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Reconstruction of the civil code article based on the value of contractual justice

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Abstract

Justice contracts is essentially the fulfillment of rights and obligations in line with the principle of proportionality by observing the contract process from start to finish. The value of fairness in Contracting is: first, the principle of proportionality, where it governs the exchange of rights and obligations of the parties in accordance with proportion or part thereof; second, the principle of consensualism, in which it governs the agreement of both sides. The agreement is a conformity between the will and the statements made by the parties, so that legally an agreement can be held accountable; and third, the principle of freedom, in which it governs the freedom of a person in making a contract accompanied by good faith. Meanwhile, there are 9 (nine) chapters in the book III Civil Code of the partnership requiring the reconstruction of chapters.

Keywords: *Civil Code, Contractual Justice*

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1. Introduction

The basis of the contract law is derived from the understanding of the agreement contained in article 1313 of the Civil Code which states: "A covenant is an act by which one or more persons bind themselves to one person Other or more". This indicates that a contract is a promissory agreement between two or more parties that may create, modify or eliminate a legal relationship.

The main foundation of each transaction is the principle of good faith and honest transaction. Both principles must the baseline of the entire contract process from the time of negotiation to the execution and expiration of the contract. The principle of good faith can be deduced from article 1338 paragraph (3) of the Civil Code which reads "The Agreement shall be exercised in good faith". The principle of good faith is the basis in which the parties involved must abide by the contract based on the trust or the firm belief or goodwill of the parties. The principle of good faith is divided into two, which is good faith and absolute goodwill. In good faith, people pay attention to the attitudes and behaviors that are tangible from the subject. In the Absolute goodwill, the judgment lies in common sense and justice, made by an objective measure to assess the circumstances. Contracts must be implemented according to compliance and fairness.

The term contract is states in Article 1233 of the Civil Code. "All obligations arise either from agreements (contract) or law". Legal contracts are part of the Law of Obligations. A contract or contractual law is: "A rule to govern the legal relationship of a covenant that is deliberately made by the parties in writing and raises the rights and obligations to a person as a tool of evidence for the parties involved". The term contract or agreement in the national legal system according to Utomo has the same meaning with the Dutch word *Overeenkomst.* (Utomo, 2011) The term contract is also often referred to "agreement". In addition, term that is interchangeable with 'contract' is transaction

(Fuady, 2005). However, the term contract is the most modern, widespread and prevalent in use, especially in the business world. A contract is essentially a promissory agreement between two or more parties that can cause, modify or eliminate legal relations. (Fuady, 2001)

A contract is valid according to the United States Common law system, if it meets certain conditions which are the presence of an agreement, and halal objects, as well as the capacity, to make a contract. (Dirdjosisworo, 2003) Any agreements or contracts will be effective when they the contained in Article 1320 of Civil Law, namely: *First*, there must be consent of the individuals who are bound thereby; *Secondly*, here must be capacity to enter into an obligation; *Third*, there must be a specific subject matter; and *Fourth*, there must be a permitted cause.

With regard to human relations, the Civil Code is one of the prevailing legislation in Indonesia. The Civil Code consists of four books: (1) book I, "The Subject of persons" (Persoonen van), containing individual and family laws; (2) book II, "Subject Matter" (Van Zaken), contains the law of matter and inheritance; (3) book III, "Subject of partnership" (van Verbintennisen), contains the laws of wealth relating to the rights and obligations applicable to certain persons or parties; and (4) book IV, "Subject to Proof and expiration" (Van Bewijs en vernets), contains the subject of proving instruments and consequences of expiration to legal relations.

