DE LEGA LATA Jurnal Ilmu Hukum
Volume 7 Nomor 2, Juli 2022: Page 272-279
E-ISSN: 2477-7889 I ISSN: 2477-653X I Akreditasi: SINTA 3, SK No: 28/E/KPT/2019
http://jurnal.umsu.ac.id/index.php/delegalata

The Four Main Principles That Become the Pillars of Legal Building National Treaty

Muhammad Arifin

Faculty of Law, Universitas Muhammadiyah North Sumatra
Jl. Kapten Mukhtar Basri No. 3 Medan-Sumatera Utara

Email: muhammadarifin@umsu.ac.id (corresponding author)

Accepted: 27-05-2022 Revised: 28-06-2022 Approved: 29-06-2022 Published: 04-07-2022
DOI: http://dx.doi.org/10.30596/dll.v7i2.10288

How to cite:

Arifin, M. (2022). "The Four Main Principles That Become the Pillars of Legal Building National Treaty". De Lega Lata: Jurnal Ilmu Hukum, 7(2), 272-279.

Abstract

Contract law as regulated in Book III of the Criminal Code. Civil Code is a legacy of the Dutch Colonial which is more than a century and a half old. Considering the development of the business world which is closely related to the law of agreement or contract, it becomes a sine qua non to reform the law of agreement. The renewal of treaty law cannot be separated from the search for legal principles that serve as the basic foundation so that legal issues arise to seek and find the legal principles that are the pillars of the building of national treaty law. This research is a normative juridical research, namely research that conducts an assessment of library materials. The data source used is secondary data. Secondary data is "data sourced from library research related to publications, namely library data listed in official documents. The search and discovery of these legal principles is carried out through normative legal studies by relying on the search for various theoretical legal materials obtained from literature studies. The results of the study found four main legal principles as the main pillars of the building of national contract law, namely the principle of consensualism, the principle of freedom of contract, the principle of binding contractual power and the principle of good faith.

Keywords**: **Legal Principles, National Treaty Law.

INTRODUCTION

The State of Indonesia is a State of Law, this is regulated in article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, affirmation The contents of this constitution mean that all aspects of life insociety, state and government must be based on law (Asmadi, et.al, 2021). In accordance with the title of upgrading and coursework in the field of engagement, the material is entirely related to engagement law, including contract law. Various cases were put forward, both those that occurred in the Netherlands and their comparisons in Indonesia, which involved, among other things, defaults, coercive circumstances, abuse of conditions and standard agreements as well as usury agreements contained in Indonesian law..

This study is dedicated to the professor in honor of the age of 90 years, with a prayer that the professor remains in good health. Most of these studies contain reflections on the teacher's thoughts towards reform and the formation of national treaty law. This thought is also juxtaposed with some thoughts from other civil law experts.

The term agreement here is taken and is the equivalent or translation of the Dutch overeenkomst. This term is also synonymous with the term consent. The use of the term agreement for verbintenis is a mistake, because the agreement is the source of the engagement. In order to accommodate the legal relationship between the parties, it is more appropriate to use the term engagement for verbintenis.(Mariam Darus Badrulzaman, n.d.)

Selain perjanjian terdapat juga istilah kontrak (*contract*) yang keduanya dipandang identik, seperti terlihat pada Buku III KUHPerdata, Bab Kedua dengan judul "tentang perikatan-perikatan yang dilahirkan dari kontrak atau perjanjian. Dipakainya kata "atau" ditengah kata antara "kontrak" dan "perjanjian" menunjukkan pembuat undang-undang memandang kedua istilah yang dipisahkannya memiliki arti yang sama (J. Satrio, 1992). Likewise, in some Indonesian-language literature, agreements and contracts are seen as the same. Some see that there is a difference between an agreement and a contract, such as Subekti who said that a contract is usually aimed at an agreement made in writing or held in business circles (Subekti, 1976). The contract has a narrower meaning because it is addressed to a written agreement (Subekti, 2010). A contract is a written agreement and if it is not written it cannot be called a contract but an agreement.

