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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE

Ramon Nofrial

Student of Doctoral Program Faculty of Law Sultan Agung Islamic University

Email : ramonnofrial@yahoo.com

Darwinsyah Minin

Doctoral Program Faculty of Law Sultan Agung Islamic University

Email : jurnal_mizan@yahoo.co.id

ABSTRACT

The existence of Law No. 8 of 1999 on Consumer Protection guarantee the fulfillment of the rights of consumers to consume goods and services produced by businesses, as well as achieving a balance between consumer and business.

Specifications are preskriftif analytical research. This study is a prescriptive offered the concept to solve a problem, highlight something (object) aspired or should be. Is a descriptive analysis, which is to describe all the symptoms and the facts and analyzing the problems that exist in the present.

In respect of consumer protection in realizing the balance of businesses and consumers based on values of justice as an effort towards a welfare state based on Pancasila and the Constitution NRI Year 1945 made to the monitoring of the use clause like to give certain restrictions that do not diminish the rights of consumers, the application of strict liability businesses (strict liability), consumer dispute resolution pursuant to Act No. 8 of 1999, not tort (KUHPdt), and the addition of Article 45 in paragraph (2) which states: in the consumer dispute resolution in civil and criminal can not be charged back, before businesses found not guilty, and Article 63 paragraph (1) reconstructed into: criminal sanctions as referred to in Article 62, can be imposed additional penalties, such as: Deprivation of certain goods; Verdict; Payment of compensation; and the obligation of withdrawal of goods from circulation.

Keyword: Consumer Protection, Balance, Businessmen, Consumer, The Value Of Justice

A. Introduction

At this time, the Indonesian state is pursuing the development continues to increase, with the aim of reaching people just and prosperous Indonesia based on Pancasila and the Constitution of the Republic of Indonesia Year 1945 (NRI Constitution of 1945).

Article 27 paragraph (2) Constitution NRI 1945 confirms that every citizen has the right to earn a decent living for humanity in order to bring prosperity and intelligence, should the provision of goods and services in sufficient quantity, good quality at a price that is affordable to the public.

Every individual has diverse needs, as individuals and social beings. Humans need other human beings to meet their needs. There is a need of primary, secondary and tertiary. In fulfillment of human needs to consume or use the goods and / or services originating from other human beings. Therefore, every human being is a consumer that is provided by another man called producer services.

The producers or entrepreneurs will seek the highest profit, the producers / businesses must compete among themselves with their own business behavior that could harm consumers. Therefore, it is a fundamental consumer need of legal protection given the weak position of the consumers than producers notch relatively stronger in many ways.

Consumer protection is the right of citizens on the other side is the state's duty to protect its citizens, especially on a good product. Thus, in determining the rules of law required the intervention of the state through the establishment of a system of legal protection of consumers. Relating it was passed Law No. 8 of 1999 on Consumer Protection.

In the preamble of Law Consumer Protection mentioned the existence of the Law on Consumer Protection ensure improved welfare and assurance of the quality, quantity and safety of goods and or services obtained in the market, increase awareness, knowledge, awareness, awareness, ability and independence as well as cultivate business operators responsible attitude. The phrase the preamble of the Act has a philosophical meaning, juridical and sociological. At the stage of ideas (*dass sollen*) Consumer Protection Act could be upheld as well as possible to achieve the purpose of the law, the law of justice, rule of law, and prosperity. But in practical terms (*dass sein*) reality is not as easy as turning the palm of the hand, were not as expected.

Monopolistic practices and consumer protection less optimal position the consumer in the face of the lowest level of business operators. The powerlessness of consumers is clearly very detrimental to the interests of society. In general, businesses hide behind Baku Standard

Contract or Agreement which has been signed by both parties (between businesses and consumers), or through a variety of false information given by businesses to consumers in a standard clause

The justice system is considered complicated, tend to be wordy and relatively expensive helped obscure the consumer's rights and obligations of businesses, so that sometimes people themselves do not know clearly what the rights and obligations of, or to businesses with whom the consumer has related laws.

Thus, there are four (4) was the principal reason why consumers should be protected include

1. Protecting consumers is tantamount to protecting the entire nation, as mandated by the national development objectives according to the preamble NRI 1945.
2. Protecting consumers need to prevent consumers from the negative impact of the use of technology.
3. Protecting consumers need to create a climate of healthy competition physically and mentally for businesses to maintain continuity of national development.
4. Protecting consumers need to ensure that development funds are sourced from consumer society

On the question of how the consumer protection provisions related to running a business does not harm consumers and consumers to obtain legal protection of their rights so as to create a balance between consumer and business based on values of justice.

