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Jalan Raya Kaligawe, KM.4 Semarang, Indonesia

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"Legal Reconstruction in Indonesia Based on Human Right"

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, HilaireTegnan, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

PROCEEDINGS
The 5th International Conference and Call for Paper Faculty of Law 2019
Legal Reconstruction in Indonesia Based on Human Right

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The Relevance of Civil Law and Common Law Systems in Regulating Standard Contract Law in Indonesia

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Abstract

Fulfillment of the legal needs of the parties is mostly carried out through standard agreements that are generally accepted in society, both those adhering to the Common Law system and the Civil Law in casu in Indonesia. These two legal systems have relevance in the development of standard contract law, including, regarding written requirements (statue of frauds), regarding the validity of standard agreements, regarding breaking of contracts and regarding exonation clauses stated in the standard agreement. This regulation should be standardized for legal certainty and to fulfill justice for the parties as well as to provide benefits for fulfilling the legal needs of the Indonesian people.

Keywords: Civil Law System, Common Law, Standard Contract Law.

A. INTRODUCTION

Mariam Darus Badrulzaman quotes Pitlo's writings that a Greek philosopher named Heraclitus has revealed a statement which is important in human life which reads: 'pantarei', that is, everything changes or 'all things flow'.[1]In line with the idea of 'pantarei', it can be understood as a sign of the life of a society, is a fact that cannot be denied that there is a change. Society is moving towards change, including the laws inherent in people's lives. One of the functions of law is to serve and maintain the movement that exists in society towards change so that it can run in an orderly and just manner. Therefore, in order to fulfill the interests of society that are leading to change (transition), it is inevitable that the need for legal reform is sought to accommodate existing and new interests in society.

As with the movement of changes in societies in the world or other developing countries, Indonesia has also experienced a process of movement towards change (transition). In this case the transitional process includes various kinds of life in society, including the field of law. One aspect of the legal field that enters the transitional process is from an unwritten legal system to a written legal system.

The shift from unwritten law to written law (statutory law), according to Soetandjo Wignjosoebroto, citing Niklas Luhman's opinion, that legal positivization always has the main priority in any legal development efforts in developing countries that want unity and / or unification, not only those who headed to the nation state but also those who used to go to the colonial state. Legal positivization is always entitled as a process of nationalization and legal ethicization in order to improve the ability of the state and government (as the bearer of state power) to monopolize formal social control through the enactment or utilization of positive law (in fact it is statutory law)[2]

One area of law that is experiencing a transitional period is the field of civil law. This field of civil law is written civil law as stated in the Civil Code and all special regulations (in the form of laws, government

[1]Mariam Darus Badrulzaman, *Perjanjian Baku (Standard): Perkembangannya Di Indonesia* dalam Kumpulan Pidato-Pidato Pengukuhan (Bandung: Alumni, 1981). p. 2

[2] Soetandyo Wignyosoebroto, *Dari Hukum Kolonial Ke Hukum Nasional: Suatu Kajian Dinamika Sosial Politik Dalam Perkembangan Hukum Di Indonesia* (Jakarta: Raja Grafindo Persada, 1994). p. 13

regulations, government decrees, presidential decrees, ministerial decrees, etc.) which cover all aspects. Civil law, as it grows and develops, until its latest developments are in accordance with the development needs of society and the modernization of law in general as well as supporting economic development and development in particular. This means that the notion of civil law is not only identical to the Civil Code (KUH Perdata), but is broader because it includes all new regulations, changing and developing modern regulations as stated in the laws of the Republic of Indonesia which grew and developed during the independence period and was known in banking, credit, guarantee, industrial, investment, contractor agreements and others. In practice, various legal transactions that are in line with and meet the needs of the community often use standard agreements (standards).