Budiono Kusumohamidjojo, the main characteristic of a contract is that it is a written document containing the agreement of the parties, complete with terms and conditions and serves as evidence of the existence of a set of rights and obligations that bind the parties reciprocally (Budiono Kusumohamidjojo, 2017). From one definition it is said, the contract as "an agreement creating an obligation" (Anderson, Fox, 1984). A contract is an agreement that creates an obligation (commitment). The substance of the definition of a contract is, that by mutual agreement or assent the parties create enforceable duties or obligations that are legally binding (Anderson, Fox, 1984). A contract is a mutual agreement or agreement of the parties by creating an enforceable duty or legally binding obligation.

In general, the agreement is not bound by a certain form, so that it can be made orally or in writing, unless the law states otherwise by specifying that it must be carried out in a certain form or formality. If it is made in writing, it is more like a means of proof in the event of a dispute (Mariam Darus Badrulzaman, 1983). In its form, the agreement is in the form of a series of words containing promises or abilities that are spoken or written (Subekti, 2010).

An understanding of the meaning of an agreement as a legal act that gives birth to a legal relationship called an engagement as mentioned above looks like two different momentums or periods even though they are closely related and inseparable. In fact, the legal act that gives rise to a legal relationship exists at a time that gives rise to legal consequences. Momentums in the process of making an agreement are a series that cannot be separated from one another. An agreement is a legal act, because from that act there will be legal consequences and an engagement as a legal relationship is a relationship between the parties that has legal consequences (Moch. Isnaeni, 2017). The legal consequences that arise are in one period, namely when a legal action is held while at the same time giving birth to a legal relationship that contains the rights and obligations of the parties. With this construction, it is

reasonable that the agreement is not only a legal act, but also a legal relationship. Legal relationship (engagement) is only born when there is a legal action (agreement), there is no legal relationship if there is no legal action, except for those born from law.

This new understanding or understanding is not yet popular, because the mainstream of thought contained in most of the literature still holds on to the agreement as a legal act. The need for understanding the terms engagement and agreement is felt in the theoretical aspect of academics, but is less important in practice in society. However, it is still deemed necessary as a legal understanding, because there are engagements that originate outside the agreement, namely those that originate from the law.

RESEARCH METHOD

This research is a normative juridical research, namely research that conducts an assessment of library materials. Normative juridical research is research that is used to examine the application of legal rules or norms (Koto & Lubis, 2020). The data source used is secondary data. Secondary data is "data sourced from library research related to publications, namely library data listed in official documents.

DISCUSS AND ANALYSIS

Open Systems Approach and Partial Codification

Mariam Darus always prioritizes a systems approach in understanding the law. The system is a building that is supported by principles, both general and specific, so that the building becomes strong, harmonious and integrated as a unit. The system is open in nature which can be developed into sub-systems (Mariam Darus Badrulzaman, 20183). The principle is obtained through juridical construction by analyzing (processing) data that is real (concrete) and then taking its general nature through the process of abstracting (Mariam Darus Badrulzaman, 1997).

With a systems approach, civil law is a sub-system of national law, and therefore the principles contained in civil law must be in line with the principles contained in national law (Mariam Darus, 1987). Legal principles are used as the basis for the civil law movement as a sub-national legal system. Civil law as a sub-system of national law has a special operational principle that distinguishes it from other sub-systems. This principle is systematized in four areas, namely family law (including individual law), inheritance law, property law and binding law (Mariam Darus Badrulzaman, n.d.). From the law of engagement as a sub-system of civil law, there is a sub-system of contract law. Each sub-system when pulled apart from its parent can form its own smaller system, but still related to the parent system. That is, the sub-systems that remain and are a single unit, so that each part has no meaning outside the unity. The division of the legal system into parts (sub-systems) is a feature of the legal system. In addition to having elements, the legal system is equipped with other standard characteristics which include divisions, consistency, completeness, and fundamental concepts. Discussing the legal system must be done by answering the characteristics of the legal system in question.

The legal system must be consistent, so that there should be no problems or conflicts in it. Even if a problem or contradiction occurs, it will be immediately resolved by and within the system itself. Because the principles of the system are woven together, problems and

conflicts that occur are resolved using the underlying legal principles. Such as the use of the principle of lex specialis drogat legi generali in resolving problems that arise between special and general legal rules, lex superiori drogat legi inferiori, higher regulations ejecting lower regulations, and lex posteriori drogat legi priori, regulations that are more just overrides older or older rules.

