

RECONSTRUCTION OF INDONESIAN AGREEMENT LAW

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Abstract

In line with the development of a society that increasingly has been complex in modern times, there grow a variety of risks which are potential to be threats to any parties who have expectations for the success of the transactions they conduct. To realize the expectations, there has been developed the norms of law in the form of a set of principles and the rule of law. They are commonly understood as a legal contract or legal agreement (law of contracts) that is expected to increase certainty, justice and predictability and at the same time a device for parties to manage risk (risk management device).

The development of treaty law set out in Book III of the Civil Code is affected by legislation such as the Basic Agrarian Law and Consumer Protection Law, judicial decisions and practices carried out by the parties in their dealings. Basic Agrarian Law and its implementation rules give legal certainty to buyers with good intention.

That's why the future of the Indonesian National Contract Law should be developed by adhering to some of the main qualities, namely: first, it must be derived from the values of Pancasila and the Preamble and the relevant provisions of the Act of 1945. In other words, thoughts rising from the philosophy of life of the Indonesian nation and the constitutional basis of the Republic of Indonesia must become a national political treaty law; legal and political as far as possible is what animates the substance of Law of the National Agreement; second, must be designed as a sub-codification of law codification National Commitments to come, so that the preparation of the Law on National Contract Law would be prepared in anticipation of the general principles of the new Indonesian Engagements law; third, it must be designed as the foundation for the Law of Treaties of Indonesia, without having to assign a specific orientation to the civil law, common law, Islamic law or customary law, or other legal traditions. Law on National Contract Law should be developed as a typical Indonesian Contract Law, because it is in line with the principles of Pancasila values. Yet, it should be able to answer legal issues.

Keywords: *National Contract Law.*

A. INTRODUCTION

Globalization and liberalization is inevitable for developing countries in the world including in this case is the state of Indonesia. It results in the structure of people's lives in Indonesia's change which is so great, especially in the fulfillment of human needs. Globalization also encourages the emergence of more sophisticated technology of information and communication technology that has developed so rapidly that affect patterns of most people in Indonesia.

Today's technology develops very quickly through the medium of radio, internet, television, and mobile phones. It can be seen from all

walks of life in Indonesia that have used the technology. These medias provide a variety of information, knowledge and entertainment. Thus, they change the patterns of thought and action among the people included in the deal to make expectations meet. The impact of globalization in the economic aspects that affect society is changing people's behavior patterns that tend to be more consumptive in owning particular items and excessive in how to own the items.

Improvement and development of human interaction in society, both in quantity and in quality, go hand in hand with the development of human needs in modern life which is increasingly

complex. Efforts to satisfy human needs can only be realized through multidimensional human interactions, namely between the user and the supplier/provider's needs, the supplier/provider's needs and industry in a variety of scales, industry providers of goods or services with the developer and producer of technology both in industry as well as communication and information. Even, human interaction is also associated with maintaining the sustainability and environmental power to support life. The development of such human interactions above, whether consciously or not, had established a variety of networks in society.

The Sociologists generally argued that there is no single society that does not change, even though there are societies who are changing faster than any others¹. Human behavior is not purely biological behavior but rather a sociological and ethical behaviour which are meaningful because they are based on a philosophy about life itself. Both behaviours are concerning on the personal goal of human life, as well as directing people's lives in a group or community. Related to that, it is important to know also that the legal institutions, norms and behaviors of people today really are in accordance with the philosophy of life which is embraced by the people of Indonesia.

Efforts to satisfy human needs embodied in the various social networks for most of the activities are carried out through the exchange of goods and services, both for commercial and personal use. The activities of the exchange were realized through the implementation of obligatories issued voluntarily by the promises that bind the parties to the perpetrators. Therefore they need to be distinguished from the engagement arising from events where the voluntary element may be considered irrelevant, or at least, the obligations which appeared more of a legal order or legislation².

Leaded and forth promises that are voluntarily made by each of the parties to implement/not to implement something in the interest of the other party, or to fulfill a mutual interest, the development

is not sufficiently bound by moral commitments and goodwill of the parties only. Each party always have hope and want assurances that the other party has to fulfill its promises. In addition to the subjective aspect pertaining to faith/intention of the parties to bind themselves to one another (intention to be bound), the implementation of the promises of the parties also should always be placed in an objective condition in which the fulfillment of the expectations of the parties must be confronted by the specific risks that may be able to put the parties in a situation of uncertainty (uncertainty and unpredictability).