Since the last few decades with regard to the principle of freedom of contract, there have been restrictions both from the state in the form of statutory regulations and court decisions as well as restrictions on the enforcement of standard agreements in the business world. Such is the strength of restrictions on the principle of freedom of contract as a result of the use of standard agreements in the business world by one party, so that for the other party the freedom to remain is only a choice between rejecting or accepting (take it or leave it) the terms of the agreement. standard that was presented to him.[3]

In relation to the flow of changes in society, both from internal and external conditions, it is necessary to have an in-depth study of the legal aspects of the standard agreement (standard) which includes principles, conceptions, theories, legal rules, including customs which can be used as the legal basis for Indonesian treaties so that it is hoped that it can resolve legal problems for the Indonesian people in particular as well as problems relating to transitional conditions and the effects of globalization.

Based on the description above, this paper will discuss the Relevance of Civil Law and Common Law in Legal Development in Indonesia, as well as Legal Practices in Indonesia: Standard Agreements under the Influence of the Civil Law and Common Law Systems.

B. DISCUSSION

1. Relevance of Civil Law and Common Law in Legal Development in Indonesia

The importance of comparative studies in the context of realizing the reconstruction of the National Criminal Law System is intended to study other legal concepts / systems that are closer to the characteristics of legal sources in Indonesia.

This is in accordance with Barda Nawawi Arief's opinion[4] which constructs the division of criminal law scientific approaches from the point of view of dividing the types of criminal law studies, which are divided into three approaches, namely:

- A scientific approach / legal thinking that is oriented to the substance of positive criminal law (can be called a scientific / theoretical juridical approach / orientation)
- A legal thought-oriented approach to criminal law policy / reform (juridical approach / orientation with a national policy / BANGKUMNAS / criminal law politics), and
- A legal thinking approach that is oriented towards comparative materials (a global / comparative approach / juridical orientation).

[3] Sutan Remy Syahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia* (Jakarta: Institut Bankir Indonesia, 1997), p 65.

[4] Barda Nawawi Arief, *Pendekatan Keilmuan dan Pendekatan Religius Dalam Rangka Optimalisasi dan Reformasi Penegakan Hukum (Pidana) Di Indonesia*, Badan Penerbit UNDIP, Semarang, 2011. pp. 2-3.

The comparison of law as a research / scientific method is also stated by Rudolf D. Schlessinger[5] among others:

- *Comparative Law* is a method of investigation with the aim of obtaining deeper knowledge about certain legal materials.
- *Comparative Law* is not a set of rules and legal principles, not a branch of law (is not body of rules and principles);
- *Comparative Law* is a technique or method of working on actual foreign legal elements in a legal problem (is the technique of dealing with actual foreign law elements of legal problem).

Historically, comparative law activities were carried out first by the Greeks, namely Plato who made legal comparisons between various cities in Greece at that time, then Aristotle (384 - 322 BC) in his Politics had examined 153 Greek constitutions and several other cities. Solon (640- 588 BC) undertook a comparative study of law when drafting Athenian law.[6]

Comparative law studies continued in the Middle Ages where comparative studies were made between Canon law (church) and Roman law, and in the 16th Century England had debated the usefulness of Canon law and customary law. At that time, a comparative study of customary law in Europe was used as the basis for the preparation of the principles of civil law (ius civile) in Germany. Montesquieu has even conducted a comparative study to establish a general principle of good governance.

In the pre-codification era, known as the era of ius commune, comparison of law and legal materials beyond territorial boundaries was a standard technique often used by jurists and judges at that time. The job of comparing is a daily job for them so that it is not impressed and it does not appear to them that the law or legal material being compared is a foreign law. On the basis of this way of working, the comparison process at that time tended to be integrative rather than contrastive. This change in the way of working occurred in an era when codification had become popular among legal experts in mainland Europe.[7]

The relevance of the comparative study above is important and useful as a legal history for the development of Indonesian law, because so far we still use most of the written law that comes from the legacy of the Dutch colonial era, so that the legal system in Indonesia is currently included in the civil law family has long adhered to the codification system.

