Government policy in Indonesian contract law that still uses contract law inherited from Dutch product

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Abstract

Purpose – This research is very important to conduct to review government policy on Indonesian contract law that still uses contract law inherited from Dutch product (BW) and review which regulations are to be adapted to current development of contract law. This research's novelty is that new rules will be found in Indonesian contract law.

Design/methodology/approach – This research used normative and empirical methods. Normative research is dogmatic research or one that analyzes legislation using secondary data consisting of primary, secondary and tertiary legal materials. Besides the normative method, the research was also conducted using empirical method through direct interview and observation in some government agencies, such as the Directorate General of Legislation, Ministry of Law and Human Rights (HAM) and Chairman of Legal Product Formation Division, House of People's Representatives of the Republic of Indonesia and the Civil Law Teaching Association (APHK).

Findings – This research found that new Indonesian contract law is very important to give legal certainty and justice to the people, and the contract law must regulate important matters related to the sources of contract besides agreement and law, related to termination, unjust enrichment, negotiation, good faith, public contract and private contract and related to legal act and validity of electronic contract.

Research limitations/implications – The novelty of this research is that new rules will be found in Indonesian contract law. This research is different from previous researches conducted by Sigit Irianto (2013) and Deviana Yuanitasari (2020), that discuss only on contract law development related only to the good faith principle.

Practical implications – Drafting contract law is a relatively heavy duty due to the factor of law pluralism that contains contract aspect in Indonesia such as customary law aspect, Islamic law aspect, regional aspect, international aspect and other aspects. In fact, meanwhile, there is rapid development in the community with regard to business transactions that are also followed with contract law development. Therefore, amendment is needed for the Indonesian contract law to adapt to the people's need for law, and this change agenda is also addressed to updating the contract law.

Social implications – Civil law reform, especially contract law, is deemed very important for Indonesia, because based on field fact, people do their business contract by applying contract law that is not yet regulated in the contract law in KUHPerdata; thus, new contract law is needed that regulates important matters related to sources other than agreement and law.

Originality/value – It is very important to conduct this research to review government policy in Indonesian contract law that still uses the contract law inherited from Dutch product (BW) and review what

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regulations should have been adjusted to current development of contract law. The novelty of this research is that new rules will be found in Indonesian contract law. This research is different from previous researches conducted by Sigit Irianto (2013) and Deviana Yuanitasari (2020), that discuss only on contract law development related only to the good faith principle.

Keywords Government policy, Contract Law of Dutch East Indies Legacy, Modern contract law

Paper type Research paper

1. Introduction

The urgency of contract regulation in business practice is to assure exchange of interest in the form of rights and obligations for the parties to create a fair and mutually beneficial contractual relationship for the parties that enter into the contract instead of the otherwise, only beneficial to one party and harming the others, especially in commercial contracts.

Furthermore, currently contract law keeps developing throughout the world, and there are many changes in commercial contract laws and regulations. Changes also occur in international contract field in which, the separating gap is getting thinner between the contract law of common law system and the contract law civil law system. Therefore, the government should have adjusted the Indonesian contract law to the current development of contract law. This is in anticipation of the existing changes in commercial contract law and in achieving fair contract for the parties to contract.

It is very important to conduct this research to review government policy in Indonesian contract law that still uses the contract law inherited from Dutch product (BW) and review what regulations should have been adjusted to current development of contract law. *The novelty of this research is that new rules will be found in Indonesian contract law*. This research is different from previous researches conducted by *Sigit Irianto (2013) and Deviana Yuanitasari (2020), that discuss only on contract law development related only to the good faith principle*.

The currently prevailing Indonesian contract law is of Dutch heritage, Burgerlijk Wetboek (BW) or commonly known as the Civil Code (*KUHPerdata*) that has been effective for over 173 years from the period the Dutch Government ruled Indonesia. Therefore, this BW is considered inappropriate to the people's current development or "out of date." It is indeed ironic that the contract law has not been reformed despite the people's quite rapid and more complex development, while until today, the regulations in book III on contract law has not been amended.

In the Netherlands, specifically, BW has been abandoned through is contract law reform from 1947 to 1992 into a more complete and better called "New Burgerlijk Wetboek" (*NBW*). BW consists only of four books, while NBW consists of nine books. Therefore, the substance of NBW has changed fundamentally into one adjusted to what the modern people need and with the development from the contract law principles and doctrines of countries with common law system such as abuse of situation and regulating that a contract occurs based on "order and acceptance."

