

ANALYSIS OF THE LEGAL BASIS FOR THE FULFILLMENT OF CUSTOMARY DEFAULT SANCTIONS (Contract Agreement)

Uti Abdulloh

Sekolah Tinggi Agama Islam Mempawah

Abdullahutiz@Gmail.com

Abstract

This research aims to examine more deeply the fulfillment of default sanctions through customary law from a positive legal aspect. This is intended to get a clear picture of how the sanctions of default are applied through customary law and views in positive law. This research is a type of doctrinal normative research (*doctrinal research*), the selection of the type is based on several understandings and opinions of the author, This research uses a legal comparative approach, a conceptual approach (*conceptual approach*), and a case approach (*case approach*). A comparative approach to legislation is also very necessary because as a legal country that adheres to the *Civil law system*, laws are the main source of law (*rule based*). A comparison of laws was carried out by examining all laws and related regulations in this study. This study explains that customary law has an important role in the arrangement of treaty contracts in indigenous peoples of Indonesia. As a cultural heritage recognized in the 1945 Constitution, customary law provides a basis for the implementation of agreements, especially those carried out orally based on mutual trust. Principles such as freedom of contract, consensualism, legal certainty, and good faith are important foundations for the validity of contracts in customary and national law.

Keywords: Customary Law, Sanctions, Default, Positive Law.

Introduction

Customary law in Indonesia is a cultural heritage that predates the emergence of the modern legal system. As a form of unwritten law, customary law regulates people's lives based on traditional values, norms, and habits that are carried out from generation to generation. Formal recognition of the existence of customary law is stated in Article 18B paragraph (2) of the 1945 Constitution, which states that *"the state recognizes and respects the unity of customary law communities and their traditional rights, as long as it is alive and in accordance with the principles of the Unitary State of the Republic of Indonesia."*

Customary norms are often considered a source of living law because they reflect the values, beliefs, and habits of the local community. However, customary norms do not have the same legal force as positive law, so their position is often questioned in the context of formal contractual contracts. For example, the

performance of achievements in a contract agreement may include traditional aspects such as the granting of customary property, customary rituals, or local customary laws. This condition raises a debate about the position of customary law in treaties that refer to national law.

Analysis of the legal basis for fulfilling customary achievements is important to bridge these two intersecting legal systems. This study not only focuses on formal juridical aspects, but also requires a sociological approach to understand how customary norms are incorporated into treaty law in Indonesia. Sociologically, the existence of customary law often reflects the needs of local communities that cannot be fully accommodated by law

national. Meanwhile, philosophically, customary law reflects the values of justice that are often the basis for its application in society. Therefore, the analysis of the legal basis for the fulfillment of customary achievements in treaty contracts is an effort to bridge these differences while providing a clear foundation for the parties bound by the agreement.

One example of a case that often occurs among the community in carrying out a debt and receivables agreement contract that uses property as collateral in the agreement, often there is a fulfillment of achievements in the agreement contract that has been almost fulfilled, but is not completed due to certain aspects that result in an achievement that cannot be fulfilled. However, in the legal concept, it does not look at the extent to which an achievement is carried out, so that no matter how much the fulfillment of the achievement made by the debtor during the fulfillment of the achievement is not fully implemented, then with a term agreement, the creditor has the right to have the object pledged by the creditor even though the remaining achievement that has not been completed by the creditor is smaller than the collateral agreed in the contract agreement.

By looking at the example of the case above, customary law can be a bridge between positive law and customary law in dealing with legal issues with a deliberation system (*win win solution*), so that in the future the application of *posotif* law does not only look at the juridical aspect, but also be able to look at the social aspects that live and develop in society.

Research Methods

Legal research is a process of finding the laws that govern human life within society. This study uses normative doctrinal *research*. The selection of types is based on several understandings and opinions of the author, namely: the subject of this study is the legal rules applicable to contract agreements. This research employs a comparative legal approach, a conceptual approach, and a case-based *approach*. A

comparative approach to legislation is necessary because, as a legal country that adheres to the Civil law system, laws are the primary source of law (*rule-based*). A comparison of laws was conducted by examining all relevant laws and regulations in this study.

