund cannot be used because of the construction service community had paranoia on being sentenced. The criminal law police in the field of construction service seemed to be marginalized by the term of civil law, administrative, arbitrate, and so on.

One of the basic change on Law Regulation No.2/2017 about the Construction Service as the replacement of Law Regulation No.18/1999 was the sanctions due to the construction failure. In Indonesian construction record, one of the construction failure cases that gained public attention was the collapse of Mahakam Bridge II in East Kalimantan on November 2011. It was followed by giving criminal sanctions which sentenced to the technical activity officer, the budget user and the project manager.

The concept of construction failure according to the Law Regulation of Construction Service 1999 can be seen in quotation below;

As a building condition, which after being transferred by the service provider to the service user, became non-functional building, either in whole or in partial, and/or not compatible with the written requirements in construction work contract or the deviant utilization as the impact of service provider's and/or service user's failure.

While in the Law Regulation of Construction Service 2017, construction failure was defined as;

A condition of collapsed building and/or non-functional building after the final transfer of the construction service result.

The requirement of construction failure which included in the Law Regulation of Construction Service was the failure of the construction has been handed to the service user which not included on the building collapse before the final transfer. Thus, time of the final transfer of the construction service's result was becoming the crucial thing wherein in its practice, proved by written evidence as managed in the construction contract.

There were two related parties in the construction contract as the legal fundamental in the implementation of the construction; a service provider and a service user. In Law Regulation

No.02/2017, service provider was considered to be liable in construction failure caused by the implementation of construction service which is not following the standard of security, safety, health and continuity [10]. Meanwhile, the service user was considered to be liable on the construction failure happened after the passing time period of the service provider's liability. The time limit of the liability of construction failure was written to the construction work contract based on the age plan of a construction. The age plan was more than 10 (ten) years, hence the service provider only responsible for the construction failure for about 10 (ten) years counted from the final date transfer of construction service.

Either the Law Regulation of Construction Service 1999 or the Law Regulation of Construction Service 2017 was realized that construction service is a complex thing which involves many things. Therefore a party enable to see objectively and professionally related on the liability of construction failure was needed. Moreover if the construction failure was caused by the service provider, considering that the service provider in construction service involves more than one function. As what was written on Law Regulation of Construction Service No.18/1999, the types of construction business were consisting of the construction planning business, construction implementation business and construction supervising business held by each construction planner, implementer and supervisor [7]. While on the new Law Regulation of Construction Service No.02/2017, the types of construction service were composing of construction consultation business, construction job business and integrated construction job business. Thus, both of the Construction Service Law Regulation appointed on an expert evaluator to do those functions in order to define the cause of the construction failure and the party that liable to the failure.

Below is the form of liability on construction failure by the service provider;

Table 1 The Liability on Construction Failure

| | Construction Service Law Regulation 1999 | Construction Service Law Regulation 2017 |
|-------------------------------|--|--|
| Building Replacement / Repair | | Article 63 Service provider is liable to change or fix the building failure as referred to in article 60 paragraph (1) which caused by the service provider's mistake |
| Compensation | Article 26 If the building failure was caused by the construction planner's or supervisor's mistake, and it proved to cause damage to other party, the construction planner and supervisor should be liable based on the field of profession and subjected to pay compensation. If the building failure was caused by the contractor's mistake, and it proved to cause damage to other party, the contractor should be liable based on the field of profession and subjected to pay compensation. Article 27 In case of building failure due to the service user's mistake in managing the building, and proves to cause | Article 67 The service provider and or the service user is are liable to pay the compensation due to the construction failure as referred to in Article 65 paragraph (1), paragraph (2), and paragraph (3) The provision regarding on the compensation as referred to in paragraph (1) is regulated in Government Regulation |

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| | | |
|--------------------------|--|--|
| | <p>damage on other party, the service user should be liable and subjected to pay compensation.</p> <p>Article 28</p> <p>The conditions regarding on the period and specialist appraiser as referred to in article 25, liability of the construction planner, contractor, and supervisor as referred to in article 26 and the service user's liability as referred to in article 27 should be regulated further in Government Regulation.</p> | |
| Criminal | <p>Article 43</p> <p>Whoever engages on the construction's work planning without complying with the technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 10% (ten percent) of the contract value.</p> <p>Whoever engages on the construction's work implementation in contradiction to or not in accordance with the determined technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 5% (five percent) of the contract value.</p> <p>Whoever engages in supervising the construction's work implementation and deliberately gives opportunity to other people who implement a construction work to do a deviation of the technical requirement and caused a construction failure or building failure is subjected to be sentenced for 5 (five) years in prison or subjected to pay a fine for 10% (ten percent) of the contract value.</p> | |
| Administrative Sanctions | <p>Information:</p> <p>Administrative sanctions had written on the Construction Service of Law Regulation 1999, but it did not explicitly stated the type of administrative sanctions of construction failure.</p> | <p>Article 98</p> <p>Service Provider who did not fulfill the liability to change or to fix the construction failure as referred to in Article 63 is subjected to administrative sanctions:</p> <ul style="list-style-type: none"> A written warning Administrative fine Temporary suspension on construction service activity Blacklisting Freezing on licenses and or Revocation on licenses |

With the deletion of criminal sanctions for construction service communities, the Law Regulation of Construction Service 2017 was assigned as the relationship between the service user and the service provider of construction service in the field of criminal law. It was compatible with the basic of legal relation among the parties, namely the contract of construction work.

5. CONCLUSIONS

From the explanation above, it can be concluded that the liability of the construction failure can be given to both sides; the service provider or the service user. Therefore, an expert to see the problems objectively and be professional in deciding who will be legally liable of the construction failure is needed.

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