Mariam Darus argues, the civil law system must be implemented with an open partial codification, so that a complete codification is not formed like the old concept. This open partial codification system is essentially the same as the compilation system. Sub-sectors of civil law in accordance with the priorities determined are regulated according to their respective fields, but remain within the scope of codification systematics, namely each field is a sub-system of the civil law system even though it is formed partially. Covenant law as a sub-system of civil law will be regulated in separate legal rules partially, but systematically as part of the civil law system. Once formed, the law of agreement which was regulated partially earlier, of course, will affect by replacing the existence of the law of agreement contained in Book III of LUH. Civil. This method has occurred with the formation of Law no. 5 of 1960 jo. UU no. 4 of 1996 and Law no. 1 of 1975, each of which was drawn from and influenced Book II and Book I of the Civil Code as long as it concerns the earth, water and natural resources contained therein and mortgage rights and the field of marriage.

The Four Main Principles That Become the Pillars of Building National Covenant Law

Most of the rules of contract law are derived from general law principles. The principle (principle) of law is the basic thought and ideological basis of the rule of law. A legal principle can be the basis for the rule of law, the composition of the rule of law and the legal system as a whole. The existence of the principle becomes the basis, foundation and foundation for the rule of law. Paton gives a formula about the principle (GW. Paton, 1964):

> *"A principle is the broad reason which lies at the base of a rule of law: it has not exhausted itself in giving birtd to thatparticularrulu but is still fertile. Principle, the means by which the law lives, grows, and develops, demonstrate that law is not a mere collection of rules".*

The formulation of the rule of law in the law as a form of legal entity, is always associated with the principle as a foundation. Articles of law that contain legal norms can actually be returned to the underlying principle. Because legal norms are formulated according to the principles that form them, then every legal norm must be able to be returned to the principle of law.

The steps that need to be carried out in reforming the national treaty law are to seek, discover and examine the underlying principles. Madjedi Hasan put forward four important principles of universal contract law, namely the principle of freedom of contract, the principle of pacta sunt servanda, the principle of good faith and the principle of consensualism (Madjedi Hasan, 2005). Likewise, Ridwan Khairandi put forward the same four principles that are intertwined with each other, namely the principle of consensualism, the principle of strength to bind contracts, the principle of freedom of contract, and the principle of good faith (Ridwan Khairandy, 2015). Sudikno Mertokusumo, put forward three principles contained in contract law, namely the principle of consensualism, the principle of binding force and the

principle of freedom of contract. The principles put forward are the principles of contract law which are also contained in the Civil Code which are found in Articles 1320 and 1338.

Indonesia's treaty law reform needs to pay attention to accommodating the four main principles that are the pillars of the building of national treaty law. The four principles are the principle of consensualism, the principle of freedom of contract, the principle of the power of binding agreements and the principle of good faith. Although these four principles exist and originate from the Civil Code, they still need to be maintained, moreover they have been enforced through jurisprudence and received general acknowledgment by legal experts (doctrine).

1. Principles of consensualism

The principle of consensualism means that an agreement has occurred and is binding on the parties since an agreement was reached. The agreement is valid and binding on the parties if an agreement has been reached on the main points of the agreement. The specified agreement does not require certain formalities, so it can be done, both in writing and orally. If an agreement is reached, the agreement is valid and applies as law for those who make it (Subekti, 1975). In the development of practice, to make it easier in terms of proof and not easy to deny what has been agreed, it would be better if the agreement was put in written form. There are some exceptions that require certain formalities for certain types of agreements. If the specified formalities are not fulfilled, the agreement will be void. As in the Civil Code, grant agreements for immovable objects must be made by a notarial deed (Article 1682 of the Civil Code) and a peace agreement which must be made in writing (Article 1851 of the Civil Code).

Subekti is of the opinion that in fostering national contract law, it is important to maintain the principle of consensualism which is an absolute requirement for modern contract law and for the creation of legal certainty. Furthermore, Subekti gives a view that shows his disapproval of customary law which is real. Adhering to the principle of consensualism means letting go of the assumption in customary law, that words alone are not binding and to create that bond there is a need for "down payment" or "binding money" or so on. Likewise, releasing the idea that one person can free himself from the bondage, by returning the down payment or from the down payment provider by letting the down payment be owned by another party.