In line with the development of a society that increasingly complex in modern times, there grow a variety of risks that are potential to be threats to the parties in an effort to realize their expectations of the transactions they conduct. It is this fact that the parties need to obtain legal protection so that their transactions can be achieved (the protection of the legitimate expectations of the parties), especially in anticipating the risks that could hamper these efforts. Changes in people's lifestyles, especially in the trade in the next daily needs have changed, therefore we need a legal device that can accommodate their interests especially that of contract law that will regulate the transactions carried out by the people of Indonesia at this time.

To realize the contractual objectives, it is urgent to develop the norms of law in the form of a set of principles and the rule of law that are commonly understood as a legal contract or legal agreement (law of contracts). They are expected to increase certainty, justice, and predictability, at the same time as the device for parties to manage risk (risk management device). Thus, the uniqueness of this field of law is especially apparent from the functions embodiment to simultaneously (or dialectically) ensuring legal certainty for the parties in the establishment and implementation of the promises and the obligations of the parties which is based on voluntary obligations. When placed in the context of the national legal system of Indonesia, or the national legal system of any country, the fundamental properties of contract law must also be able to accommodate mutual interests (common interests) and the common good

1 Soerjono Soekamto, *Teori Sosiologi Tentang Perubahan Sosial*, Ghalia Indonesia, 1983, page 3.

2 Stone, Richard, *The Modern Law of Contract*, Routledge, London, 9th edition, 2011, page 2.

(common good). At this point, people begin to question the role and functions of the state in law enforcement contract.

Correspondingly, Book III of the Civil Code Law (*Burgerlijk Wetboek*), governing the engagement and agreements are appropriately updated. This is because the provisions contained in that Book III cannot accommodate the interests of today's society. In connection with the existing contract law is necessary to reform in order to meet the needs of the community. The concept of law as a means of renewal of society is the concept of legal development as the most appropriate and relevant today. As stated by Mochtar Kusumaatmadja that the function of law is not only a means to maintain the order within the community but also to make better change comes true within the community³.

Based on the above explanations, it is essential to make review of the existence of contract law prevailing in Indonesia in order to accommodate mutual interests which are adjusted with the today's progress so that the freedom and openness can be felt. In turn, the role of the state as the protector of the parties' agreement in the Indonesia can be used well continuously.

B. DISCUSSION

1. Basic Concepts of Agreement/ Contract

National legal history shows that the enforceability of the engagement of the Civil Code as it is known today. It evolved through phases in which the rules and principles of customary treaty law also applies in the colonial social order and in an atmosphere of legal dualism⁴.

Various legal tradition that grows and becomes the development platform

3 Mochtar Kusumaatmadja, *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, Lembaga Penelitian Hukum dan Kriminologi Fakultas Hukum Universitas Padjajaran, Binacipta, Bandung, 1976, page 11.

4 Suharnoko, *Hukum Kontrak dalam Perspektif Komparatif*, in Hijma, Jaap (ed), *Hukum Perikatan (Law of Obligations)*, Pustaka Larasan, Denpasar, Seri Unsur-unsur Penyusun Bangunan Negara Hukum, 2012, page 79.

of the various legal systems of the world basically accept the leaded and forth conceptions between Treaty (approval/*overeenkomsten/agreements*) with Commitments (*verbintenissen/obligations*). Therefore, one can easily understand that the Law of Treaties (law of contracts, *overeenkomstenrecht*) by generally understanding part of the Legal Commitments (*verbintenissenrecht/ law of obligations*). However, it is not always easy to find sharp boundaries between the Law of Treaties with other parts of the Law of Commitments.

As part of the Commitments Law, Contract Law also basically involves a legal relationship that of the two-sided (two-ended relationship). On the one hand the norms will be seen with regard to the rights of individuals to file a claim (personal rights to claim), and on the other hand, with obligations to implement something (duty to render performance)⁵. However, what distinguishes the field of the Law of Contracts from parts of the Law of Commitments (commitment because of the law or tort/delict) is the nature of transactions between human beings as being considered spawned legal bond.