B. Creating the Welfare State Consumer Protection Based on Pancasila and the Constitution NRI Year 1945

Consumer protection to be conducted by the state in accordance with General Assembly resolution of the United Nations. The setting of consumer rights through legislation is part of the implementation as a welfare state, because the Constitution of 1945 in addition to the NRI as a political constitution can also be termed the economic constitution, the constitution contains the idea of a welfare state so that it can grow. Consumer protection carried out by berasaskan justice, works to increase awareness, ability and independence of the consumers to protect themselves, the duty to protect public health and the goods of domestic production and illegal imports to increase understanding in order to avoid and care of human health from the production of food and non food for consumers who will use it and businesses in the conduct of its business has a responsible attitude.

Consumer protection is all the effort that guarantees the legal certainty to provide protection to the consumer, is set in the Law on Consumer Protection. Consumer protection aims to accommodate the growth that occurs due to the influence of the globalization of trade. In accordance with the purposes of the law, the reason for the establishment of the Consumer Protection Act can be seen and philosophical aspects, juridical and sociological.

Pancasila is the philosophical aspect under which the development of well-being, and physical, but also spiritual in the era of economic democracy. From the juridical aspect is the establishment of the rule of law that serves as the main guideline in the implementation of consumer protection in order to run an orderly and equitable and rnengandung certainty of goods and / or services obtained from trade without resulting in consumer losses. The government and parliament to form Consumer Protection Act pursuant to the authority stipulated in Article 5, paragraph (1), Article 21 paragraph (1), Article 27 and Article 33 of the Constitution NRI 1945. Associated with the sociological aspects that consumer protection is based on the wishes of the national economic development in the era of globalization must be able to support the growth of the business world that is able to produce various goods and / or services that have technological content so as to improve the welfare of society.

C. Realize Justice Law Enforcement

In the implementation of the rule of law, justice must be considered, but the law is not identical with justice, the law is general in nature, binds everyone, is a leveler. Every person who steals must be punished without discriminating who steal. Instead of justice is subjective, individualistic and not generalize. Fair for one is not necessarily perceived as fair to others.

Radbruch says that the law must meet various works referred to as the basic value of law. The legal basis is the value: fairness, usefulness and legal certainty. Even though all three are a basic value of the law, but among them there is a Spannungsverhältnis (tension), because of the three basic values of the law each make different demands of each other, so that all three have the potential for conflict.

If we are more likely to hold on to the value of legal certainty or of the angle of rules, then as he immediately shifts the value of the values of justice and usability. Because of the importance on the value certainty it is the rules themselves. About whether this regulation has fulfilled a sense of justice and useful to society is beyond the primacy of the value of legal certainty. Likewise, if we are more likely to hold on to the utility value only, then as the value

it would shift the value of the rule of law and the values of justice, because it is important for the value of usability is the fact whether the law is helpful or useful for the community. Likewise, if we just stick to the values of justice alone, so as the value it would shift the value of certainty and usefulness, since the value of justice is not bound by the rule of law or the utility value, caused by something that is perceived as fair does not necessarily correspond to the value of usability and legal certainty. Thus we should be able to make the proportionality between the three grades were or could seek a compromise proportionally harmonious, balanced and harmonious between these values.

D. Reconstruction Law Against Use Clause Baku

In this case, the protection provided by the government as a regulatory and policy holders in the country. The responsibility of the government can be done in the form of guidance and supervision. The purpose of the guidance and supervision is to empower consumers to receive and know their rights not only the obligation of course, building the business activities that are positive and dynamic so that consumer rights can still be considered by operators.

In connection with the foregoing, governments protect consumers by providing the setting is limited to the standard clause which prohibited the existence of an intermediate form of responsibility from businesses to consumers (Article 18 paragraph (1) letter a). We recommend that the prohibition is given an explicit time period so that businesses produce goods may be exempted from liability for damages suffered by consumers. In this regard, Article 27 letter e UUPK in giving a maximum limit of 4 (four) years. If there is no clear arrangement then it is possible for businesses to take responsibility by including in the standard clauses more quickly than the regulations stipulated in the legislation.

