

# Extraction of Adat Law Values as National Law Forming Principle in Contract Law: Study on 3 Districts in North Sumatera

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**Keywords:** Contract Law Principle, Engagement Law, Customary Law, Legal Policy, Partial Codification.

**Abstract:** The current national engagement law is a law originating from Dutch colonial heritage. The message implied in the 1945 Constitution of the Republic of Indonesia, through its transitional rules, is that the existing colonial law is still in force as long as there is no new one. Enforcement of Colonial-made Engagement Laws with different ideological backgrounds, has lasted for more than one and a half centuries in this country. The method used in this research is doctrinal (normative) and non-doctrinal (sociological) methods. The findings in this study are: In Langkat District There are values and principles of tolerance in the legal relationship of the engagement where profits and losses are borne jointly by parties who conduct business relationships; In Deli Serdang District, especially in the fishing community there is a reciprocal legal relationship between ship owners and fishermen workers who do not fully refer to the agreement that they agreed upon initially but adjusted to the final conditions faced by each party by using the principle of balance; In Coal District found voluntary principles for each additional work that was not agreed upon.

## 1 INTRODUCTION

The national obligation law that applies in Indonesia today, is the law of obligation which refers to the Indonesian Civil Code that is written in the third book of Civil Code. The implementation was based on the principle of concordance, which equated the application of the law in the Netherlands with the colonies which were then called the Dutch East Indies

So far there is indeed a government effort to make the National Obligation Law itself in the style of Indonesian law. This effort has been initiated since 1978. Although unlike the Dutch Civil Code in its complete codified form, the government's attempt to replace the colonial legacy law uses a partial approach as its legal political choice.

The government's efforts to make a partial codification of civil law, including in the field of national obligation law, have begun. Collaboration between the National Law Development Agency and the Indonesian Faculty of Law has been conducted (Mariam Darus Badruzaman, 2006) After Indonesia's independence in the ideals of legal development - and that is a necessity - has laid the foundation for the development of national law is Pancasila which is Grundnorm . Pancasila as the

ideological and philosophical foundation of the nation must be used as a foundation and aspiration which is at the same time a source of all the sources of orderly national law. These principles of law can later be reduced as concrete legal norms (OK. Saidin, 1, 2016)

Finding and make the values that live in the community to be placed as the principle of the formation of national law in the legal field of contract, an important reason, why this research needs to be done. Selection of the three research sites namely; in Langkat District, Deli Serdang and Batubara are costs to the cultural and ethnic situation, namely the Malays who in their daily lives have carried out business transactions as an economically more developed area, compared to other provinces in Sumatra, but still use customary and customary norms in everyday life. In addition, the composition of society is culturally very open in the sense of accepting other ethnicities and cultures to be symbiotic.

## 2 RESEARCH METHODOLOGY

With the choice of doctrinal research methodology and non-doctrinal research, it is hoped that this

research will find various principles of national engagement law abstracted from proverbs, pantun, poetry and various forms of agreements that take place in the community in the research area. In turn, these legal principles can be used as a basis for the formation of the Indonesian national engagement law.

### 3 RESULT AND DISCUSSION

#### 3.1 Choice of Legal Policy : Pancasila Ideology

After Indonesia gained its independence, Indonesia should have drafted the law of the country with a law derived from the ideology of its own people. The Pancasila which is a Groundnorm hides many principles of law, including the principle of the law of obligation.

The principle of law always follows the underlying ideology. If the legal norms of agreement come from the Netherlands, of course the legal norms are derived from values that originate in the ideology that grew out of Western civilization, European civilization. (Mahadi, 1986)

For example, agreement law which refers to the principle of freedom of contract, has moved towards capitalists. Many agreements in the field of civil law (business and economics), no longer refer to the values of freedom derived from customary law and habits that grew in the Indonesian civilization. Communal principles and alignments to people's economy no longer underlie the making of an agreement. Ranging from credit agreements, lease purchases, franchising, licenses to agreements that fulfill consumer rights. The shift of Pancasila values crystallized from the original paradigmatic values of Indonesian culture and society is increasingly exploding that not only happens in the urban community with all big business but also has penetrated into the village community with a small business scale (OK. Saidin, 2, 2016)

This situation is certainly not beneficial for the future development of Indonesian civilization. Indonesia's future is very much determined by the choices of the current generation, including the choices in the legal field.