In examining and tracing the relevance of the Common Law and Civil Law system in standard agreements in Indonesia, it is necessary to first understand the existence of law in Indonesia, especially contract law is still considered to be under the influence of Romano-Germanic (Civil Law) based on tradition and history. According to Ifdhal Kasim, the entry of this mainstream of legal thought into Indonesia, apart from the impact of the Dutch East Indies government colonization, also cannot be separated from the role of Dutch academic jurists who initiated the milestones of teaching and legal studies here. As a country that continues the tradition of Civil Law, legal development is very much determined by academic jurists because they have academic and professional authority in interpreting law. This differentiates from countries that, under the Common Law tradition,[8]

[5] Dalam Barda Nawawi Arief, *Perbandingan Hukum Pidana*, 2010, p. 5.
[6] Romli Atmasasmita, *Comparative Criminal Law*, CV.Mandar Maju, Bandung, 2000, p. 1.
[7] Romli Atmasasmita, *Perbandingan Hukum Pidana Kontemporer,* PT. Fikahati Aneska, Jakarta, 2009, p. 5.
[8] Ifdhal Kasim, *Membebaskan Hukum dalam Wacana,* (Yogyakarta: Insist Press, 2000), p 4

*Common Law*who were born and developed under special circumstances, both based on history and British culture and the countries related to it, initially had not influenced and were not suitable for the existence of law in Indonesia. In its development, the influence of Common Law is increasingly felt in Indonesia because since the legal community has interacted with international economic forces, it cannot be denied that English has become the main international language of interaction. The global impact of Common Law is the use of Common Law terms in international business agreements, such as mortgages, in consideration of, liquidated damages, and others.[9]

2. Legal Practice in Indonesia: Standard Agreement Under the Influence of Civil Law and Common Law Systems

Before examining the development of standard agreements in Indonesia, it is necessary to understand first that traditionally an agreement occurs based on the principle of freedom of contract between two parties who have an equal position and both parties seek to reach an agreement necessary for the agreement to occur through a process of negotiation between them. . However, in its development there is a tendency to increasingly show that many agreements in business transactions that occur do not go through a balanced negotiation process between the parties.

The use of standard agreements in social life and especially in the business world is common. However, the use of this standard agreement is not without facing legal problems that have been highlighted by legal experts, namely as stated by PS Ati yah in Sutan Remy Syahdeni: 'By mid-century these standard-form contracts had be come one of the major problems of the law of con tract '. Starting from this understanding, it can be stated that the problems faced in the use of standard agreements are the first with regard to the legality of the standard agreement and the second in connection with the loading of clauses or provisions which are unreasonably burdensome for the other party.

In legal practice in Indonesia, separate rules for special agreements contained in Chapter V-Chapter XVIII Book III of the Civil Code (which are considered to be under the influence of Roman Law) are complementary, so that they can basically be diverted. by the parties. This means that there are wide opportunities to make agreements based on the principle of freedom of contract as stated in article 1338 (1) of the Civil Code. This is very different from the influence of Anglo American law (Common Law) which during a certain period is not based on special rules, so it is likely that the agreement is formulated in a long and more detailed manner. Thus, in the Common Law tradition there is no need for separate rules for special complementary agreements. Special agreements were only made when the need for special imperative rules arose.

Agreements, both under the Common Law and Civil Law systems, both do not determine or impose written requirements (statue of frauds). This means that most of the agreements made are valid even though they are made in oral form or not in written form. Statue of fraud was stipulated in England in 1667 because it aims to avoid or reject fraudulent claims by determining the conditions for those who file claims to show or submit something in writing in order to prove the claim. It can be understood that many agreements which are made orally, whether that occur in the Civil Law, Common Law or other systems, will face evidentiary problems in court.