In the Indonesian contract law, meanwhile, the BW still uses the requirements for validity of a contract as set forth in article 1320 BW including covenant, capacity, certain thing and a legal cause (Subekti, 1996, p. 17), while in the trade practice in Indonesia, many contracts have been based on the "order and acceptance."

With the development of international contracts, the Indonesian contract law should have adjusted and harmonized into the international commercial contract law as set forth in the Unidroit Principles, Principles of International Commercial Contracts (PICC), Contracts for the International Sales and Goods (CISG) and United Nation Conference on International

Trade Law (UNCITRAL) (Agus Yudha Hernoko, 2011, p. 15). The advancement of technology also causes many commercial contracts are entered into online (online contract), that naturally also needs definite regulation in the Indonesian contract law.

Draft Indonesian contract law has actually been worked on and initiated by Elips (1998, p. 3), trying to draft new contract law to accommodate all changes in the community. In addition, draft contract law has also been made by the Civil Law Teaching Association (APHK), but until now, the government and the legislative agency have not taken any policy to discuss the new contract law immediately, while if the new contract law has existed, the new Indonesian contract law is expected to follow other countries' development such as NBW in the Netherlands and contract law as per international standard set forth in UNIDROIT, UNCITRAL and CISG.

Based on the above, the research problems are as follows: how is government policy in the Indonesian contract law that still uses contract law inherited from Dutch product (BW)? And what regulations should have been adjusted to current contract law development?

2. Research methodology

This research used normative and empirical methods. Normative research is dogmatic research or one that analyzes legislation using secondary data consisting of primary, secondary and tertiary legal materials. Besides the normative method, the research was also conducted using empirical method through direct interview and observation in some government agencies, such as the Directorate General of Legislation, Ministry of Law and Human Rights (HAM) and Chairman of Legal Product Formation Division, House of People's Representatives of the Republic of Indonesia and the Civil Law Teaching Association (APHK).

With normative juridical method, research is conducted by reviewing primary legal materials, such as research conducted because of legislation that is deemed not in conformity to current era and technology, such as contract law regulation set forth in KUHPerdata that is a legacy of Dutch East Indies era. Therefore, new rules on contract law are needed, expressed into a norm of positive law in Indonesia.

3. Result and finding

Drafting contract law is a relatively heavy duty due to the factor of law pluralism that contains contract aspect in Indonesia such as customary law aspect, Islamic law aspect, regional aspect, international aspect and other aspects. In fact, meanwhile, there is rapid development in the community with regard to business transactions that are also followed with contract law development. Therefore, amendment is needed for the Indonesian contract law to adapt to the people's need for law and this change agenda is also addressed to updating the contract law that is out of date and incompatible with what the people need.

4. Result and discussion

4.1 Government policy in the Indonesian contract law that still uses contract law inherited from Dutch product (BW)

Development process brings the consequence of changes or reforms in economic, political, social and cultural aspects, including reform of legal institutions. Legal changes or reforms bear positive meaning in creation of new law that conforms to development condition and people's development.

Legal reform is always related to legal policy, that is the policy taken by a state through its agency or official, to determine which law needs to be replaced, or amended, or which is

to be maintained so that with the policy, state and governmental administration can run well and orderly to achieve the state's goals (Saragih, 2006, p. 17).

According to Fajar Arif Yanto, Sub-Directorate of Legislation Designing Conception Planning, Ministry of Law and Human Rights of the Republic of Indonesia states that the Government and House of People's Representatives have not included KUHPerdata and Contract Law as the National Legislation Program (Prolegnas) in 2022 as there is still no academic script related to KUHPerdata and Contract Law that will be discussed in small group by drafters of Law of the Ministry of Law and Human Rights (Interview with Fajar Arif Yanto, 20 June 2022).

Fajar Arif also states that based on Article 18 Law No. 12 of 2011 on Formation of Laws and Regulation and Article 11 Presidential Regulation No. 87 of 2014 on Implementing Regulation of Law Number 12 of 2011, determining formation of new law or replacing old law shall be performed under command of the 1945 Constitution and other laws, and also under national development planning system, long- and medium-term development plan, government work plan, House of People's Representatives' strategy and aspiration of the people's needs.