Pertnerships, agreements and contracts are under the same umbrella and are related to each other. This means that all these three things are one body and the final part of the contract is a written agreement. It is thus necessary to point out that the terms of the partnership and the laws are also valid contractual conditions. What is applicable in an agreement and a partnership also applies to the contract. The Law of the Partnership is governed by the book III of the Civil Code which contains general rules in four chapters (titles) and special provisions of the Twelve Chapters (RM.Suryodiningrat, n.d.). The term "partnership" comes from the Dutch Verbintenis. In Indonesian, it is called as "*perikatan*" and "*perutangan*". (Subekti, 1995) The term Verbintenis in the Civil Code turned out to be translated differently in Indonesian law. Some translate it into *perutangan* or debt, as said by Sofwan (Sofwan, 1975) and Utrecht (Utrecht, 1957). Some translate it into *perjanjian or* agreement (Ichsan, 1969), and some translate it into *perikatan* or partnership (Badrulzaman, 1983). The use of the term "*perikatan*" for Verbintenis appears to be more commonly used in Indonesian legal language.

One of the areas of law that needs to be governed and developed is contract law. The existence of Law No. 30 of 1999 on arbitration confirms that in the world of trade, disputes are prone to happen, especially with regards to trade contracts. The explanation of the Law No. 30 of 1999 mentions that the arbitration stipulated in this act constitutes a means of resolving a dispute outside the general court based on the written agreement of the disputing party. However, not all disputes can be resolved by arbitration. , but Only disputes regarding rights under the law are fully controlled by the parties in dispute on the basis of their said agreement. It is intended to prevent a prolong arbitration. Unlike the district court process where a verdict can be In arbitrations, appeal and cassation are not possible.

Hernoko (2010) states that the best solution is necessary for the realization of a contract for the mutual benefit of the parties (win-win solution contract). On one hand, it gives legal certainty. And on the other hand, it gives fairness. It is further explained that the urgency of contractual arrangements in business practices is to ensure the

exchange of interest (rights and obligations) among the parties, thereby establishing an equitable and mutually beneficial contractual. A contract must not harm any parties.

2. Method

The present study is a normative research. The data is obtained from the laws and related books on the interpretation of the contract. This study concentrates on the Civil Code which has been effective in Indonesia since April 30, 1847 Statblat: S. 1847-23, which has been translated by Prof. R. Subekti, SH and R. Tjitro Sudibio and published by PT Pradnya Paramita Jakarta. There are 1993 chapters examined and reviewed from the viewpoint of fairness theory. The data collection technique used in this study is documentation which then analyzed using qualitative descriptive method. The research process is conducted through, *first*, data collection in the form of legislation that became the subject of the research; *second*, reduce the data by categorisation or initial identification to determine the subject to be used; *third*, presenting the data in the form of writing; and *fourth*, draw conclusions.

3. Values of Fair Contract

The legal rules of contracts, according to (Marzuki, 2003), are the embodiment of the philosophical fundamentals contained in the principles of law that are very common and become the basis of thinking or known as ideology. The legal principle as a foundation of the norm becomes an equipment to test the legal norm, in the sense that the legal norm should eventually be returnable to the underlying principle. In this case, the principles of the law functioned as a system builder, and further the principles at once formed a check and balance system.

First, the principle of freedom of contract. The freedom of contract, according to (Sihombing, 2010), sets in an understanding of individualism which has been known since the Greek era, which was then continued by Epicuristen and rapidly expanding in the Renaissance period through the teachings of Hugo de Groot, Thomas Hobbes, John Locke, and Rousseau. The peak of development was achieved after the French Revolution. Open System of Book III of the Civil Law can be seen from the meaning of Article 1338 Paragraph (1) of the Civil Code that, " All valid agreements apply to the individuals who have concluded them as law". According to (Subekti, 1995), the restriction on freedom is simply what is meant by order and public decency. The extreme emphasis on the principle of contractual freedom that develops in the understanding of 19th century liberalism is limited by the intervention of rulers. The law progressively shifted from private affairs to community or public affairs. The trend is that the elements of private law are replaced by public elements of law (Budiono, 2006). The freedom of contract according to (Friedmann, 1994) is still regarded as an essential aspect of individual freedom, but it no longer has such absolute nature compared to a century ago.