In this regard, the prohibition to include the standard clause which states that the businesses entitled to refuse delivery of goods and / or services bought by consumers, it is also necessary period of time because it can be just the reason of this article the businessmen refuse any goods and / or services bought by consumers regardless of everything, ie a newly purchased one day because there are certain damages businesses refuse reversing that such goods (Article 18 paragraph (1) letter b).

Article 18 paragraph (1) letter b is a pair of Article 18 letter c, where businesses are allowed to refuse items that are returned by consumers and not refund the money paid by consumers for goods already received. It is not absolutely true, consumers may return the

goods that he has received a course on the refund payment of the goods, if the return is based on reasons that are justified by law.

Standard clause that contains authorization from consumers to businesses to undertake any unilateral actions relating to goods purchased in installments are to be unfair. This is because the goods are paid in installments, as if the consumers themselves have no rights before the goods are paid. Besides that, may also qualify as penyalahgunaan of the rights and the state of the consumer.

In Article 18 paragraph (1) letter e, f, g, and h, the government provides protection to consumers associated with the use of standard clauses, where businesses should not put a notch consumers under so it must comply with all rules set by businesses, so that businesses can only eliminate its responsibility to consumers. In addition, the Consumer Protection Act also stipulates that business operators are prohibited to include standard clauses in place that tersumbunyi, written in small letters are not noticeable so it is difficult to be understood by the public. Against that contains the standard clause of Article 18 paragraph (1) and (2) it is declared null and void.

E. Reconstruction Consumer Protection Law Against Responsibility Business Actor

Enforcement of the principle of strict liability (strict liability) in Indonesia can not be applied to all areas of business, or for all products, but only imposed on certain groups of producers and products. Among them are products that (a) the risk of use of the product; (B) the level of negligence committed by the manufacturer; (C) the products are used in bulk, and so forth. In addition, manufacturers scale conglomerate is a group of producers who absolutely must apply the principle of strict liability.

Need to be reiterated that the principle of strict liability (strict liability) is an article that is very hard to put in place, because of the impact of the law will be accepted by the manufacturer. Such circumstances this will create a condition that is counterproductive. One alternative solution proposed is to amend the Consumer Protection Act, which allows the application of the principle of strict liability (strict liability).

One alternative solution proposed is to set in amending the Consumer Protection Act, that the Law on Consumer Protection regulates the principle of absolute liability (strict liability) and further provisions on the principle of absolute liability (strict liability) will be regulated further in government regulation / implementing regulation.

If the agenda of amending the Consumer Protection Act are not included on the application of the principle of strict liability (strict liability), then the liability for policy makers to make the provisions governing product liability becomes more extensive and comprehensive cargo or even the provisions regarding sanctions maximum given should provide a deterrent to those who commit violations.

F. Reconstruction Consumer Protection Law Against Wanprestrasi Not Torts In Consumer Dispute Settlement

Reconstruct in this sense is reviewing consumer disputes in the civil courts, in particular the claim is based on tort.

But keep in mind, that if the consumer as the injured party, sued under Section 1365 KUHPdt (tort) there are difficulties, because the question must prove the elements contained in Article 1365 of the KUHPdt. It is also related to the provision of Article 1865 KUHPdt which states any person who argues that he has a right, or to affirm its own right as well as denied a right of others, refers to an event, required to prove their rights or the event.

Therein lies the weakness of the position of the consumer with businesses, although the Law on Consumer Protection adopted the system of proof, but the difficulty is experienced which is to prove the existence of an unlawful act (Article 1365 of KUHPdt) errors manufacturers complicate consumers, but on the other hand the consumer menganggap their against the law, but the evidence was or controlled by the manufacturer.

Reconstruction required a lawsuit in consumer disputes with the legal relationship between the parties in a dispute over consumer protection. If there is a relationship between consumers and entrepreneurs kontraktual the lawsuit qualification is in default and if consumers use the lawsuit qualification unlawful act (tort), the contractual relationship is not required.

G. Reconstruction of Article 45 of the Consumer Protection Act Regarding Defamation Charges Against Consumers by Business Actors

Setting legal protection for consumers tuntutan rapporteur so avoid turning of businesses / producers need to be reconstructed. Because all this is being debated in legal protection for consumers is still a vulnerable consumer reporter reprisal by business operators / manufacturers. Thus, in this problematic need for a clause in the law that explicitly states that the consumer should not be required of the reporting back by business operators /

manufacturers. Therefore, to provide legal protection to the complainant damages consumers need to be added in the articles of the Law on Consumer Protection, especially in Chapter X that regulates dispute resolution, in Article 45 added another verse which states: Every consumer who fight for the right to damages suffered from fraudulent business practices of businesses can not be prosecuted criminally and sued civilly, until businesses get the judge's decision that turns upside down after proving his innocence.