Law of Contracts, on the one hand, arranges the transfer of resources that go on between members of the community voluntarily (voluntary transfers of resources). He therefore focused its attention on meeting the expectations of the parties that formed the bind (fulfillment of expectations engendered by a binding promise). On the other hand, other areas of Commitments Law, particularly on tort, deal with the possibility of a clash between the personal interests of the members of the society. The issue of volunteerism becomes irrelevant here because the attention in this area is maintaining the

5 Zimmerman, Reinhard, *The Law of Obligations – Roman Foundation of the Civilian Tradition*, Clarendon Press, Oxford University Press, Oxford, 1996, page 1.

status quo as regards the potential actions or adverse circumstances (wrongful harm)⁶.

The contract is essentially an engagement between people/subjects of law seen as rights and legal obligations and which is published in led and forth as the consequence of the deal/agreement formed between and above the will of the parties maker. In other words, the agreement/consent between the parties had been the key word for the existence of a contract so he could bind the parties before the law. Perfection of agreement between the parties must be measured both in terms of human morality and in terms of jurisdiction. The creation of harmony in fulfilling aspects of morality and legality should underlie a legal order for the upcoming national agreement.

Aspects of morality give a feel of good faith (good faith and fair dealings), proportionality (reasonableness), and justice (fairness) on each of the engagement that was born out of the agreement. While the juridical aspect issues guarantees of legal certainty on the various components that cover the entire life-cycle. It includes, but not limited to components of the formation, validity, execution, and the efforts for the parties to uphold the rights and obligations rising from their deal.

At the theoretical level, there needs to be a distinction between the meaning of "agreement" with the "contract". Agreement can be understood as a "bargain" or "equilibrium position" that obviously achieved by the parties as it turned out of their language or inferred from relevant situations, including negotiation, enforceability habits trade, or the process of implementing their promises⁷. While

the contract is a legal obligation that the whole issue of agreement of the parties is in accordance with the provisions of contract law and the on-going legislation⁸. Applicable contract law (or in other words: "positive contract law") that is in Indonesia today is largely regulated in the Civil Code, and that in the future is expected to be replaced by the Indonesian National Contract Law.

Another perspective which can be used to understand the essence of the contract and contract law is through the distinction between "legal acts" (Juridical acts) and "legal fact" (Juridical facts)⁹. When the "legal act" involves action as an expression of the will/intention of someone voluntarily, so the "legal fact" is a state/event, regardless of the presence or absence of the human will, causes the emergence of the obligations result in any legal consequences. A contract is a "Juridical act" in which one party (the obligor) can bind themselves to give, do or not do, something to benefit the other¹⁰. On the other hand, a tort in civil law can be considered as Juridical fact.

In the tradition of civil law, an engagement/commitment can rise from a legal act that is a manifestation of the will of my party (unilateral Juridical act), or a legal act as a manifestation of the exchange's will stated and agreed upon by the parties (exchange of wills) and make it as Juridical bilateral act.

In the Common Law tradition, the concept of Unilateral and Bilateral starts from the contract as the manifestation of the existence of the will of (unilateral) or two wills (bilateral) when there is the formation of the contract¹¹. If the contract

6 Ibid, page 10.

7 General Provisions, Uniform Commercial Code (UCC)– United States of America, Article 1, General Provisions, Part 1, Par. 1-103, version year 2009, quoted in: Knapp, Charles L., Crystal, Nathan M., Prince, Harry. G, *Rules of Contract Law* – 2011-2012, Wolter Kluwer – Law and Business, New York, 2011, page 106.

8 An interpretation to the definition of "contract" in Uniform Commercial Code, the same with the above one page 107.

9 Levasseur, Alain. A, *Comparative Law of Contracts – Cases and Materials*, Carolina Academic Press, North Carolina, 2008, page 13.