According to Y. Sogar Simamora, as the Chairman of Civil Law Teaching Association (APHK), APHK is preparing academic script of Contract Law, not academic strict of KUHPerdata, as making and replacing KUHPerdata take a long time as in the Netherlands, that making NBW takes over 30 years. Therefore, APHK will only make academic script for Book III of KUHPerdata on Contract Law (Interview with Y. Sogar Simamora, 17 June 2022).

Y. Sogar Simamora also argues that until now the government and the parliament have not had any political will to replace the old KUHPerdata, and many of the provisions in KUHPerdata are unsuitable anymore for the current legal development of modern community. Civil legal reform is deemed insignificant; thus, it is left as is. On the other hand, the government must facilitate business players for them to invest in Indonesia, and certainly, potential investors will see and learn the Indonesian legal system including the Indonesian contract law (Simamora, 2022, p. 5).

Based on the foregoing, the national legal development is classified as the civil legal development, especially in contract law that is influenced by many factors; thus, it is not an easy thing and takes time to make a legal product like law. The influencing factors are divided into two: internal and external factors. External factors are related to the global and regional development of developed countries and the development of regional organizations such as ASEAN Free Trade Agreement (AFTA), Asia Pacific Economic Cooperation (APEC) and Association of Southeast Asian Nations (ASEAN). The internal factors are, meanwhile, influenced by increased human resources, advanced technology and customary law and Islamic law that are adopted into the national law.

Based on the two factors above, the government policy in contract law development should also consider the actors. Therefore, the author will analyze the factors one by one related to contract law reform in Indonesia as follows:

(1) External factors

- Global development:

Global development is influenced by the development of science and technology, that will lead to very big changes to human life, such as changes in how they do business and transaction. These changes are also related to changes that support industrial revolution 4.0 and changes in future innovation. Global development is also influenced by international development that grows what is commonly called global governance. Thus, economic, legal

and political issues become international ones or of global scale, despite growing and developing at local level.

Erman Rajagukguk suggests that the Indonesian economic law reform policy in the current global transformation era, and in the face of the free market tendency, should not simply take over global regulations, but at the same time should be oriented to maintenance of state unity, driving economic growth and protecting the weak from industrialization's negative impacts (Rajagukguk, 2016, p. 27).

The global regulations related to international contract law include Unidroit Principles, PICC and UNCITRAL (Soenandar, 2004, p. 15).

In addition, in relation to the global and international regulations, it is necessary to compare our contract law with that of developed countries that use the civil law system such as, The Netherlands' Nieuw Nederland Burgerlijk WetBoek (NBW), Germany's Bürgerliches Gesetzbuch (BGB), France's Civil Code Des and Japan's Civil Code (Simamora, 2022, p. 2).

With regard to international law against national law, the practice in Indonesia follows Dionisio Anzilotti that there is difference in the basis of validity between national law and international law. State law is based on the obligation to comply with the instruction of law and legislative, while international law is based on the *pacta sunt servanda* principle. Therefore, international law binds individually only after it is adopted into the norms of national law or through the legislative policy of that country to transform international law into national law (Gragl, 2018, p. 36):

- Regional development:

Regional development in various parts of the world should also keep ongoing such as the regional organizations such as ASEAN AFTA and Asia Pacific Economic Cooperation (APEC. In the Southeast Asia there is ASEAN that also improves cooperation among its members not only in economic integration, but also the flow of trade of goods, services and manpower also increases.

Contract law development in Indonesia in relation to regional development should also be based on the country's own legislative policy to transform developed regional law into national law, such as expressing rules on force majeure into contract law taken from developed regional law.

The problem is sometimes regarding transforming foreign law into national law that is practically less adaptive to local condition or culture, such as the concept of *alternatif penyelesaian sengketa* (APS) that is adopted from foreign law on Alternative Dispute Resolution (ADR). However, with regard to contract law, in the author's opinion, Indonesian contract law should indeed have adapted to current global development, for foreign parties to invest and cooperate with Indonesian local companies.

Based on the foregoing, the dynamics of global and regional development in the development of the Indonesian contract law, hwo the Indonesian contract law to position the contract law into the constellation of global and regional development in the future, and the contract law to follow the development of technology in the future to change the order of life are part of business law:

(2) Internal factors

The condition of national law development is also influenced by customary law and Islamic law which are adopted into the national law and Pancasila as the main source of law (*Groundnorm*). With regard to the internal factors, Prof Sutjipto Rahardjo states that the law of a nation is actually the reflection of the concerned nation's social life. Therefore, a state's

law formation or reform must be free from other country's influence and interest, and so be Indonesian contract law reform (Rahardjo, 1986, p. 2).