Second, the principle of consensualism. The principle of consensualism can be concluded in Article 1320 Paragraph (1) of Civil Code where one of the conditions of the agreement is the existence of the consent of both parties. The agreement according to the principle of consensualism is not formally held. A consent from both parties is sufficient. The agreement is a conformity between the will and the statements made by the Parties (Salim HS, 2005). Nevertheless, according to (Widjaja, n.d.), to safeguard the interests of the debtor or an obligation to fulfill certain formalities and actions are required. Eggens, quoted by Ibrahim argues that the principle of consensualism is a culmination of human

achievenment implied in the saying "*een man een man, een woord een woord*". This provision requires people to be held accountable by what they say which is a form of public decency. And indeed, to be respected as a human beinga person should be trustworthy (Ibrahim, 2004).

Third, the fundamental principle of *sund servanda*. When parties have an intention to achieve something, there will form an partnership and make a partnership. Such contractual obligations become a source for the parties to freely determine their goals with all its legal consequences. Based on these goals, the parties freely bring together their respective goals. The goals of these parties is the basis of the contract. The occurrence of the law is determined based on the agreement. Based on the consensus of these parties, the agreement obtains the power to becomre a binding agreement which is equal to the law (sunt servanda). What someone expresses in a relationship becomes a law for them. This principle is what makes an agremeent binding. This is not a moral obligation, but also a legal obligation whose implementation must be obeyed (Khairandy, 2009). The provisions of article 1338 paragraph (1) of Civil Code states that, " All valid agreements apply to the individuals who have concluded them as law". The article shows that the law itself acknowledges and puts the parties into the contract parallel to the lawmakers (Hernoko, 2008).

Fourth, the principle of good faith. Wirjono Prodjodikoro (2000) which gives a good faith limitation pursuant to article 1338 paragraph (3) of Civil Code in honest terms where it not only means goodwill/honesty that is objective but also subjective. The goodwill in the contract, according to Hernoko (2008), should emphasize more on the proportional principle which is more focused on the proportion of the distribution of rights and obligations among the parties fairy and reasonably based on equality, freedom, proportional distribution, fundamental accuracy, feasibility, and appropriateness rather than basing on mathematical balance of results. It is further explained that good faith should be applied throughout the contractual process from pre to contractual stages. Thus, the good faith function in article 1338 paragraph (3) of Civil Code has a dynamic nature encompassing the entire contract process.

Checks and balances is used as the basis for carrying out the approval of the goals of the parties. Everyone is allowed to make any binding agreements in any forms and contain anything. The contract is limited by the laws enforced, so the parties who make the consent must abide by the laws. In addition, although each person is free to make any agreements the contents of the agreement must be in line with the law and public order and decency.

The realization of contractual justice by Agus Yudho Hernoko (2007) is determined through two approaches. *First*, the procedural approach, this approach emphasizes the issue of freedom of wills in a contract. The *second* approach is a substantive approach that suppresses content or substance as well as the execution of contracts. In the substanstive approach, different consideration must be taken into account. The criteria that can be used as a guideline to find a proportionality in the contract are as follows: *First*, a contract of proportionality as the proportion of the contracts is a contract that gives recognition of the equal rights and opportunities for the parties to determine a fair exchange. Equality is not in the sense of "the similarity of results" but in the position of the parties that supposes "position equality and equitability" (the similarity principle of rights/equality). *Second*, based on the similarity/equality of such rights, the contracts that have the substance of proportionality principle are contracts that are based on the freedom of the contractors to determine

what is just and what is unfair to them (the principle freedom). *Third*, a contract of proportionate punishment is a contract that is able to guarantee the exercise of rights and simultaneously distribute obligations proportionally to the parties. It should be underlined that fair does not mean everyone should always get something in the same amount. In this context, it is possible to have a different end result. The significance of proportionality is the principals governing the exchange of rights and obligations of the parties in accordance with the proportion or part thereof, which encompasses the entire process of contract; in the pre-contractual stage, the establishment of contracts, and the execution of contracts. The function of proportionality as the same as commercial contracts is: first, in the pre-contractual stage, guarantees the realization of a fair contract negotiation process; Second, in the establishment of contracts, guarantees the equality of rights and freedoms in determining the contents of contracts; And third, in the execution of the contract, guarantees the realization of the exchange distribution of rights and obligations according to its proportions.

