

The Principle of Consensualism and Freedom of Contract as a Reflection of Morality and Legal Certainty of Contract Laws in Indonesia

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Abstract

Differences in the civil law system in each country will substantially distinguish the legal principles adopted and the regulation of the treaty law. This study seeks to analyze the principles of law that exist in Indonesia in ensuring certainty in the implementation of contracts as a derivation of treaty law. In general, the basic principles of treaty law have been legalized in various forms of regulations and in the national legal system. Taking various perspectives on the main theories on justice and expediency, this study originally focused on the state's authority to guarantee the rights of citizens in agreements. The results of the study revealed that the principle of consensualism relating to the birth of the contract, the principle of freedom of contract relating to the contents of the contract and the principle of binding force relating to the effect of the contract of principles in carrying out the agreement absolutely must be fulfilled if the parties agree to bind themselves in carrying out legal actions.

Keywords

Contract Law, Legal Certainty, Freedom of Contract, Morality, Consensualism.

Introduction

In Indonesia, Pancasila as an orderly source of the law of the Republic of Indonesia, in the fifth precepts mandates social justice for all Indonesian people. Social justice is expected to provide benefits and prosperity for as many people as possible. Jeremy Bentham (1996) described that the so-called welfare of a society is the welfare of all individuals. Thus, the law aims to achieve maximum benefits on things that are useful and are of a general nature by maintaining good and trying to prevent crime and provide legal certainty for each individual.

The efforts of the Republic of Indonesia to be able to prosper the people (human welfare,) constitutionally stated in the 1945 Constitution of the Republic of Indonesia (UUD 1945). Although currently there have been four amendments, the Preamble to the 1945 Constitution has not changed. The spirit of the welfare state is still attached to the Constitution. In the fourth paragraph the opening of the 1945 Constitution explicitly lists the objectives of the state, one of which aims at the welfare of society as a whole and protecting the region as a place to live and make a living for the people and have legal and legal rights. The right itself becomes the benefit for the person who obtains it. Although in law there is a difference between the right to an item (*ius in rem*) and the right to sue someone to act in a certain way (*ius in personam*) (Bouckaert, 1990; Xiaoqing, 2010), but both of them imply that the state must provide legal protection to the right-holder. The state formed based on community agreements according to Rousseau (2018) has given authority to the state administrators, and the executive to carry out government for the achievement of the country's goals. Rosseau (2018) states that the social treatment has at its end the preservation of the contracting parties. Hence, community agreements aim to ensure the safety of every member who acknowledges it.

To understand the definition of welfare in a definitive manner, we must use a multidimensional formula. Based on the results of academic research and a number of concrete initiatives developed throughout the world carried out by the Commission on Measurement of Economic Performance and Social Progress in Europe (Stiglitz et al., 2009) have succeeded in identifying the main dimensions that determine the welfare of society. At least in principle the dimensions that must exist and are simultaneous to shape the welfare of society are first material living standards (income, consumption and wealth), second health, third education, fourth individual activities including work, fifth political voice and governance, sixth social relations and kinship, the seven environments (present and future conditions), the eight insecurities, both economic and physical. By looking at the differences in the civil law systems in each country that substantially distinguish the principles of adopted law and the regulation of treaty law, this study seeks to analyze the legal principles that exist in Indonesia in ensuring certainty in the implementation of contracts as a derivation of treaty law. In general, the basic principles of treaty law have been legalized in various forms of regulations and in the national legal system. Taking various perspectives on the main theories on justice and expediency, this study originally focused on the state's authority to guarantee the rights of citizens in agreements. The results of the study revealed that the principle of consensualism relating to the birth of the contract, the principle of freedom of contract relating to the contents of the contract and the principle of binding force relating to the effect of the contract of

principles in entering into an agreement absolutely must be met if the parties agree to bind themselves in carrying out legal actions.

Principles of Agreement Law and Rule of Law

Basically what is called the principle of law is the general basis contained in the rule of law and the general basis is something that contains ethical values. The law is a concrete rule about the correct procedures for acting in social life. Law is a concretization of the principle of law. Sudikno Mertokusumo (2010) outlines the understanding of the legal principle, first explaining the understanding of the legal principle from various legal scientists. The principle of general law is a basic norm that is spelled out from positive law and which is not considered by legal science to come from more general rules. The principle of general law is the deposition of positive law (*bellefroid*). The principle of law is the basis or direction in the formation of positive law (*eika hommes*) (see, Manullang, 2015). Mertokusumo (2010) explained that the principle of law is the basic mind contained in/behind concrete rules/laws.