The contract law built must reflect the Indonesians' legal aspirations. Prof Dr Sri Redjeki Hartono, SH. explains that the term legal aspiration bears the definition as the sense of feeling, ideal or will, that is continuously thought or idea. Therefore, legal aspiration will guide policymakers of legal order development, especially national contract law development, to keep conforming to the Indonesians' legal aspirations. Legal aspiration is a general formulation and essentially the basic thinking of the desire and directing the destination to be achieved by national legal order (Hartono, 2000, p. 12).

The national legal aspirations in the preamble of the 1945 Constitution Paragraph 4 are the points of Pancasila, that when it is explained with the national law development shall be as follows (Emirzon, 2022, pp. 12–14):

- National law must be built in consideration of rational criteria and respect spiritual, ethical and moral values. This is concluded from the First Principle: Belief in the Almighty God.
- National law must be built based on the principle of respecting human dignity and prestige by assuring citizen's human rights and consistent, harmonious and balanced social rights. Therefore, the national law presents social justice value. This is concluded from the Second Principle: Just and civilized humanity.
- National law must protect the whole Indonesia Nation that is independent, united, sovereign, fair and prosperous, strengthen the nation unity that there is only one national law serving the national interest. This is concluded from the Third Principle: The Unity of Indonesia.
- National law is formed in line with sovereign state's principles, for national law to conform to its aspirations. This is concluded from the Fourth Principle: Democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives.
- National law present social justice value in the sense that national law opens the path for realizing distributed justice for all people of Indonesia. This is concluded from the Fifth Principle: Social justice for all of the people of Indonesia.

Based on the foregoing, Pancasila as the foundation of the Republic of Indonesia and the 1945 Constitution are the main requirements for determining national law reform policy, including contract law reform, besides other requirements. Pancasila is the main requirement, as it is the ground norm as Hans Kelsen states. Pancasila is even not only the ground norm of legal life and legal order in Indonesia, but also the ground norm of other norms, such as moral norm, norm of decency and ethical norm (A. Hamid Attamimi in Darji Darmodiharjo and Shidarta, 2004, p. 58).

The other internal factors to be taken into consideration are customary law and Islamic law in formation of Indonesian contract law reform. Customary law has long been acknowledged in the national law and also influences national law formation, especially in contract law there are cash and clear as set forth in customary law for sale and purchase.

In Indonesia there are so many customary laws prevailing in the communities. However, Cornelis van Vollenhoven divides Indonesia into 19 customary law environments. Each of the customary law environments is divided into sections called *Kukuban Hukum* (*Rechtsgouw*). The existence of customary also depends on acknowledgment of Customary Legal Community (MHA). Given the existence of MHA is a *conditio sine qua non* for acknowledgement of customary law, acknowledgement of customary law in Indonesia,

either through the Constitution or various laws and regulations in other certain fields, still leaves validity issue.

The main concept of law born from Islamic law, especially contract law in sharia banking sector, is mostly dominated by terms in Arabic that are not yet translated into Indonesian language such as "akad," *murabahah*, *musyarakah* and *mudharabah*; thus, it is quite difficult to understand. Therefore, the concept of Islamic law in the national law needs harmonization and synchronization; thus, the concepts of Islamic law show adaptation to the context of Indonesian culture.

4.2 Regulation of what matters to be adjusted to current development of contract law

Book III of KUHPerdata (BW) that regulates contract law is out of date, as can be viewed from the source of contract that is set forth in Article 1233 BW on contract due to agreement and due to law; thus, it is as if there are only two sources of contract, while there are other sources which may cause contract such as unjust enrichment. In developed countries, Civil Code does not only regulate sources of contract, such as Germany's BGB, France's Civil Code, Japan's Civil Code and The Netherlands' NBW. Book VI of The Netherlands' NBW Article 1 states that "Obligation Can Arise Only on the Basis of The Law."

That there are sources of contract other than agreement, the source of contract can also be Law as set forth in Article 1365 BW on Unlawful act, other sources such as voluntary representation *(zaakwarneming)*, non-indebted payment *(conditio indebiti)*, unjust enrichment.

Other regulation related to cancellation of agreement set forth in Article 1266 and Article 1267 BW that to end an agreement the parties to it can only cancel it through the Court. This is considered not conforming to the current development of contract law. In view of the currently developing rules, one party can end a contract when the other fails to perform its obligation in the contract, as set forth in Article 7.3.1. Unidroit Principles 2016 regulates that "(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance." This provision has also been set forth in the Netherlands' NBW.