10 Levasseur, Alain. A, the same with the above one, page 13 and 14.

11 Ibid page 6 and 7.

formation begins with the offering of the offerer who promised to do (or not do) a certain action if the other party/offeree, so the willing to do (or not do) certain actions the other, while the other was (offeree) completely not bound to make any promises (option contracts), then the contract is unilateral. A new contract is understood as bilateral when both the offerer and the offeree mutually bind themselves to do (or not do) something for the benefit of the other reciprocally. It's not too surprising that in common law, tradition is for the formation of a bilateral contract (simple contracts) required consideration as the requirement. In the US legal system, consideration is defined as "obligations of an exchange" (requirement of exchange) in the form of implementation of the appointment or appointments and forth that made one of the parties as consideration "equivalent" (bargained for) the promise he made to the other party. An act or re-promise is considered "equivalent" when he was asked by the donor appointment (promisor) in exchange for a promise that it provides, and the promise given by the receiving party (promisee) in exchange for a promise of the promisor¹².

2. Factual Condition of Contract Law

In this discussion, the author intends to evaluate the adjustment process that took place between the legal conditions of fact about the behavior of people in the field of contract law today with legislation that exist and is applied in Indonesia, both horizontally and vertically. One fact that cannot be ignored in the implementation of the law in Indonesia today is the existence and effectiveness of the enforceability of the Civil Code (herein after the "Civil Code") as the legal codification which contains principles and rules of law regarding the engagement that was born from the agreement. Evaluation

efforts of the legislation related to the agreement cannot be separated from the Third Book of the Civil Code, although with due regard to the legislation and other relevant legal sources.

Vertically, the evaluation on the positions of the Civil Code will be made with reference to the Pancasila as the philosophical foundation of the nation which is also the source of all sources of law, and the 1945 Constitution as the constitutional basis of laws and regulations of Indonesia. Both are as umbrella of the birth of the provisions of any other law, so it should be Pancasila and the 1945 Constitution that also are used as fundamental measure (norm criticism) at the time of the evaluation done vertically.

Horizontally, the evaluation will be done by examining the consistency of the Civil Code with the various laws and regulations that are applied. Ideally horizontal evaluation is not only done by the regulatory equivalent laws, but also by the legislation hierarchically located under the Act as Government Regulation, Presidential Regulation, regulation, regulation of the Head of the Agency, even should it involves the jurisprudence and the doctrine of jurisprudence. Both are with regard to the principles and rules of customary law, religious and at the same rules or regulations in international environmental agreement or contract. The following evaluation study agreement/contract vertically and horizontally can be described as follows:

a. Book of the Law - Civil Code (*Burgelijk Wetboek* KUHPerd / B.W.)

In case the legal provisions of the agreement is part of the Civil Code, so it needs to make evaluation first. The team felt the urgency of need to look briefly at the background in advance of the entry into the achievement of B.W in Indonesia which incidentally as the main reference in the field of the agreement (although theoretical and

12 Chapter 4, Topic 1, Par. 71 Restatement (Second) of Contracts, United States of America. American Law Institute, Restatement (Second) of Contracts, 1981.

practical studies have been presented in the previous chapter). The origin of this is important to be reviewed in advance in order to find the concept and background of enforceability of B.W in Indonesia. Then it can be determined whether the concept and background B.W is appropriate and can be qualified in harmony with Pancasila and the Constitution - 1945, which is the source of all the legal and constitutional foundation in Indonesia?

Referring to the search results of C.S.T. Kansil, Civil Code or B.W formed in 1848 as a result of codification which is chaired by Mr.C.J. Scholten Van Oud Haarlem, the codification at that time was done with the intention to hold a rapprochement between the law and the situation in Indonesia with the law and the situation in the Netherlands. The task of the Committee is:

1. design the rules, so the rules of the Dutch legislation can be run;
2. put forward proposals;
3. pay attention to the organization of the judiciary (*Rechtelijke Organisatie* = RO).

In connection with these conditions, Mr. De Jonge Van Campens-Nieuwland at that time (when the enactment of concordance between Indonesia and the Netherlands legislation), issued a question as followings: "Why are laws and regulations in Indonesia should follow the rules of Netherlands? The situation is far different, and if it turns out that the regulations are not good, for what it is used in Indonesia? "

In connection with the above description, what is proposed by Mr.De Jonge Van Campens-Nieuwland at the time of enactment of concordance between Indonesia and the Netherlands legislation mentioned above is still relevant. To ponder more

carefully, it seemed that since the beginning of the formation until its entry into BW, it was intended to run the rules of laws that existed in the Netherlands. Though the condition of Indonesian society has made different characteristics and interests with the situation in the Netherlands, B.W built it in a nuance of individualistic and liberal concept,. Meanwhile the Pancasila is the crystallization of traditional and religious values of communal and religious concept.