For Satjipto Rahardjo (1991) the principle of law is not a concrete legal norm because the principle of law is the soul of legal norms which are the basis for the birth of legal regulations (logical reasoning of the law) so that ultimately all legal regulations must be returned to their legal principles. Because the legal principle is the soul of the legal norms, and legal norms are a concrete translation of the legal principle so that if there is a conflict as a result of legal action the solution should be done by returning it to legal principles, the law is not so easy to understand, agreed the parties. Efforts to understand the law in a perfect manner have given birth to many theories, each of which is only able to provide limited knowledge in the field of science studied and the method of interpretation used. To get a broader understanding of law, legal materials from various theories are needed and discussed comprehensively. The rule of law is a choice based on a consideration that the basic foundation of the Indonesian state confirms in its constitution that this state is a state of law (*rechtstaat*) not a state of power (*machtsstaat*). In this way, all state management arrangements must be based on law. The rule of law states explicitly and implicitly in Article 1 paragraph (2) of the 1945 Constitution which reads Sovereignty is in the hands of the people and implemented according to the Basic Law. So the state constitution is the reference for the work of state institutions (Asshiddiqie, 2007). In modern history, the idea of the rule of law itself was built by developing legal instruments as a functional and just system, by arranging the supra and infrastructure of an orderly and orderly political, economic and social institution, and building a rational and impersonal

legal culture and awareness in life social, national and state. For this reason, a legal system needs to be developed (law making) and enforced (law enforcement).

The idea of a rule of law is not only related to the concept of *rechtsstaat* and the rule of law, but also to the concept of nomocracy. This latter concept is closely related to the idea of legal sovereignty or norms (*nomos*). The rule of law, according to Dicey (1971; 2013), must reflect the three criteria of the rule of law. According to Dicey (1971; 2013) in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. It means, again, equality before the law, or equal subject to all classes to the ordinary law of the land administered by the ordinary law courts; lastly, it may be used as a formula for expressing the facts that with us the law of the constitution, the rules which in foreign countries naturally form part of constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.

This as it should be, starts with the constitution as the highest law. To guarantee the establishment of the constitution as a basic law, a Constitutional Court was formed which functions as the guardian and at the same time the ultimate interpreter of the constitution. The ideas, ideals or ideas of the rule of law, besides being related to the concept of *rechtsstaat* and rule of law, also relate to nomocracy which comes from the words of *nomos* (power) and *crotos*. What is imagined as a determining factor in the exercise of power is the norm or law. Therefore, the term nomocracy is closely related to the idea of the rule of law or the principle of law as the highest authority. However, the principle of the rule of law itself is not always good, because the law itself can be made and arbitrarily determined by the authorities.

Three elements of the rule of law, according to Dicey (2013), first are the necessity of absolute supremacy or legal superiority to limit the power of the government and negative actions that might be carried out by the government. Secondly, there is the principle of equality before the law that applies to all members of society, including those who are holding governmental power. Third, the constitution is not a source of protection of human rights but is a consequence of individual rights that have existed since humans were born. The purpose of the state is formulated in the constitution, among others, to advance social welfare, thus if it is connected with the Indonesian rule of law, Indonesia is a state of *rechts* which welfare states are categorized as a modern rule of law. The modern rule of law aims to realize the welfare of the people (welfare state). Legal products that are born must lead to the welfare of the people, if there are legal products that are contrary

to the concept of the welfare state, such legal products must be rejected in which the mechanism can be through the right of material testing. The founding fathers of the Republic of Indonesia aspire to the State of Indonesia as a rule of law, *rechtstaat*.