The richness of Indonesian civilization that originates from cultural values with cultural background, plural ethnicity if it is not immediately removed will sink and be buried and will eventually disappear in the days. Like the sinking of the value of "Representative Consultative Democracy" in the system of election of the Head of State and Regional

Head which has been going on since the "reform" government order. There is no more questioning about our politics, with the principle of consensus. The values of the fourth principle of Pancasila in our democracy are moving towards liberal democracy. Likewise, the people's economic system desired by the 5th Sila Pancasila has moved towards capitalist economy, as evidenced by the many laws and regulations that apply in this country related to the economic field that refers to the American legal system. For example, Law on Limited Liability Companies, Capital Markets, Consumer Protection, Legislation on Intellectual Property Rights such as: Copyright, Patents, Brands, Industrial Designs, New Plant Varieties, Integrated Electronics Layout Designs, and others others are largely compiled with reference to the capitalist legal system.

All of the Laws mentioned above are based on the legislation produced by the legislature in this country which largely ignores the ideological and philosophical values of Pancasila. Therefore, there needs to be an effort to raise and explore the values hidden behind Indonesian culture and civilization. These values are important today to be inventoried, collected and searched and explored to find the principles of national law. The principles that are hidden in the culture and civilization of the Indonesian nation that have been explored, searched for, adopted and then through the process of abstraction with the method of induction of specific things into things that are general are drawn to the summit to find the principles of law which later used as a concrete legal norm to replace the national legal norms from the Dutch Colonial (Mariam Darus Badrulzaman, 2006).

#### 3.2 Position of Contract Law in the Civil Law System

Civil law is a system (Mariam Darus Badrulzaman, 2006). In the legal system (civil) there are several components or sub-systems, whether in the form of legal principles, legal norms or legal notions (Sudikno Mertokusumo, 2009:102).

Soedewi argue that, Civil Law is the law that regulates the interests between individual citizens and other individual citizens (Sri Soedewi Masjchoen Sofwan, 1981:1). This formulation is not final nonetheless. Because there are still many other formulations put forward by experts in the field of legal science. But for a reference, the limit above can be taken, which is actually a translation from *Privaat Recht* (Utrecht and Mohd Saleh Djindang, 1983:50).

Based on the above formula, it can also be ascertained that the scope of civil law is very broad. There is a written civil law and there is an unwritten civil law. The arrangement is spread in various legal systems in various forms. There are codified and non-codified (some are arranged in detail and systematically and some are spread in various sporadic regulations). In the field of customary law there is also the field of civil law, as well as in the field of Islamic law there is also the same thing. However, the scope regulated in the field of civil law in various legal systems remains the same, which includes the arrangement of:

1. Personal body law / legal entity (*Rechtspersoon*).
2. Family law (*familie Recht*).
3. Property law (*vermogen Recht*).
4. Inheritance law (*erfrecht*).

Such a systematic arrangement is known as the division of civil law according to science (Sri Soedewi Masjchoen Sofwan, 1981:2). However, the Civil Code in its drafting does not follow such systematic. Even what deviates greatly from the conception of the division of civil law according to science in the system of the Civil Code, is the inclusion of regulations on the Law of Evidence and *Expenditure (Verjaring)* contained in Book IV of the Civil Code, which is actually included in the formal legal field.

The Civil Code in its systematic arrangement regulates the following fields:

1. Book I about People (Van Personen)
2. Book II about Objects (Van Zaken)
3. Book III about Perikan (*Van Verbintennissen*)
4. Book IV concerning Proof and Expiration (*Bewijs en Verjaring*)

If in this description what is intended is the law of engagement, the limit is the legal engagement which is contained in the book III of the Civil Code (Van Verbintennissen). Thus the engagement law intended is the engagement law which is part of the fields of law regulated in the Civil Code.

### 3.3 Principles of Contract Law Contained in the Civil Code

In Civil Code Book III Contract Law (Mariam Darus Badruzaman, 2006:108), put forward a number of principles contained in the treaty law namely:

1. The principle of freedom to enter into an agreement (autonomy section)
2. Principle of consensualism (conformity of will)
3. Principles of trust

4. The principle of binding strength
5. The principle of legal equality
6. Principle of balance
7. The principle of legal certainty
8. Moral principle
9. Principle of propriety
10. Principle of habit

Furthermore Mariam Darus Badruzaman elaborate the principles mentioned above. We have derived the following description from his writings.