Departing from their different concepts, goals, circumstances and conditions, then the possibility of a discrepancy between the Civil Code to the value of life in Indonesian society is actually not a new issue. Conditions as stated above, resulting in the emergence of two major problems associated with the level of harmonization of the Civil Code applicable in Indonesia today, namely:

1. Issues related to the difference between the basic concept of Indonesian society (Pancasila as a way of life and a source of law) with the basic concepts of BW / KUHPerd in conjunction with the potential for problems associated with the level of concordance between the BW / KUHPerd with Laws - National law more,
2. Problems arising with the development needs of the people of Indonesia in connection with the development of the law of treaties, and the position of Indonesia as a part of the international community.

Pancasila consists of five precepts and if the five principles of Pancasila is summarized, it would appear that the basic value of "*Gotong Royong* (Mutual-Help)". It features Indonesian society that is built with a system of customary

law that has both communalistic and religious concept. That's why the concept is different from KUHPerd, and vertically different concepts as referred to above, if applied as it is. Then, of course, will potentially lead to inconsistencies in the development and application of contract law in Indonesia. Indonesian society has religious values and culture or the customs are typical, as crystallized in the Pancasila, the philosophy of the nation and the source of all sources of law which must be observed to maintain the consistency of what has been said above.

Pancasila, as a reflection or crystallization of values in Indonesian society, is a philosophy that has been accepted by the Indonesian nation and should not be contended for longer in the formation of the principal staple of national contract law. The philosophy of the nation should not only be placed as a myth, but should be able to be logos and ethos. In order to implement Pancasila as the logos and ethos is not easy. The philosophy of Pancasila should be able to be transformed into the legal value (Legal values) and the concept of law (Legal Concept), which will underpin the establishment of the rule of law (Legal Norms) for national agreement in Indonesia as part of the national legal system¹³. Thus, it is expected that the legal establishment of national agreement should no longer be merely interpreted as the formation and renewal of treaty law only in order to replace or meet the needs of the new law, but more than that, plays a role as part of the development of national legal systems (national legal system).

13 Bagir Manan, *Peranan Hukum dalam Mewujudkan Cita-cita Keadilan Sosial Menurut UUD 45*, Orasio Dies Natalis 55, Fakultas Hukum Universitas Katolik Parahyangan, Bandung, 2013.

Recognizing the development of national contract law as part of the development of the national legal system, Boediono Herlien's talk on national legal system seemed to be relevant to be presented in this paper. Herlien Boediono told that national legal system should include customary law, Islamic law, and the western legal system. In connection with this opinion, it should be recognized that it is a real condition that there are different legal systems accompanied in the areas of agreement and growing practice in Indonesia today.

Nevertheless, it should be in line with the opinion that Pancasila should be kept as the reflection or crystallization of the value of life in Indonesian society so that the compilation of national law reform treaty should use Pancasila as the main runway and the only. Yet, it should also be acknowledged too that Indonesia is a part of the international community so that efforts to develop the provisions draft of the law of treaties in Indonesia, must be able to accommodate values of the customs and way of life of Indonesian society (Pancasila). They also must consider the rules of association internationally in the field of contract law but with condition that Pancasila is still the reference. It is to accommodate and pay attention to the rules of international applicable law in general and the field of international contracts and civil or international in particular¹⁴.

The above description intends to assert the factual conditions today which indicate the existence of various legal system of agreements in practice as stated earlier, should not be interpreted that the national agreement prepared by blending way

14 Herlien Boediono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia*, Citra Aditya Bakti, Bandung, 2006.

as just the existing system without testing the philosophical foundation of the nation. It is because cohesion within the national system can only be realized if it is based on the same philosophy (in the sense of unity of philosophy). For the teachings of Prof. Soediman Kartohadiprojo as borrowed by Bagir Manan, it is important to give the national law that must reflect "unity in diversity and diversity in unity"¹⁵.