Basic 1945 states that the State of Indonesia is a state of law. The principles of the Indonesian rule of law are expressly stated in the 1945 Constitution, namely: Protection of the rights of human rights and citizens (Article 28 A to 28 J). Free judicial power (Article 24) There is a state administrative court (Article 24 paragraph 2). Indonesia as a state based on law put the ideals of the Pancasila law state, so that the values contained in the Pancasila precepts are derivated into every legal rule that is enforced in Indonesia. The main characteristics of the Pancasila state law are: a. Harmony of relations between the government and the people is based on the principle of harmony. A proportional functional relationship between state powers. Principles of dispute resolution by deliberation and justice with a balance between rights and obligations (Nasution, 2011; Hadjon, 2011). The main characteristics stated above can give rise to the concept of a modern Indonesian law state by giving freedom to members of the public to participate in the life of the state through the formation of a Pancasila-based law, which fosters broader community participation. As a Democratic State, Indonesia also upholds equality. Equality in relations between members of the community must always be conditioned by determining the criteria for equality qualifications through the establishment of performance of state institutional functions. Laski (2010) states that democracy, it is obvious, has as much need to test the standards of its performance as the chemist to test the accuracy of his balance. Equality must always be conditioned by the establishment of the criteria of qualification for the performance of functions. Until the reform era, the concept of the Indonesian rule of law has not yet been standardized. The reality is only the formation of sectoral and partial laws. Law should be understood in the perspective of the legal system. Lon L. Fuller (1969) argues that the regulation (law) as a system of rules must be based on eight principles, that are the legal system must have strong rules as a basis and generally accepted and must not be merely decisions that are while (*ad hoc*), regulations that have been made must be announced regulations be non-retroactive principle, regulations must be prepared in clear and easy-to-understand language so that they can be implemented correctly. Furthermore, regulations as part of a system must not conflict with other regulations, and it must not require anything more than what must be done. Finally, rules must not always be changed in order to meet legal certainty, and regulations must be in accordance with the provisions in the law with concrete implementation.

In the constitution, Indonesia adheres to the rule of law as stated in Article 1 of the 1945 Constitution of the Republic of Indonesia. The theory of the system was developed by Mariam Darus Badruzaman (2001) who argues that the legal system is a collection of integrated principles, which are the foundation, upon which built in an orderly manner. These legal principles are obtained through juridical construction, namely by analyzing data that is tangible to then take their collective or abstract characteristics. The process of finding this legal principle is called abstracting. Legal rules form themselves in a law that can also be classified in sub-systems such as civil law, criminal law, constitutional law, economic law and so on. Thus, a legal system in a country can be divided into parts (sub-legal systems), so that one law with another law should be interrelated and may not conflict with each other because it has principles and joints that are related to each other. However, if there is a conflict between the legal sub-systems, the theory of the system from Badruzaman (2001) is placed as the middle range theory. Kees Schmit (2011) argues that a legal system consists of three elements that have a certain independence and identity with relatively clear boundaries which are interrelated and each can be further elaborated. These elements are idealistic elements, operational elements and actual elements. Idealistic elements which are the ideals of the law are formed by a system of meaning of the law consisting of rules and principles which are referred to by the jurists as the legal system. Operational elements consist of all organizations and institutions established in a legal system. The actual element is the whole of decisions and concrete actions related to the meaning of the legal system, both from the position holders and from the community members in which the legal system is contained. Law as a system can also be understood as stated by Lawrence M. Friedman (1975) which states that structure, to be sure, is one basic and obvious element of the legal system and substance (the-rules) is another part. When an observer tries to describe a legal system in a cross section, so to speak, it is likely to speak of these two elements. The structure of a system is its skeletal frame-work; it is the permanent shape, the institutional body of the system, the tough, rigid bones that keep the process flowing within bounds. We describe the structure of a judicial system when we talk about the number of judges, the jurisdiction of courts, how higher courts are stacked on top of lower courts, what persons are attained to various courts, and what their roles consist of. The substance is composed of substantive rules and rules about how institutions should behave.

Legal Culture as Derivation of Morality in the Formulation of the Hukum Agreement

Each legal system contains a structure, as a real element of the legal system, substance as other elements and legal culture as an element that can influence the benefits of using the court as a place to seek justice. H.L.A. Hart (1997) argues that the hallmark of a legal

system is a double collection of regulations (see also, Gavison, 1987). A legal system is a unity of primary rules and secondary regulations. Primary rules are norms of behavior, and secondary rules are the norm for these norms of behavior - how to decide whether they are valid, how to apply them and so on. According to Hart (1997), primary rules are regulations that impose obligations regarding actions involving physical movements or changes and secondary rules provide power, public or private to regulate performance that leads not only to physical movements or changes, but also to the creation or change of obligations or duties (Hart, 1997).