#### 1. The Principle of Freedom of Contract

The principle of freedom of contract is a very essential principle of law in the treaty law. By quoting the French term Mariam Darus Badruzaman stated that this principle is also called the principle of "consularism" autonomy, which determines the "existence" (*raison d'etre, het bestaanwaarde*) agreement.

Consensualism principle contained in Article 1320 of the Civil Code contains the meaning of "willingness" (*will*) the parties to mutually participate, there is a willingness to be bound to each other.

This will evokes trust (*vertrouwen*) that the agreement is fulfilled. This principle of trust is an ethical value derived from morals. Respected humans will keep their promises, Eggens said.

Grotius, looking for the basis of that consensus in the Law of Nature. He said, that "pacta sunt servanda" (the promise is binding). Then he stated again, "promissorum implendorum obligatio (we must fulfill our promise).

This philosophy is also illustrated in a Malay pantun which says "Buffalo is held by its rope, man is held by its promise". This is an example of social norms.

This principle of consensualism has a close relationship with the principle of freedom of contract (*contractvrijheid*) and the principle of binding force contained in Article 1338 al. 1 of the Civil Code. This provision reads "All Agreements made legally apply as laws for those who make them. This is an example of legal norms.

"All" means to include all agreements, both those whose names are known and those not known by the Law. The principle of freedom of contract (*contractvrijheid*) relates to the contents of the agreement, namely the freedom to determine "what" and with "who" the agreement is held. The agreement made in accordance with Article 1320 of the Civil Code has binding powers.

In its development the principle of freedom of contract is increasingly narrow in terms of several aspects, namely:

- In terms of public interest
- In terms of standard agreements
- In terms of agreements with the government.

## 2. Principles of Consensualism

This principle can be found in Article 1320 and Article 1338 of the Civil Code. In Article 1320 of the Civil Code the denominator is firm whereas in Article 1338 the Civil Code is found in the term "all". The words all indicate that everyone is given the opportunity to express their will (will), which feels good to create an agreement.

This principle is closely related to the principle of freedom to enter into an agreement.

## 3. Principle of Trust (*Vertrouwensbeginsel*)

Someone who enters into an agreement with another party, fosters trust between the two parties that each other will hold his promise, in other words will fulfill his achievements behind the day. Without that belief, the agreement will not be held by the parties.

With this belief, both parties bind themselves and for both agreements have binding powers as laws.

## 4. Binding Strength Principle

Thus it can be concluded that in the agreement there is a principle of binding strength. The binding of the parties to the agreement is not only limited to what is promised, but also to some other elements as long as the habits and propriety and morals are desired. Thus, the principles of morality, decency and habits are binding on the parties.

## 5. Principle of Legal Equation

This principle places the parties in equality, there is no difference, even though there are differences in skin, nation, wealth, power, position and others.

Each party must see this equality and require both parties to respect each other as human beings created by God.

## 6. Balance Principle

This principle requires both parties to fulfill and implement this agreement. This principle of balance is a continuation of the principle of equality. Creditors have the power to demand achievement and if needed can demand repayment of achievements through the debtor's wealth, but creditors also bear the burden of implementing the agreement in good faith. It can be seen here that the position of a strong creditor is balanced with its

obligation to show good faith, so that the position of the creditor and debtor is balanced.

## 7. Principles of Legal Certainty

The agreement as a legal figure must contain legal certainty. This certainty is revealed from the binding power of this agreement, namely as a law for the parties.

## 8. Moral Principles

This principle is seen in a fair engagement, where a voluntary act from someone does not give him the right to sue for the counterparty of the debtor. Also this is seen in *zaakwaarneming*, where someone who commits an act voluntarily (morally) has an obligation (law) to continue and complete his actions as well as this principle is contained in Article 1339 of the Civil Code. Factors that give motivation to the person concerned carry out the legal act based on "morality", as a call from their conscience.