Departing from considerations as described above, the efforts to renewal of the law of treaties in Indonesia should be done by taking into account internal factors (within the meaning of Pancasila should be the main foundation and the only one, the 1945 Constitution as the constitutional basis), and taking also into account external factors. Efforts focus on external factors should not be construed as a tow or simply adapt internationally accepted rules (in the sense that external factors should not be used as the sole basis and not a primary reference). Attention to external factors should be interpreted as an attempt to understand and implement national values in international affairs based on Pancasila.

b. Actuality of Civil Code

In relation to what has been described above, may be it is accepted if the on-going Civil Code in Indonesia at this time is said to represent copies of the Dutch BW drafted without considering the values and life situations in Indonesian society. The next issue that needs to be examined is the level of topicality of the Civil Code. It needs to be met with the will of new law. As it is known

in general, the developments take place in social life is almost always faster than the rule itself. Then it should be determined whether the legal provisions stipulated in the Civil Code agreement can be qualified adequate in relation to the development of society where in turn it indicates the need for a new legal agreement?

Issue of the timeliness has also been understood by the Netherlands. It appears to an effort - the work done by the Dutch to renew BW prevailing in the Netherlands, which eventually resulted in *Nieuw Burgelijk Wetboek* which is sometimes called NBW. Without intending to follow changes made by the Netherlands, the development of society shows that factually B.W. had problems also with the level of topicality in meeting the demands of the developments taking place in public life. It indicates the provisions of the Civil Code which exists at the moment where is no longer actual and therefore potentially causes tensions of law / legal tension (a term borrowed from Bagir Manan).

Among issues related to the level of topicality of the Civil Code are those related to contract law principles, including:

- 1) The principle of freedom of contract in relation to the standard agreements and unequal bargaining position. This issue is not only related to the issue of protection for the weaker party alone, which has been realized anyway, but also that is regulated in the Act - legislation on consumer protection and other legislative provisions. The fundamental issue is: "How Pancasila looked raw treaties and the principle of freedom of contract with all aspects related?" B.W. is not accommodated

15 Bagir Manan, *Peranan Hukum dalam Mewujudkan Cita-cita Keadilan Sosial Menurut UUD 45*, Orasio Dies Natalia 55, Fakultas Hukum Universitas Katolik Parahyangan, Bandung, 2013.

firmly on the matter, and it is understandable, because B.W. is not prepared based on Pancasila. It is necessary a gesture or a clear perspective of how Pancasila looks into this matter. Customary law, on the other hand, describes the characteristics of the communal people's lives, not explicitly regulate this issue, but the suitability of the communal spirit is clearly can pose its own problems when faced with the tendency of using standard contracts in today's society¹⁶. The restriction to the principle of freedom of contract shows that the principle of freedom of contract is not regarded as an absolute, and indeed should be limited. Currently, the restriction on the principle of freedom of contract has been done for example in consumer in Protection Act, Job Agency Act and other legislative provisions. Departing from this fact of development, it needs to think about the principle of freedom of contract in the eye of Pancasila to determine the extent in which the State through legislation will regulate products and contribute to resolve the problem issues that arise from the principle of freedom of contract.

- 2) Problems arising from the development of business practices, such as pre-contract action. B.W. does not distinguish between actual pre-contract with a contract, either relating to the formation as a result or its termination. While in the practice of pre-contract action as a Memorandum of Understanding or the Minutes of Meeting have become common

place and necessary. B.W. does not regulate this clearly so that unclear view and restrictions regarding pre-contract or contract qualification will eventually cause problems such as the rights of contractual premature. In connection with these conditions, Pancasila should be able to provide guidance in determining the nation's perspective on the pre-contract.

- 3) The setting relating to the formation and validity of contracts has no specific differentiation.
- 4) The term related to affirmation and clarification, agreement and contract.
- 5) The development of the arrangements regarding the void in B.W, which has now grown and filled out and scattered in several laws and regulations applied¹⁷. It is important not only to study but also to find a common thread that will be tailored arrangements of the sort referred, also in order to avoid inconsistencies between one regulation with other regulations.
- 6) Problems related to Indonesian as the official language of the country of which function in commercial transaction and documentation. The thing above needs certain firmness and meaning so that in practice it does not cause problems when it is in contact to contracts or agreements relating to foreign elements, contract or bilingual. It is by hope of regulatory agreements that will be drawn apart to accommodate the interests of the nation. Besides, it can also be accepted in the association

16 Paripurna Sugarda, *Posisi Hukum Adat dalam Penyusunan Hukum Kontrak Nasional Indonesia*, Makalah Anggota Tim, Desember 2013.