The development of the good faith principle has also changed in understanding the intention and meaning of good faith. Article 1338 (3) BW states that "An agreement must be performed in good faith," but what good faith means is not expressly and clearly defined in BW. Therefore, Article 1338 (3) is always paired with Article 1339 BW as the measure of good faith, that is an agreement must also consider propriety, customs and law (Subekti, 1982, p. 139). Meanwhile, good faith as set forth in Book VI NBW presents the understanding that develops with the definition of good faith, thus good faith is defined as "volgens de Eisen van redekijkheid en billijkheid" as in decree of Hoge Raad of the Nehterlands in 1923, that good faith must be implemented in accordance with propriety and appropriateness. Propriety is defined as an equity and fairness, while appropriateness can be defined rationally, acceptable to reasoning and common sense (Werry, 1990, p. 12).

Article 2.1.15 Unidroit Principles 2016 also expressly regulates negotiation, that there is prohibition against negotiation that is performed with bad faith (Negotiation in Bad Faith), as stated: "(1) A party is free to negotiate and is not liable for failure to reach an agreement; (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party;." Thus, in UNIDROIT's principle, legal responsibility has been born from negotiation process, and the legal principles of negotiation are Freedom in negotiation; Responsibility for negotiation in bad faith; and Responsibility for cancellation of negotiation in bad faith. Therefore, one party can sue the other in which at the time of

negotiation there is a party who feels harmed in negotiation. Meanwhile, our KUHPerdata has not regulated this matter in negotiation.

Other matters that need be regulated in new contract law need to stipulate "Legal Act," that any legal subject's act (natural person and legal entity) with consequence of the act being regulated by the law, as the legal consequence is desired by legal subject who performs legal act. Matters on this legal act are concerning: definition and terms of validity of legal act; cancellation of legal act caused by fraud, coercion, mistake, abuse of situation, violating law and morality, violating morals and public order (Simamora, 2022, p. 8).

It is also important to regulate public contract and private contract in the new contract law. Public contract is a contract performed by government institution or agency with other legal subject, while private contract is a contract performed by one legal subject with other legal subject and there are not parties of government institution/agency.

With regard to public contract, agreement of procurement of state's goods and services has been set forth in Presidential Regulation No. 106 of 2007, that one party to an agreement is allowed to terminate a contract (termination). Meanwhile, Article 1338 (2) KUHukum perdata right now terminating a contract cannot be performed without approval of both parties. Therefore, it is important to regulate termination in the new contract law since based on field fact many people who enter into an agreement have used this termination in their contract.

In International Trade Contract set forth in article 7.3.1. Unidroit on the "Right to the Terminate the contract" has also this matter as follows: 1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance (Unidroit, 2016, p. 153). The party harmed can terminate a contract in case of fundamental and material default causing big loss, instead of small interest.

Although Indonesia has regulated Law of Information and Electronic Transaction, they should still be regulated in new contract law related to validity of electronic contract. The new Contract Law needs to set transitional provisions containing adaptation of the existing legal act or legal relation regulation based on the old laws and regulations to the new laws and regulations so as to assure legal certainty and provide legal protection to those affected by the provisions of contract law regulation.

5. Conclusion and suggestion

5.1 Conclusion

Government policy in formation of new Indonesian civil law is evidently also influenced by national law development that is influenced by some factors. Internal factors are related to global and regional development such as the development of science and technology by developed countries and the development of regional organizations such as AFTA, APEC and ASEAN. Internal factors are influenced by increase in human resources, advancement of technology and customary law and Islamic law adoption into the national law.

However, civil law reform, especially contract law, is deemed very important for Indonesia, because based on field fact, people do their business contract by applying contract law that is not yet regulated in the contract law in KUHPerdata; thus, new contract law is needed that regulates important matters related to sources other than agreement and law, related to termination, unjust enrichment, negotiation, good faith, public contract and private contract and related to legal act and validity of electronic contract. Therefore, this research's novelty is that, besides taking principles in contract law into consideration, there is also a need to regulate doctrines on unjust enrichment.

5.2 Suggestion

The government as the executive agency and the House of People's Representatives (DPR) as the legislative agency should naturally reform the Indonesian contract law that is it not up to date with the development of people who do business transactions either in national or international scope.

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