[9] Djasadin Saragih, *Sekilas Perbandingan Hukum Kontrak Civil Law dan Common Law dalam Hukum Kontrak di Indonesia*, (Jakarta: ELIPS, 1998), p. 2

In connection with the issue of the validity of standard agreements, it can be understood that in Indonesia, which is believed to adhere to the tradition of Civil Law, is based on the provisions of Article 1320 of the Civil Code which determines the four legal conditions of the agreement, namely agreement, skill, certain objects, and halal causes. According to Common Law, the validity of an agreement requires agreement, skills, certain objects and an added important element, namely consideration. The meaning of consideration is almost the same as the meaning of causa in the French Civil Code, namely the achievements made or undertaken by the parties. The meaning of causa according to Pitlo in Djasadin Saragih is what the parties want. The cause is nothing other than the contents of the agreement which in turn must not be contrary to law, morals and public order.

The principle of consensualism has a close relationship with the principle of freedom of contract and the principle of binding strength which is contained in article 1338 of the Civil Code. The principle of freedom of contract is related to the contents of the agreement, namely the freedom to determine what and with whom the agreement will be concluded.

The agreement made in accordance with Article 1320 of the Civil Code has binding power. If we examine the problems of 'existing' and 'binding power' of standard agreements, theoretically, this agreement does not fulfill the desired elements of Article 1320 jo 1338 of the Civil Code. This is based on the reason that the difference in the position of the parties when the standard agreement is made is that it does not give the debtor the opportunity to enter into 'real bargaining' with the creditor.

In the Civil Law tradition regarding broken promises, it is stipulated that if there is default by the debtor, there will be a creditor's claim for compliance, cancellation / dissolution, fulfillment or cancellation with compensation payments as stated in articles 1236-1250 of the Civil Code. According to Djasadin Saragih, this is different from Common Law, if there is a break of contract, then there will be a creditor's claim to the debtor who only pays damages and not the fulfillment of prestige (performance). Even if in its development what it wants is the fulfillment of prestige, it is actually based on equety, so that besides legal remedies (compensation) it is also an equitable remedy (achievement fulfillment). This can be taken as an example of the provisions of Article 1266 of the Civil Code which states that they will dissolve the agreement. However, the parties and judges often deviate from this provision in practice and consider the regulation to be complementary.

In line with this thought, the break of contract stipulated in Common Law states that not every break of contract gives rise to the right to dissolve the agreement because it is limited to serious (substantial) violations. However, in general it can be said that the possibility of the agreement dissolution in Indonesia is wider than the Common Law system. Normal damages due to default are real damages or ordinary damages.

In practice, the parties at the time of closing of the agreement have determined the amount of compensation to be paid in the event of an interpretation which is called liquidated damages. This must be distinguished from the promise of fines (pelnaties) which under Anglo-American law cannot be enforced other than Indonesian law (compare article 1304 of the Civil Code). Liquidated damages can have a positive meaning for the parties, namely that the creditor will be free from the heavy burden of proof regarding the amount of loss he has suffered and the debtor will also benefit because he will not be faced with a shock of the amount of compensation he has to bear.

The next most important legal problem regarding the many uses of

standard agreements in the business world is the problem relating to the inclusion of clauses or provisions that are unreasonably burdensome to other parties. Among the clauses that are considered as burdensome clauses and which have appeared in many standard agreements according to Sutan Remy Syahdeini, are the ones called the eczema clause. According to Mariam Darus Badrulzaman, for naming this clause, the term exoneration clause can be used as a translation of the exoneratie clausule used in Dutch.

The use of standard agreements in business transactions in Indonesia is increasing so that it should require great attention to the basic rules that must be obeyed by all parties in using standard agreements, as in countries that adhere to the Common Law system, which is based on developed basic rules. by various jurisprudences in connection with the application of the principles of public policy and unconscionability.

C. CLOSING

In the era of globalization that has swept the world, various citizens have conditioned to interact with each other in order to meet their daily needs. This results in a meeting between the various existing legal systems and can meet the legal needs of the parties who carry out their interests. Fulfillment of the legal needs of the parties is mostly carried out through standard agreements that are generally accepted in society, both those adhering to the Common Law system and the Civil Law in casu in Indonesia. These two legal systems have relevance in the development of standard contract law, including, regarding written requirements (statue of frauds), regarding the validity of standard agreements, regarding breaking of contracts and regarding exonation clauses stated in the standard agreement.

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