17 Elly Erawati, Herlien Boediono, *Penjelasan Hukum tentang Kebatalan Perjanjian*, National Tegal Reform Program, Jakarta, 2010.

of the nation Indonesia as part of the international community.

- 7) Developments in practice on specific setting or special agreement made in certain areas of the field. In relation to the intended development, such as on sale and purchase of coal, contracts held by the government, distributor agreements, agreements in the field of intellectual property rights, banking, insurance, land, etc., would need attention so that later legislation in the field of the agreement to be prepared can be in harmony with existing laws and applicable regulations.
- 8) Developments in information technology, knowledge, international relations, health, food, and other fields.

Dealing with issues that accompany these developments, as including issues relating to the regulation of electronic contracts, the agricultural sector, turned out to be what considered in the international sphere indicating similar tendencies. They gives more attention to the contract relating to agriculture (contract farming). This case is apparent starts from construction of the contract models on the subject, where such efforts have been undertaken by *Unidroit* in which Civil Code/BW cannot meet these needs adequately. Actual conditions mentioned above cannot be qualified as a result of inventorying the comprehensive one. This occasion reflects the description of factual conditions of actual legal agreement, so it is still very likely there are many other issues related to the actuality of BW today or its harmonization with the provisions of national legislation. The unsuitability of legal problems contained in the Civil Code made necessary to what we need to

reconstruct the legal agreement or contract that is based on the foundation of our country, namely Pancasila. This fifth *Sila* of Pancasila functions as an integral thinking suggests on understanding of the meaning of each *Sila*. Definition of "family spirit" or "*gotong royong*" which is often regarded as an abstraction of the principles of Pancasila is essentially a crystallization of the groove-thinking as follows:

- a. The Indonesian people believe that human and the universe are the creation of God Almighty as the highest and different from other creations. This belief is equipped not only with exercise (physical being) but also with elements of flavor (emotional being) and the ability to use ratios (rational being) to maintain and improve the quality of their existence in the universe. That belief is also growing awareness that in life and put yourself in the universe, human beings should always serve and are accountable to God the Creator (vertical relationship);
- b. The Indonesian people believe also that in the Oneness and the Omnipotence of God, man was created as equal to one another so they must respect each other and can recognize the equality of man. It will always manifested in recognition of the humanity of man as different from other creations (as just and civilized humanity);
- c. Recognition of this equality concept brings logical consequences that the differences and uniqueness are in fact inherent in every human self (and every nation). This is the result of differences in history, socio-cultural, environmental, etc. that also continues to be gained recognition and reasonable

respect. This does not only means that the uniqueness is inherent in the Indonesian nation and other nations, but also meaningful recognition for each human being's differences and uniqueness. As the state philosophy, this value is reflected in third *Sila*, the Indonesian Unity.

- d. As a creation of God Almighty who live in "unity in diversity and diversity in unity" and reflected by integrality of *Sila* 1, 2 and 3, then all human efforts, both as individuals and as members of society, must be realized through the agreement reached by consensus. If the "deliberation to reach a consensus" about to be synchronized with the concept of "democracy", then *Sila* 4 of Pancasila mandates democracy in the sense that any decision or agreement to be made in human interaction can not only in terms of the recognition and enforcement of rights only, but must be understood in harmony with the implementation of obligations that must be upheld in the interest and/or a common goal. That's why the agreement (or consensus) is very valuable, because it reflects a willingness to sacrifice for the achievement of common objectives and a commitment to respect the rights of others to obtain happiness. Deliberation is basically inherent properties (inherent) in human existence as God's creatures that always exist in society (social being). This is a manifestation of the four elements that make up the whole person, that is the element of Harmony¹⁸.

18 Soediman Kartohadiprodjo, *Pancasila sebagai Pandangan Hidup Bangsa Indonesia*, Gatra Pustaka, Jakarta, 2010, page 61.