There are three reasons why the importance of consumer protection through consumer reporter immunity from civil and criminal charges of business operators / manufacturers. First, these provisions are intended to protect the victim and / or reporting legal action as a result of fraudulent business practices and is not responsible or crime of businesses / manufacturers. This protection is intended to prevent acts of retaliation from the reported through criminal prosecution and / or civil violation with regard to the independence of the courts. Secondly, there is the provision that the Consumer Protection Act to be consistent with the statement in Article 22 and 28 of the Consumer Protection Act which regulates the reversed burden of proof. Third, it gives courage to consumers to report businesses that often acts committed crimes in its business practices that harm consumers.

H. Reconstruction Consumer Protection Law Against Law Enforcement and the Administration of Criminal In Consumer Dispute Settlement

Enforcement of Consumer Protection Act as part of the economic law that has the function of protecting the interests of consumers of imbalances with the manufacturer, the legislators have to accommodate formal and material requirements in consumer protection law.

In terms of legal substances that are regulated, Consumer Protection Law, when associated with Science Tree, can be classified as a science that is Cross Sectoral which is an amalgamation of various disciplines of classical law. Nonetheless, in terms of the qualification of the sanctions, it appears that in the formulation of norms of the Consumer Protection Act is, there are job descriptions of the law, at least for the areas of administrative law and criminal law. In the field of administrative law govern the exercise of governmental power and authority to impose sanctions contained in Chapter VIII of Part One of Article 60, on Administrative Sanctions, namely:

Paragraph (1): Consumer Dispute Settlement Board be authorized to impose administrative sanctions against businesses that violated Article 19 paragraph (2) and (3),

Article 20, Article 25 and Article 26

Paragraph (2): administrative sanction implementation of compensation of Rp. 200,000,000.00 (two hundred million rupiah);

Paragraph (3): The procedure for the determination of the administrative sanctions referred to in paragraph (1) shall be further stipulated in the legislation.

Sanctions (penalties) criminal stipulated in Part Two of Article 61, Article 62 and Article 63. If Article 61 outlines the possibility for prosecution of officials businessmen, Article 62 providing for sanctions (penalties) the principal criminal, while Article 63 determines the additional sentence, Article 62 set:

Paragraph (1): Entrepreneurs who violates the provisions referred to in Article 8, Article 9, Article 10, Article 13 paragraph (2), Article 15, Article 17 paragraph (1) letter (a), (b), letters (c), paragraph (2) and Article 18 shall be punished with imprisonment for a period of 5 (five) years or a maximum fine of Rp. 2,000,000,000.-

Paragraph (2): Entrepreneurs who violates the provisions referred to in Article 11, Article 12, Article 13 paragraph (1), Article 14, Article 16 and Article 17 (1) (d) and letter (f) shall be punished with imprisonment 2 (two) years or a maximum fine of Rp. 500,000,000.-

Article 63 paragraph (1) determining the criminal sanctions referred to in Article 62, additional penalties can be imposed, such as:

- a. Deprivation of certain goods;
- b. Verdict;
- c. Payment of compensation;
- d. The stoppage of certain activities that contributed to the loss of customers;
- e. Liabilities withdrawal of goods from circulation, and
- f. Revocation of business licenses.

The formulation of additional penalties under Article 63 of this turned out to follow kind of additional punishment in the Criminal Code as a *lex generalis* of the types of penalties (sanctions) criminal in positive law. Only in this Article shall also about the stoppage of certain activities that cause consumer loss (d) and percabutan business permit (f). When linked with the description of the administrative sanctions in Chapter II, Section 2, it appears that, two additional punishment is part of some kind of administrative punishment.

Position additional penalty of criminal punishment is to follow the principal. In this context, additional punishment (Article 63) mengikuiti subject to criminal sanctions contained in Article 62. This means that, if hakim want to give it (sanctions) penjabutan

additional form of business license (as a type of administrative sanctions), from the businessmen for a violation he did, then it becomes one with the verdict sentencing decision (sanction) the principal criminal. Therefore, the criminal case is the absolute authority of the district court, the sentencing both principal and additional criminal sanctions, conducted by the District Court. If this happens then there will be fundamental issues, namely

- a. Basic legitimasi (authority) the District Court impose administrative sanctions
- b. The Court is competent to adjudicate a lawsuit (resistance) of businesses that their business licenses revoked.