2. Principle of freedom of contract

The principle of freedom of contract provides flexibility for the parties to determine the content and terms of the agreed agreement, including establishing a dispute resolution mechanism and determining the law that applies to the agreement. In relation to the development of national contract law, Sunaryati Hartono said, there is no need for the principle of freedom of contract to be used as the main principle. However, it is impossible to negate the individual's free will which is free within the limits of the state plan and state philosophy. On the other hand, Subekti considers it necessary to include the principle of freedom of contract in national contract law in order to increase legal certainty. Likewise, Mariam Darus Badrulzaman argues that the principle of freedom of contract is maintained as the main principle.

Mariam Darus Badrulzaman further linked the principle of freedom of contract with the human rights contained in the 1945 Constitution. Based on the Pancasila philosophy, human rights in the form of freedom of thought and freedom of expression mean freedom of responsibility, freedom that contains obligations. The appearance of freedom of thought and freedom of expression in the 1945 Constitution is a strong and logical basis for maintaining responsible freedom of contract as one of the main principles of contract law, especially from the perspective of the birth of an agreement. Freedom of contract is the backbone of contract law, because through this freedom, community members can develop their creativity.

3. The Principle of Binding Strength

The principle (principle) of the power to bind the agreement is related to the consequences of the agreement. An agreement made legally binding the parties like a law for the parties, so it cannot be withdrawn or changed unilaterally. Another consequence, judges or third parties may not interfere with the contents of the agreement agreed by the parties. The principle of binding power essentially begins and has the same meaning as the adage pacta sunt servanda which means that promises must be kept. Pacta sunt servanda requires the agreement that has been agreed to be binding on those who make it (Adolf, 2020). This principle applies universally which is known in various legal systems in the world, including in the law of transnational business transactions (Adolf, 2020).

Every promise made in the making of an agreed contract not only creates a moral obligation but also becomes a legal obligation that must be obeyed by the parties in their contractual relationship. This relationship in turn increases trust and certainty that the agreed agreement will be implemented and adhered to or fulfilled as it should be. Without trust and certainty in the fulfillment of contractual promises that have been agreed upon, the community will not develop properly which can have implications for the non-smooth economic traffic.

4. Good faith principle

Every agreement is always related to good faith. Good faith is the basis that governs the law of collective agreements with the principles of consensuality and freedom of contract, as well as binding force. Good faith is related to the making and implementation of the agreement. Good faith when making an agreement means honesty, while good faith at the stage of implementing the agreement is propriety, namely a good assessment of the behavior of a party in carrying out what has been agreed. Honesty is subjective and propriety is objective. Honesty has a subjective element, because it lies mainly in the hearts of interested parties and propriety has an objective element, because it lies mainly in the circumstances surrounding the agreement or agreement.

The agreement is carried out in good faith, meaning that the agreement must be carried out rationally and properly (rational en billijk) who live in society. According to Mariam Darus, it is appropriate if this principle is used as a reference in the implementation of the agreement. Agreements must be tested in good faith, especially based on changes in circumstances that occur in people's lives.

The principle of good faith and fairness is not only regulated in contract law, but also in the law of other engagements as well as part of property law, or becomes a general law

principle that applies outside of contractual legal relationships. In Dutch civil law this principle is seen as a very fundamental principle. The principle of good faith and fair treatment is not a source of supplementation, but also a method of transfer, if there are special rules, both those born from contracts and the Civil Code itself, cannot be accepted according to the criteria of good faith and fair treatment, then the provisions or regulations are not binding.

In its development, the principle of good faith serves to add to the contents of an agreement and serves to limit and eliminate the implementation of the agreement or contractual obligations. With the principle of good faith, judges are given the power to supervise the implementation of the agreement so as not to violate decency or justice. The judge has the power to deviate from the contents of the agreement according to the letter if it is contrary to good faith. The application of this good faith is a demand for justice, so the parties must be able to act fairly in demanding the fulfillment of promises.