- e. In that spirit, relation and interaction between people, both in the micro (between individuals) and macro-level (individual and society, the individual and the state, between countries) should be realized. It means, based on Pancasila, the operation of the elements of the body, sense, reason and harmony will leads man to happiness. Achieving goals in life in this corridor (in the spirit of devotion and responsibility to the Creator, in recognition of equality, in recognition of the differences and uniqueness, through consultation to achieve consensus) undoubtedly achieve social justice (social justice). The principle of equality and solidarity are also often accepted as the main elements of social justice contained in the *Sila* 5 of Pancasila (social justice). It should be accepted as a logical consequence of a way of thinking that is intertwined between *Sila* 1, 2 and 3 and then through *Sila* to 4 of Pancasila.

C. CONCLUSION

In line with the development of a society that increasingly complex in modern times, grew a variety of risks that are potential to be a threat to the parties who have efforts to realize the expectations of the transactions they conduct. To realize the objectives, the norms of law has been developed in the form of a set of principles and the rule of law that is commonly understood as a legal contract or legal agreement (law of contracts) which is expected to be able to increase certainty, justice and predictability and at the same time as a device for parties to manage risk (risk management device).

Indonesia has been bestowed with Pancasila which is the crystallization of the outlook of Indonesian nation, should be the main landing foot for the development of Indonesian national laws, including the Law of the National Agreement

to come. At this point, the relevance view of the rules of customary law which are thought to lie in the values of local people, needs to be studied further in order to give a sense of “Indonesian-ness” on National Contract Law that will come.

In the study of law, jurisprudence, as well as the contracting practices in society, illustrates as follow:

- a. **The process of convergence of principles and rules that originates from the Civil Code (which is rooted in the tradition of civil law) with the principles and rules that grow in the common law tradition,**
- b. **The occurrence of significant divergences in the practice of the principles and rules of contract law contained in Book III of the Civil Code through jurisprudence. As a result, the Civil Code more seen as a source of contract law that justifies and validates the development of the practice of contract on the only basis of Article 1320 and 1339 of the Civil Code.**
- c. **The development of the principles use of contract law which is based on the economic concept of Sharia in various commercial activities (especially banking and finance);**
- d. **The growth of the views of paying attention to the first principles of Customary Law, which in its essence still reflects the mindset of the Indonesian nation to life and, in particular of the pattern of human relationships;**
- e. **Increasing number of attempts or tendencies of privatization of various public and / or concerning the lives of many people exactly are the duties and authority of public bodies (government contracts, project financing, etc.).**

The development of treaty law set out in Book III of the Civil Code is affected by legislation, such as the Basic Agrarian Law and Consumer

Protection Law, judicial decisions and practices which are carried out by the parties in their dealings. Basic Agrarian Law and its implementation rules give legal certainty to buyers with good intention.

Consumer Protection Act restricts the principle of contract freedom. This contract freedom protects the weaker party, namely consumers when dealing with employers. Court decisions also influence and fill in the vacancy of law doctrine of abuse such as the misuse of court witness and the agreement by secretly through action. Similar to them is habit that arise in the practice of making business contracts and problems that arise.

Therefore the future of the Indonesian National Contract Law should be developed by adhering to some of the main qualities, namely that the law (or at least the substance of its maxims):

- a. Must be derived from the values of Pancasila and the Preamble and the relevant provisions of the Act of 1945. Both should be stepped on Law of the National Agreement. In other words, thoughts that rise from the philosophy of life of the Indonesian nation and the constitutional basis of the Republic of Indonesia must become a national political treaty law; legal and political as far as possible. It is the one which animates the substance of Law of the National Agreement;
- b. Should be designated as sub-codification of law codification of National Commitments/ Treaties to come, so that the preparation of the Law on National Contract would always be prepared by anticipating the general principles of the new Indonesian Agreements/Engagements;
- c. Must be designed as a foundation stone of Law of Treaties in Indonesia, without having to assign a specific orientation to the civil law, common law, Islamic law or customary law, or other legal traditions. Law on National Contract should be developed as a typical Indonesian Contract Law, because it is in line with the principles of Pancasila values which is in condition of answering the issues of law.

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