Unlike the proportionality principle that Agus Yudho Hernoko presents as a value in contractual justice, Wiwoho (2017) emphasizes contractual justice on the principle of consensus. This principle essentially deals with the execution of contracts after the distribution of rights and obligations have been agreed by the parties. This principle also sets aside the differences in views and opinions on the promised aspect. Consensus principle puts an emphasize that a person cannot legally be compelled to enter into an agreement. Contracts are only formed after the parties agree to determine the material hereof.

Based on the explanation above, it can be said that the value of contractual justice is as follows:

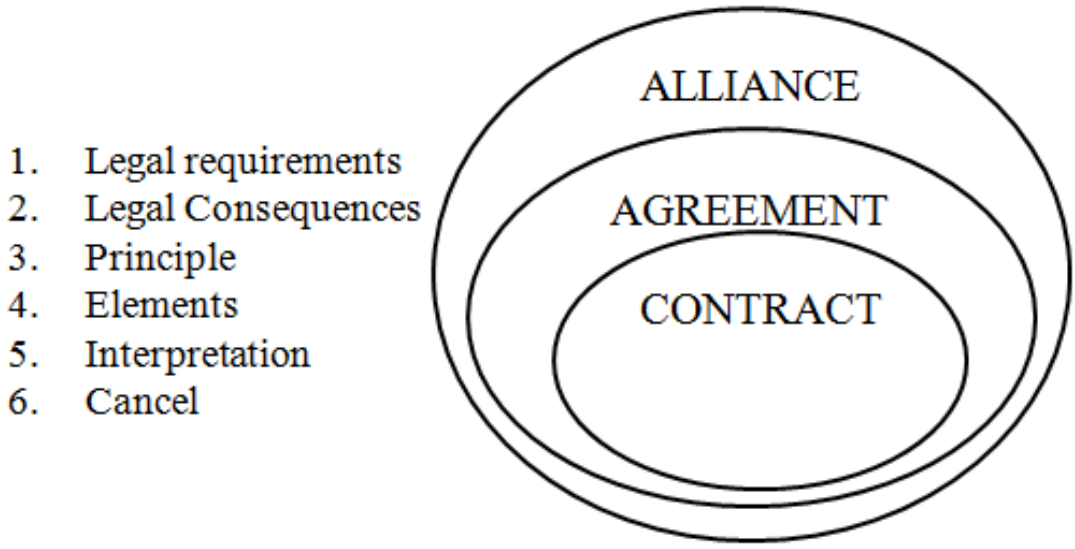

Figure 1. Core of Contractual Justice Value

Pertnerships, agreements and contracts are under the same umbrella and are related to each other. This means that all these three things are one body and the final part of the contract is a written agreement. It is thus necessary to point out that the terms of the partnership and the laws are also valid contractual conditions. What is applicable in an agreement and a partnership also applies to the contract. The value of justice adheres to the principle of contractual freedom and consensualism, the foundation of the Sund pacta, and the principle of good faith. Thus, the value of contractual justice includes: first, the existence of the principle of proportionality, which governs the

exchange of rights and obligations of the parties according to proportions or parts thereof. Secondly, the principle of consensualism which governs the agreement of both sides. The agreement is a conformity between the will and the statements made by the parties, so that legally an agreement can be held accountable. Third, the principle of freedom which governs the freedom of a person in making a contract accompanied by good faith.

The Civil Code (BW) was announced in 30 April 1847 Statblat: S. 1847-23 and started to be in effect since 1 May 1848 with 1993 chapters. Book III concerning Obligation has 632 articles (Articles 1233-1864) containing Law of Possession (*Vermogensrecht*). It regulates legal relationships that can be assessed with money. If it is to say about a person's wealth then the intended amount and all rights of the person's obligations are made with money. The rights of possession are subdivided by the rights that apply to each person, so it is called the absolute right and the right that only applies to a person or certain party only and hence is named individual right. The absolute right that gives power to an object that can be seen is called the material's right. The absolute right that does not give power to an object that can be seen is called the material's right.