## 9. Principles of Compliance

This principle is stated in Article 1339 of the Civil Code. The principle of propriety here relates to the provisions regarding the contents of the agreement. In my opinion this principle of propriety must be maintained, because through this principle the measure of relations is also determined by a sense of justice in society.

## 3.4 Opportunities for the Entry of Adat Law and Customary Law Values

Article 1339 jo. 1347 of the Civil Code, opens a great opportunity to receive the values of customary law and customary law and even normatively in the legal field of crime. Article 1339 reads, "An agreement is not only binding on what is expressly regulated, but also things that are in a state and habit that are commonly followed."

Something that demands the nature of the agreement, is required by propriety and habits will be found in the daily lives of the Indonesian people, which is accepted as custom and custom.

Article 1347 of the Civil Code also states that according to the *principle of the contract (bestaandig gebruikelijk beding)* is considered to be secretly included in the agreement even though it is not expressly stated.

Both provisions leads us to the conclusion that the elements of the agreement are:

1. The agreement itself
2. Compliance
3. Habits

#### 4. Constitution.

Element (1), (2) and (3) will be found in the community, in people's daily lives, while the element (4) refers to the formation of a national legal system countries are.

The contents of the agreement are interpreted as expressly stated by both parties regarding their rights and obligations in the agreement. The form may be written, it can also be in oral form.

Adherence in the provisions of the Dutch civil law refers to the condition of European society, of course propriety according to Indonesian society is different from propriety according to European society.

Likewise, what is meant by the law by this provision is complementary law because the law which is compelling cannot be deviated by the parties. So if we had been as long as references concerning the treaty law Book III B the Civil Code.

There is an interesting view conveyed by Mariam Darus, that propriety can change the contents of the agreement. This means that the agreement that has been agreed upon and even set forth in an authentic deed can change, if the content is contrary to propriety.

The problem in the application of the above provisions, is about the relationship of each element of the agreement, what is meant by habits and how is the relationship between habits and laws.

In judicial practice it turns out that the sequences as determined by Article 1339 of the Civil Code are subject to changes, in which the court concludes from what is regulated by Article 15 AB (*Algemene Bepalingen Van Wetgeving*). This article determines that the habit is only recognized as a source of law, if appointed by law.

This is where the importance of the habits that take place in the community must be raised, used as a source of values to be then normatively expressed in the form of laws.

On that basis the judiciary places the law on habit, so that in reality the order of the elements then becomes:

1. Contents of the Agreement
2. Constitution
3. Habits
4. Propriety

What does it mean by habits?

The habits referred to by Article. 1339 the Civil Code is a general practice (*gewoonte*) and habits regulated by Article. 1347 Civil Code is a local (special) habit or habit that is commonly applicable in certain groups (*bestending gebruikelijk beding*).

In judicial practice, we see differences about the relationship between local customs and the law.

Decree of HR 26 June W.8729 concerning disputes over payment of rent indicates that the general practice cannot deviate from the law. The law stipulates that debt is a debt (in form of money) that is delivered (*brengschuld*) does not have to be picked up. Payment must take place and be carried out at the residence of the creditor, according to Article 1393 of the Civil Code. However, it is the habit of leasing payments taken by the homeowner to the tenant. A tenant adheres to the habit and does not want to deliver rental payments to the homeowner. Likewise, the homeowner adheres to the law and waits for the rental payment to be delivered by the tenant to him. In front of the court, it was decided that the provisions of the law would be maintained.

HR April 1932 decision (NJ 1932, 1613) states the following:

A sold cow to B which will be submitted later. Then the cow is sick. By using Article. 1460 Civil Code, the buyer must accept the sick sick and must pay the price.

The custom that applies in place, regarding animal trafficking is that cattle that are sold and have not been handed over are borne by the seller, the buyer does not have to accept and pay for it. The buyer demands that habit. In its decision, the court was of the opinion that the prevailing habit (according to the contents of Article 1347 of the Civil Code), although not stated expressly, was considered to be secretly included in the agreement, and because it was part of the agreement. And in the event that agreements that are expressly made can deviate from the law, even this habit can override the law. So in this case the risk is borne by the seller.

The conclusion is: the habits mentioned in Article. 1347 of the Civil Code is higher than the law but the habit is in Article. 1339 is lower than the law.