In another section, Lawrence M. Friedman (2006) describes the three parts/components of the legal system. First, the structural component is part of the legal system that operates within a mechanism, such as law-making institutions, courts, and various bodies that are authorized to implement and move the law. Second, the substance component is a tangible result issued by the legal system. This tangible result can be in the form of law *in concreto* or individual legal norms such as the court convicting the convicted, the police summoned witnesses for the purposes of verbal and legal process *in abstracto* or general legal principles such as criminal acts of theft regulated in article 362 of the Indonesian Criminal Code. Third, the component of legal culture is the attitudes of the citizens along with the values they hold.

According to Friedman (2006), Kusumaningtuti (2009), legal culture is the attitude of legal people and the legal system, beliefs, values, ideas and their expectations. In other words, legal culture is part of the general culture associated with the legal system. These ideas and opinions can be said is what determines an ongoing legal process. Legal culture in another sense is the climate of social thought and social forces that determine how law is used, avoided or misused. Without legal culture, the legal system will become static. Every country, every community has a legal culture. There are always attitudes and opinions about the law. In legal culture there are theories that distinguish formal law and law in action. Formal law means a set of norms or rules contained in legislation or in the settlement of a legal case, whereas law in action is the law that is applied or implemented by the parties, lawyers and courts (Glazebrook, 1999). The law as a unitary system according to Jimly Asshiddiqie (2008) contained therein institutional elements, instrumental elements and behavioral elements of legal subjects bearing rights and obligations determined by the rules norms (subjective and cultural elements). Therefore, comprehensive understanding of law as an integrated system is an important factor in realizing legal objectives that are based on justice, expediency and certainty (Asshiddiqie, 2008).

The purpose of law according to the idea *des recht* contains 3 elements, namely justice, legal certainty and utilization. Justice as one of the legal goals according to the theory developed by John Rawls (1971) has two principles. First, each person is to have and equal right to the most extensive basic liberty compatible with a similar liberty for others, and second social and economic inequalities are to be arranged so that are both reasonable expected to be to everyone's advantage and attached to the position and office open to all. Two principles put forward by John Rawls (1971) in the first theory of justice that everyone has the same right to the most basic basic freedoms, as wide as the same freedom for all people. Secondly, social and economic inequality must be regulated in such a way that can be expected to benefit everyone and all positions and positions are open to everyone. This principle of justice is a benchmark of what is right, good and right in life and is therefore binding on all people both society and authority. However, a very important factor in the application of law and justice is the human factor as the executor of the rule of law. A good law will be fair and beneficial if the people implementing it are of high quality and integrity. This theory is placed as the first applied theory in this study. The second applied theory is the theory of rights. This theory is related to legal certainty because new rights arise, if legitimized by law. According to the theory of rights, which was first developed by Thomas Hobbes (1998), rights are interests protected by law, whereas interests are demands of individuals or groups that are expected to be fulfilled. Interests in essence contain powers that are guaranteed and protected by law in carrying them out. Legal certainty is a very important element when related to rights. Under natural conditions there are no restrictions on what is the right of people. In the case that there is no system of power everyone has the right to everything against others, but after there is a contract, everyone is only entitled to the rights permitted by law. Article 584 of Indonesian Civil Code determines that ownership of an item cannot be obtained other than by taking for ownership, by attachment, by expiration, by inheritance according to the law or according to a will and by appointment or surrender based on a civil event for the transfer of ownership committed by people who are entitled to act on the goods. From the aspect of public policy theory, Thomas R. Dye (1992) states that public policy is whatever the government chooses to do and not do. Although the understanding given by Dye (1992) is considered rather appropriate but it is not enough to give a clear distinction between what is decided by the government and what is actually done by the government (Winarno, 2010). Carl Friedrich (2007) also states that public policy is a direction of action proposed by a person, group or government in a particular environment that provides obstacles and opportunities for proposed policies to use and overcome in order to achieve a goal or realize a specific goal or purpose. Public policy according to William

Dunn (1998) are policies made by the government as policy makers to achieve certain goals in society.