Result and Discussion

The Role of Customary Law in Indonesia

The existence of customary law is one of the imperatives that every Indonesian citizen must maintain, as it is a mandate of the constitution that should be implemented. Customary Law is a law that applies and develops in the community in a region. There are several definitions of Customary Law. According to

M.M. Djojodiguno Customary Law is a work of a certain community that aims to regulate a fair system of behavior and deeds in society for the welfare of the community itself. According to R. Soepomo, Customary Law Refers to unwritten laws that include life rules not determined by authorities, but obeyed by the community based on the belief that these regulations have legal force. According to Van Vollenhoven, Customary Law is a comprehensive set of rules governing positive behavior, where, on the one hand, there are sanctions, while on the other hand, it is not codified. The existence of customary law in Indonesia's national legal system will continue. In this case, Soepomo gave his views as follows. In the field of family life, customary law will still dominate Indonesian society. The criminal law of a country must be in accordance with the patterns and characteristics of its nation or society. Therefore, criminal customary law will provide valuable materials for the formation of a new Criminal Code for our country. That customary law as a written customary law, will remain a source of new law in matters that have not been stipulated by law.

Validity of Customary Treaties

An agreement is a legal action involving two or more parties, who bind themselves to do or not do something. In a legal context, agreements have binding force and can give rise to rights and obligations for the parties involved. According to the Indonesian Civil Code (KUHPer), specifically article 1313, an agreement is defined as "*an act by which one or more persons bind themselves to one or more persons.*" This indicates that an agreement is a form of commitment made by the parties to fulfill the terms of the agreement. R. Subekti added that the agreement is in the form of a series of words that contain promises or abilities that are spoken or written.⁹ It can be understood as an event in which one party promises to the other, or where both parties promise each other to do something. The agreement can be

made in oral or written form.

Oral agreements are often used in the context of indigenous peoples or for simple agreements, while written agreements are more commonly used in the context of more complex business or legal relationships. Written agreements provide clarity and stronger evidence about the agreements that have been made, making it easier to enforce in the event of an agreement in future. Overall, agreements are a crucial element in social and economic interactions, as they provide a legal framework for relationships between individuals or entities.

There are several principles of agreement in the legitimacy of indigenous peoples that must be known¹¹: The Principle of Freedom of Contract. According to Article 1388 paragraph (1) of the Criminal Code, it determines that *"all agreements made legally shall be valid as laws for the person who makes them"*. This principle states that a person has the right to make or enter into an agreement in accordance with the provisions that have been mutually agreed upon, provided that it does not violate applicable laws and regulations. Asas Konsensualisme (Concensualism), Article 1320 paragraph (1) of the Criminal Code reads: *"part of the conditions for the validity of an agreement requires the 'agreement of those who bind themselves"*. This principle stipulates that for an agreement to be valid, a mutual agreement is required from the parties concerned. The Principle of Legal Certainty (*Pacta Sunt Servanda*), Article 1338 paragraph (1) of the Criminal Code stipulates that *"all agreements made legally shall be valid as laws for the person who makes them"*, which means that the parties concerned are obliged to carry out the agreement by following what has been determined together. The Basis of Good Faith, According to Article 1338 paragraph (3) stipulates that the contract must be executed in good faith. Article 1315 of the Criminal Code, Personality Principles, emphasizes that, in general, a person cannot enter into an alliance or agreement on behalf of another. Then, Article 1340 of the Criminal Code reads: *"an agreement is only valid between the party who makes it"*.

The Essence of the Agreement

In an agreement it can be defined as an agreement that has binding legal force, and the agreement will have legal consequences if there are legal consequences for breach of the promise. For example, a simple agreement that is not legally binding, such as a promise to attend an agreed agenda such as a promise to play football, a promise to attend a wedding invitation, and many more, it certainly does not provide clear legal consequences, even though there may be social sanctions in the community. This is based on the definition of a contract, which is more similar to an engagement, Article 1233 of the Criminal Code as described in the common law textbooks. Western jurist David Kelly, CS,

interprets a contract as "the simplest description of a contract is a legally binding agreement, but it should be noted that although all contracts are the result of agreements, not all agreements are contracts, that is, not all agreements are legally enforceable." To realize a contract, it has been legally grouped into three important elements, namely: Essential Elements, This element is the main element that must be present in a contract, this is because if there is no agreement about this essential element by the parties, then there is no contract. This element is intended as an object that is an achievement of the parties so that the rights and obligations of the parties arise.¹³ The Gospel of Jesus Christ, Natural Elements That is, elements that are generally inherent in the law but in practice this element can be set aside by the parties if they have expressly waived its applicability, generally contained in a guarantee agreement or contractual guarantee.