The discovery of the criteria contained in jurisprudence is casuistic, meaning that it is seen case by case according to the events and facts revealed at the trial. Although buying and selling is not done in front of the village head or lurah, but between the seller and the buyer know each other or the purchase price is reasonable, then the buyer is in good faith. Every buyer with good intentions gets reasonable protection from the law and buyers who do not have good intentions do not need legal protection (Decision of the Bandung High Court No. 144/1970/Perd/PTB, dated December 26, 1970). Article 1977 paragraph (3) of the Civil Code in essence also aims to protect buyers who have good intentions, but are limited to movable goods or objects.

Taking into account jurisprudence that applies the principle of good faith in a concrete manner, it should have a place as one of the principles in the formation of national treaty law. The placement of this principle relates to the legal protection given to parties who have good intentions and provide protection from the abuse of power of other parties.

CLOSURE

Conclussion

The four main principles stated are also summarized in Article 1320 and Article 1338 of the Civil Code. Although contained in the Civil Code, the existence of these four principles is still relevant to the development of modern contract law and is still used as a pillar for the building of national contract law. The four main principles are still appropriate and have received general recognition from the thoughts of Indonesian legal and jurisprudential experts.

Suggestion

Business life cannot be separated from contractual activities, and so that business life can run well which can have an impact on the economy, it is necessary to realize the formation of a national contract law. The formation of national treaty law needs to be prioritized by taking into account and placing the four main principles described above as pillars. The four main principles are deemed still appropriate to be compromised with customary law and Islamic treaty laws that apply in Indonesia.

REFERENCES

Adolf, H. (2020). *Hukum Transaksi Bisnis Transnasional*. Keni Media.

Anderson, Fox, T. (1984). *Business Law*. South-Western Publishing Co.

Asmadi, Erwin, Padian Adi Selamat,Benito Asdhie Kodiyat, MS, Ismail Koto, "Efektivitas Pemanfaatan Teknologi Informasi Dalam Persidangan Perkara Pidana Selama Pandemi Covid-19 ", *De Lega Lata: Jurnal Ilmu Hukum*, Vol. 6 No. 2 Tahun 2021.

Badrulzaman, Mariam Darus. (1987). *Sistem Hukum Perdata Nasional*. Medan.

_____. (n.d.). *Menuju Hukum Perikatan Indonesia*. Medan: Fakultas Hukum USU.

_____. (1983). *KUHPerdata Buku III: Hukum Perikatan Dengan Penjelasan*. Alumni.

_____. (1997). *Mencari Sistem Hukum Benda Nasional*. Alumni.

_____. (2018). *Hukum Harta Kekayaan Indonesia Didalam Perkembangan*. Citra Aditya Bakti.

GW. Paton. (1964). *A Textbook of Jurisprudence*. Oxfort University Press.

Hasan, Madjedi. (2005). *Pacta Sunt Servanda: Penerapan Asas "Janji itu Mengikat" Dalam Kontrak Bagi Hasil di Bidang Minyak dan Gas Bumi*. Fikahati Aneska.

Satrio, J. (1992). *Hukum Perjanjian*. PT. Citra Aditya Bakti.

Kusumohamidjojo, Budiono. (2017). *Perancangan Dan Legalitas Kontrak*. Mandar Maju.

Lubis, Taufik Hidayat, Ismail Koto, "Diskursus Kebenaran Berita Berdasarkan Undang-Undang Nomor 40 Tahun 1999 Tentang Pers Dan Kode Etik Jurnalistik", *De Lega Lata: Jurnal Ilmu Hukum*, Vol. 5 No. 2 Tahun 2020.

Moch. Isnaeni. (2017). *Selintas Pintas Hukum Perikatan (Bagian Umum)*. Revka Petra Media.

Ridwan Khairandy. (2015). *Kebebasan Berkontrak & Pacta Sunt Servanda Versus Iktikad Baik: Sikap Yang Harus Diambil Pengadilan*. Yogyakarta: FH UII Press.

Subekti. (1975). *Pembinaan Hukum Nasional*. Alumni.

_____. (1976). *Aspek-Aspek Hukum Perikatan Nasional*. Alumni

_____. (2010). *Hukum Perjanjian*. Intermasa.