The Principle of Consensualism in Contract Law in Indonesia

The use of legal principles in contract is the basis for binding an agreement or contract that has been made. The leading legal expert who explains the nature of the binding contract is Hans Kelsen (1949). According to Adolf (2008), his interesting school is what he calls the legal transaction or juristic act. This doctrine is divided into two forms. First, legal transactions as the act that creates the law and which applies the law. The second form of the doctrine of this legal transaction is a contract. A legal transaction is an act in which an individual is authorized by orderly legal system to regulate certain actions in a legal manner. This transaction is called the act that creates the law. Because the act gave birth to rights and obligations to the parties involved in the transaction, at the same time the actions in the form of legal transactions are contained not only in creating the law but also in the act of applying law. To make all these actions legal, the parties use legal norms. According to Kelsen (1949), by giving the parties the possibility to regulate their relations reciprocally through what Kelsen (1949) calls legal transactions, legal norms give individuals a certain legal autonomy. In its function as the formation of law, the legal transaction which Kelsen (1949) also called the autonomy of the parties or private-autonomy is reflected in it. With a legal action, legal norms in general are formed that govern the mutual relations of the parties. These legal norms by Kelsen (1949) are referred to as the secondary norm. The reason called the second norm is because the legal actions give birth to legal rights and obligations which, if those rights and obligations are violated, can result in a transaction. For this reason, this second norm regulates the behavior or actions of the parties. The second form of a transaction referred to as a contract is essentially a legal transaction of civil law. A contract is simply a statement of the will of two or more individuals. Without this statement, the contract cannot be established or strengthened by a court procedure. A statement or declaration alone is not enough to give birth to a contract. According to Kelsen (1949), this statement would only be binding if the statement was addressed to another party and this party stated its acceptance. Kelsen (1949) called this two-party action a two-sided legal transaction.

According to Tan Kamello (2012), the agreement should be two legal acts, each containing one (*twee eenzijdige rechthandeling*), namely the offer and acceptance based on an agreement between two or more people who are most related to cause legal consequences (*rechtsgevolg*). This concept gave birth to the meaning of an agreement is a legal relationship. The binding of the parties to the agreement is not merely limited to

what is promised, but also to other elements as long as desired by customs and propriety and morals. So that the moral principles, propriety and habits that bind the parties there is not even a legal norm that may terminate or abolish the agreement if it has fulfilled the criteria set out in Article 1320 of the Civil Code.

The nature of the abstract is seen in the engagement which is a legal relationship that occurs between two or more people located in the field of assets, so that one party has the right to achievement and the other party is obliged to fulfill the achievement. The concrete nature of the contract, according to Tan Kamello (2012) is similar to an agreement, namely a legal relationship between two or more people based on an agreement with the aim of causing legal consequences. According to Thomas Hobbes (1998), after a contract everyone is only entitled to the rights permitted by law.

A covenant is a series of words containing promises or abilities that are spoken or written. Article 1313 of Indonesian Civil Code states an agreement is an act that occurs between one person or more binding himself to one or more other people.

The principles referred to in contract law according to Tan Kamello (2012) are the essential basis of contract law, namely the principle of consensualism relating to the birth of the contract, the principle of freedom of contract relating to the contents of the contract and the principle of binding force relating to the consequences of the contract. Badruzaman (2001) stated that by treating an agreement to make an agreement, it means that both parties must have free will. Badruzaman (2001) further stated that the definition of the agreement contained in the above provisions is incomplete and too broad. It is incomplete because the formulation is only a one-sided agreement. The agreement made by both parties is binding as a law for the parties that made it. Each party must respect all the clauses containing the rights and obligations contained in the treaty. This is also encouraged in especially international law (Lim & Elias, 1998; Lim & Elias, 2010; Ochoa, 2007). This agreement is an agreement between the two parties that gave birth to a partnership of individual rights that can be held accountable by both parties reciprocally. The principles in carrying out the agreement absolutely must be fulfilled if the parties agree to commit themselves in carrying out legal actions.

Conclusions

Each legal system contains a structure, as a real element of the legal system, substance in forms of regulations as other elements and legal culture as an element that can influence the benefits of using the court as a place to seek justice. Transactions in the law of

agreement are as private-autonomy. With a legal action, legal norms in general are formed that govern the mutual relations of the parties. agreement is two legal actions, each of which contains one (*twee eenzijdige rechthandeling*), namely the offer and acceptance based on an agreement between two or more people who are most related to cause legal consequences (*rechtsgevolg*). This concept gave birth to the meaning of an agreement is a legal relationship. The binding of the parties to the agreement is not merely limited to what is promised, but also to other elements as long as desired by customs and propriety and morals. a transaction referred to as a contract is essentially a legal transaction of civil law. Here, the contract is simply a statement of the will of two or more individuals and the role of the state in contract law is to provide legal procedures to ensure legal certainty and the survival of moral values such as consensus and freedom of contract.

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