It is set in Articles 1831 and 1833 of the Criminal Code.¹⁴ Unsur Accidentalita, It is an additional part of such additional agreement declared or stipulated as a binding regulation of the parties or as a law to be implemented. For example, a car purchase and sale agreement not only includes an engine and a car, but it must also specify the types and variations of air conditioning. The validity of a treaty is essential in treaty law. The implementation of the content of the agreement, namely rights and obligations, can only be demanded by one party to the other, and vice versa, if the agreement made is valid according to the law. Therefore, the validity of the agreement significantly determines the implementation of the agreement's content. A valid agreement cannot be changed or cancelled unilaterally. The agreement contained in the agreement is therefore the dominant rule for the party closing the agreement. The legal basis or the main source of the regulatory system in contract activities initially adhered to a closed legal system, this was influenced by the teachings of legism which holds that there is no law outside the law. However, as contract law develops, then in the Criminal Code book III adheres to an open system so that most of the provisions only add to or regulate or complement, such a nature has the consequence that the parties who enter into contract agreements or make contracts have the freedom to determine the content of the contract as long as it does not conflict with the applicable laws so that the provisions that have been determined by the parties are binding and become a law for these parties.

It must be understood first that the expiration of an agreement/contract is different from the expiration of an agreement/contract A new agreement/contract will end when all the agreements arising from the agreement have been completely removed. There are several things that can end the agreement/contract: It has been determined by the parties in the content of the agreement/contract. In accordance

with the limits of the validity of an agreement as in Article 1066 of the Criminal Code regarding inheritance, which is only binding for five years. As a result of the occurrence of events both carried out by the parties and the law, such as in Article 1603 of the Criminal Code stipulating that an agreement/employment contract ends if he or she has died, Article 1646 of the Criminal Code determines several ends of an agreement/contract such as the destruction of goods or the completion of the act that is the principal act, death or declared bankrupt. Statement of termination of the agreement by both parties and one of them, as stipulated in Article 1603 paragraph (1) of the Criminal Code. There is a judge's decision. When the goal has been achieved.

An agreement is needed in realizing legal relations, this means that both parties must have freedom of will, meaning

Each party does not get a pressure that results in a defect in realizing its will.

Fulfillment of customary performance in contract agreements

The legal basis that regulates the teaching of customary exploitation in contract agreements in Indonesia can be found in the provisions of the Civil Code (KUHPerdata). One of the most relevant articles is Article 1320, which stipulates four conditions for the validity of an agreement, namely *"agreement between the parties, the ability to make an agreement, certain objects, and halal causes"*. The agreement affirms that the parties must have the same will and not be under coercion or undue influence, while competence requires that the parties to the agreement must have the legal capacity to enter into it. In addition, the object that is the subject of the agreement must be clear and determinable, and the cause of the agreement must be in accordance with the law, morality, and public order (Civil Code, Article 1320).

Furthermore, Article 1338 of the Civil Code states that *"agreements made legally have the same binding legal force as the Law for the parties who make them"*. This provision reflects the principle of freedom of contract in Indonesia, where parties are given the freedom to determine the content and form of their agreement, as long as it does not violate applicable law or norms. In practice, this provides flexibility for individuals and groups to establish legal relationships that suit their needs and interests. This principle also reinforces the importance of maintaining commitment in the implementation of agreements, because a valid agreement is not only morally but also legally binding (Civil Code, Article 1338).

In addition, customary law also plays a significant role in the arrangement of contract agreements in Indonesia, particularly in areas that still uphold traditional values. In the context of customary law, oral contracts are recognized as a valid form of agreement as long as they meet the specified conditions, such as the existence of a clear agreement between the parties involved, and do not contradict local customary norms. This recognition of oral contracts reflects the flexibility of customary law in adapting to the needs of local communities. This is crucial for maintaining the sustainability of traditional cultural values that are passed down from generation to generation and remain relevant in the face of contemporary development.¹⁷ The Gospel of Jesus Christ

Thus, the combination of the provisions in the Civil Code and customary law provides a comprehensive legal basis in regulating contractual agreements in Indonesia. The teaching of customary exploitation, for example, can be carried out on a legal basis that includes the principles of written and customary law, as long as it meets the predetermined conditions. This approach not only provides legal

certainty but also guarantees the protection of traditional values in contractual agreements. That way, the law in Indonesia can remain relevant in responding to the needs of diverse communities, both modern and traditional.

Conclusion

Customary law has an important role in the arrangement of treaty contracts in Indonesia's indigenous peoples. As a cultural heritage recognized in the 1945 Constitution, customary law provides a basis for the implementation of agreements, especially those carried out orally based on mutual trust. This customary agreement remains valid as long as it meets the conditions for the validity of the contract as stipulated in the Civil Code.

However, challenges arise in harmonizing customary law with national law. Inconsistencies often occur in dispute resolution, where formal national law is more often used than considering customary values. This creates a legal dualism that requires harmonized efforts to ensure justice and legal certainty.

Principles such as freedom of contract, consensualism, legal certainty, and good faith are important foundations for the validity of contracts in customary and national law. Therefore, a greater recognition and integration of indigenous values in national law are necessary to establish a legal system that is fair, relevant, and reflective of Indonesia's cultural diversity.

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