Many legal writers argue that the habits intended by Article 1339 and Article are actually. 1347 the Civil Code is the same because it talks about the same subject. The second is written in the law to ensure that in carrying out the agreement the habit factor must be maintained.

### 3.5 Empirical Findings

In the Langkat Community it was found that, in the beginning the agreement to lease land for the management of ponds was developed. Rent is paid in advance, some are paid after harvest. Farmers or fish farmers finance for all production processes until the shrimp can be harvested. But on the way, not all

farmers or fishpond entrepreneurs succeeded. Often, the rent that is partially paid at the end when the harvest is finished can no longer be paid by farmers or businessmen. They then look for a "peaceful" way to fulfill their achievements. For example, by giving farmers or entrepreneurs the opportunity to manage the pond the following year, with the calculation of profit sharing. This form of profit sharing agreement, is then known as "aging". Both parties give achievements. The landowner provides the land, the farmer or the farm manager, providing seeds, feed and the entire process in the management of the pond, the result is two parts for the farm manager, one for the land owner.

We can draw the conclusion that, the agreement that has been agreed upon can be amended on the wishes of both parties that are adjusted to the circumstances. The landowner does not necessarily implement the contents of the initial agreement, which places the land tenant as the default party, namely not paying rent according to the contents of the agreement. However, another alternative is sought by giving farmers or entrepreneurs the opportunity to be given the opportunity to try to avoid farmers or fish farmers from losses.

In this event there is a hidden principle, namely the principle of tolerance, the principle of tolerance. During this time the principles of tolerance and tolerance were used in the preparation of laws related to religious harmony. This tolerance principle is rarely used in business relationships. That arena during the business relationship is built with the concept of capitalism. Business is not interpreted as a legal relationship to share profits and take each other's losses. Proverb in the Malay realm: "The same weight is carried, light is carried along, the same hill climbing to the slope is the same as decreasing" should be made an important principle in business law and used as the basis for the formation of the National Engagement Law.

In Deli Serdang, fishing communities and the vessel owners fishing gear, employing the fishermen with sharing-system, but there are times when one of fishing days do not get any results. The cost of fishing and consumption of the crew and their families is often borne first by the ship owner and fishing gear. This situation occurred a bus for weeks. Oral Agreement can no longer be fulfilled normally. Normative rules often cannot be enforced. Here the role of habits is far more binding than the normative rules they have agreed on. Is already a habit, if the result of fishing "nil" is to be borne by the owner of the vessel and fishing gear, the same as fishermen who have sacrificed their time and

energy, but the results are nil. The principle of "tolerance" is a very strong principle for the people in Deli Serdang.

This principle is formed in the relation of legal engagement, similar to the principle of "negotiation". A person who buys a job for making a house. The agreement is not detailed in detail about the forms of work that must be done. However, for the needs and technical feasibility of the house there is an additional work to be done, if there will not be a house that is not technically feasible. Then the work is done voluntarily by the recipient of the job. While additional work wages are no longer questioned, they become "hearted hearts". Events of such agreements were found in Batubara, voluntary work, known as "SERAYO". A kind of additional work that is not economically calculated additional wages.

## 4 CONCLUSIONS

Based on the explanation above, it can be concluded that the three Regencies in North Sumatra insofar as the engagement law is related, the following principles are:

1. In Langkat District There are values and principles of tolerance in the legal relationship of the engagement where profits and losses are borne jointly by parties who conduct business relationships.
2. In Deli Serdang District, especially in the fishing community there is a reciprocal legal relationship between shipowners and fishermen workers who do not fully refer to the agreement that they agreed upon initially but adjusted to the final conditions faced by each party by using the principle of balance.
3. In Coal District found voluntary principles for each additional work that was not agreed upon .

The suggestions that the writer can put forward are as follows:

1. The policy of legal development in Indonesia, including the development of national law must refer to the ideology of Pancasila and the legal values that live in the midst of Indonesian society, because it is necessary to continue efforts to explore and seek the principles of law that live in the middle. Middle of Indonesian society and used as the basis for the formation of national law.
2. The existence of customary law can be found in various forms of concrete legal relations and it is the duty of the researcher to draw on the legal principles contained therein, therefore it

is necessary to develop a normative research model for the withdrawal of legal principles which have so far received less attention.

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