In terms of naming, agreement can be classified into two kinds : the *Nominaat* agreement (agreements that already have names or are already governed in the Civil Code) and the Innominaat agreement (agreements arising, growing and developing in the practice, and not yet contained in the Civil Code). This research is focused on the Nominaat agreement which is contained in the book III Civil Code. The chapters are (Hasyim, 2015):

1. Buying and selling (article 1457 Civil Code up to 1540 Civil law)
2. Exchange (article 1541 Kuhcivil up to article 1546 Civil Code)
3. Lease rent (article 1548 Civil Code up to article 1600 Civil law)
4. Approval to do the work (article 1601 Civil Code up to article 1617 Civil Code)
5. Fellowship (article 1618 Civil Code up to article 1652 Civil Law)
6. Legal Entity (article 1653 Kuhcivil to article 1665 Civil Code)
7. Grants (article 1666 Kuhcivil up to article 1693 Civil Code)
8. Luggage Storage (article 1694 Civil Code up to article 1739 Civil Law)
9. Loan use (article 1740 Civil Code up to article 1753 Civil Code)
10. Borrowing loan (article 1754 Civil Code up to article 1769 Civil law)
11. Fixed or lasting interest (article 1770 Civil Code up to article 1773 Civil Law)
12. Agreement on profit (article 1774 Civil Code up to article 1791 Civil Code)
13. Granting of power (article 1792 Civil Code up to article 1819 Civil Code)
14. Debt bearing (article 1820 Civil Code up to article 1850 Civil Code)
15. Peace (Article 1851 Civil Code up to article 1864 Civil Law)

The reconstruction of the articles in this study, which is based on the value of contractual justice, is focused on the *Nominaat* agreement which is contained in the Book III of the Civil Code. Based on the analysis the proposed reconstruction of the articles as follows:

Table 1. Reconstruction of Civil Code Article that does not Align with the Value of Fair Contract

No	Nominaat	Article	Reconstruction article
1	Buying and selling	**Article 1460:** If the goods sold are in the form of goods that have been determined, then from the time of purchase, the goods are the responsibility of the buyer, even if the raid has not been done and the seller has the right to	If the goods are sold in the form of goods that have been determined, then from the time of purchase, the goods are NOT a dependent buyer, UNTIL the raid is done.
		Article 1493: Both parties, with special agreements may expand or reduce the obligations set by these laws and even they are authorized to hold that the seller is not obliged to bear anything whatsoever.	Both parties, with special agreements may extend or reduce the obligations set forth by this law and they shall NOT enter into any agreement that the seller is not obliged to bear anything whatsoever.
2	Exchange	-	-
3	Lease rent	**Article 1579:** The renting party cannot stop the lease by stating that it will apply the rent, unless otherwise agreed.	The renting party cannot stop the lease by stating that it is to wear the goods for rent.
4	Approval to do the work	**Article 1601h:** If an immature child, who has not been able to make a work agreement, has made a work agreement and therefore for six weeks has done the work on the employer without any obstacles from his guardian according to the law, then he is deemed to have By his guardian to make the work agreement.	If an immature child, who has not been able to make a work agreement, has made a work agreement and therefore for six weeks has done the work on the employer without any obstacles from his guardian according to the law, then he is STILL considered With the oral authority by its guardian to make the work agreement, UNTIL the CHILD REACHES ADULTHOOD
		Article 1603e: The working relationship expires for the sake of law, if the expiration is stipulated in the agreement or in the legislation or if it is not there, according to the customs	The working relationship expires for the sake of the law, if the time expires in the agreement or in the legislation or if all of it does not exist, according to Customs THAT DO NOT VIOLATE THE Law
		Article 1603t: Each right to demand is based on both articles. Then, cancel after a year's time.	Each right to demand is based on both articles. And, STAY UP TO a VALID LEGAL DECISION
		Article 1603x: A work agreement held between an unsubmitted employer and a Labour subject to the past provisions of this chapter, whatever the intent of the two parties, is governed by these provisions.	A work agreement held between a submissive employer and a labour subject to the past provisions of this chapter, whatever the intent of the two parties, is ruled by the LAW
5	Fellowship	-	-
6	Legal Entity	**Article 1660:** The rights and obligations of each member of the legal entity, are stipulated in the regulations that make the legal entity or assembly established or recognized, or according to its own establishment deed, the letter of its own agreement or reglemen And if the rules are not made, the provisions of this chapter shall be obeyed.	The rights and obligations of each member of the legal entity, are stipulated in the regulations that make the legal entity or assembly established or recognized, or according to its own establishment deed, the letter of its own agreement or reglemen Alone, WITH THE GUIDANCE of NOT VIOLATING THE law