Under the system of administrative law, an authority in imposing sanctions, must be concurrent with the authority to supervise both of which were sourced from the issuing authority of state administrative decisions. It is not justified, any sanctions imposed by the party not controlling party and giving a decision because it concerns the authority which is always based on the law or other regulations.

Every administrative decision which could be the basis of the disputed state administration is a decision issued by a public authority and not in the capacity as a judicial decision, so although there is a decision of administrative sanctions issued by a judge, but because it was issued by non-state officials in the context of the use of administrative authority, the sanctions decision becomes legally flawed.

As known, the administrative sanctions and criminal sanctions of different objectives, the nature and enforcement procedures. This difference also shows differences competent courts for trial. Meanwhile, every decision of the District Court, regardless of the imposition of sanctions can not be used as the base of state administrative dispute because:

1. The judge's decision is an act in the capacity as an institution prosecuting (and not a decision PN yudicial bodies / officials of the State Administration)
2. It has been available to certain channels that appeal, cassation or An overview back in case the parties do not accept the verdict.

Basically, the law requires that justice must include values: equality, individual rights, righteousness, propriety, and to protect the interests of the community. Therefore, the desired order is the order (order) which is capable of acting:

1. Ensure law enforcement in accordance with the provisions of the orderly proceedings;
2. Ensuring the enforcement of the rule of law;
3. Ensuring uniformity of law enforcement, and
4. Ensure the enforcement of the law enforcement prediction

In the context of consumer protection, efforts normative legislators to cover all possible distortion of businesses that cause harm to consumers is an effort proportionate to realize justice in society, but if the enactment of legislation that turned out to cause potential that gave birth to an imbalance new in the relation of law between consumers and businesses, in the sense of turning off the rights to strive notebene protected by the Constitution NRI 1945 (vide Article 27 paragraph (2) in conjunction with Article 33), it can be said that the enactment of the Consumer Protection has deviated from the original purpose of enforcement.

Characteristics of administrative law enforcement and criminal in Indonesia and the implications of the mismatch formulation of norms of the Law on Consumer Protection and the legal system (positive) to the rule of law that the administrative law requires the existence of a basic (legitimacy) the authority to issue a decision, oversight, and sanction administrative , Two final component is supervision and sanctions are part of the administrative law enforcement. Whereas in criminal law enforcement, emphasized on the formulation of the offense and the threat of sanctions. However, review of component consistency of decision authority, supervision and sanctions in terms of administrative law and the system of cumulation of criminal penalties diacamkan, was not in accordance with the system of administrative law (positive) and the character of the imposition of criminal sanctions applicable in Indonesia. In fact, a legal norms rule of law, law and law enforcement tool is a component parallel. That is, if there are fundamental weaknesses in norms and the obscurity of legitimacy for sanctions under a law, would complicate the implementation of the law enforcement in practice. Thus Article 63 paragraph (1) reconstructed into: Against the criminal sanctions referred to in Article 62, additional penalties can be imposed, such as: Deprivation of certain goods;

1. verdict;
2. Payment of compensation; an
3. Obligations withdrawal of goods from circulation.

I. Conclusion

Regarding the reconstruction of the consumer protection law in realizing the balance of businesses and consumers based on values of justice carried out against government oversight of the use of the standard clause which stipulated prior notice by businesses to provide certain restrictions that do not eliminate the rights of consumers, the application of

strict liability businesses (strict liability), consumer dispute resolution which is a breach of contract, not tort.

Article 45 added another verse which states: Every consumer's rights for losses suffered from business practices that cheating of businesses can not be prosecuted criminally and sued civilly, until businesses get the judge's decision that after conducting of proof turns out he was not guilty.

Article 63 paragraph (1) reconstructed into: Against the criminal sanctions referred to in Article 62, additional penalties can be imposed, such as:

- a. Deprivation of certain goods;
- b. Verdict;
- c. Payment of compensation; an
- d. Liabilities withdrawal of goods from circulation.

Through the theory Before Equality Law in balance by performing reconstruction of Article 45 and 63 paragraph (1) can realize the balance of businesses and consumers based on values of justice as an effort towards a welfare state based on Pancasila and the 1945 Constitution NRI.

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