		Article 1661: Members of the legal entity as individuals are not responsible for their collection agreements. All the debt of the association can only be settled with the property of the association.	The members of the legal entity as individuals PARTICIPATE in the responsibility of the gathering agreements. All the debt of the association can only be settled with the property of the association AND/OR OTHER BUSINESS that DOES NOT CONTRADICT the law
		Article 1663: Other legal entities remain up until when they are firmly established according to the Deed of incorporation, reglemen or agreement, or until the moment of cessation of the pursuit of the legal entity's purpose.	Other legal entities remain in the right to the moment of its incorporation, according to the deed of establishment, reglemen or its agreement, or until the time of the cessation of the pursuit of the legal entity's Purpose AND/OR OTHERWISE LAWFULLY STATED BY the JUDGES
7	Grants	-	-
8	Luggage Storage	-	-
9	Loan use	-	-
10	Borrowing loan	-	-
11	Fixed or lasting interest	-	-
12	Agreement on profit	-	-
13	Granting of power	-	-
14	Debt bearing	-	-
15	Peace	**Article 1862:** The peace of dispute that has ended with a decision of the judge has acquired a definite legal force, but is not known by both parties or one, is void. If an unknown decision can still be appealed, then the peace of the dispute is legitimate.	The peace of dispute that has ended with a decision of the judge has acquired a definite legal force, but is not known by both parties or one, is NONETHELESS VALID. If an unknown decision was requested, the JUDGE's DECISION STILL APPLIES

Source: Processed Data (2019)

According to the table above, there are 9 (nine) chapters in Book III of the Civil Code about Obligation which require reconstructions with the following details: Two articles of Sale and Purchase (Article 1460 and Article 1493); One of Rent and Let (Article 1579); Two articles of Hiring of servants and laborers (Article 1601h, Article 1603e, Article 1603t, and Article 1603x); Three articles of the Legal entities (Article 1660, Article 1661, and Article 1663); And one article of Settlement (Article 1862).

4. Conclusion

Contractual justice is essentially the fulfilment of rights and obligations in line with the principle of proportionality by observing the contract process from start to finish. The value of contractual justice is: first, the principle of proportionality, governing the exchange of rights and obligations of the parties in accordance with proportions or parts thereof; Second, the principle of consensualism, governing the agreement of both sides. The agreement is a conformity between the will and the statements made by the parties, thus an agreement can be held legally accountable; And

third, the principle of freedom, governing the freedom of a person in making a contract in good faith. Meanwhile, there are 9 (nine) chapters in the book III Civil Code concerning Obligation which require reconstructions, with the following details: Two articles of Sale and Purchase (Article 1460 and Article 1493); One of Rent and Let (Article 1579); Two articles of Hiring of servants and laborers (Article 1601h, Article 1603e, Article 1603t, and Article 1603x); Three articles of the Legal entities (Article 1660, Article 1661, and Article 1663); And one article of Settlement (Article 1862).

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