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The Benchmark of Freedom of Contract under Indonesian Treaty Law (Customary Law Perspective)

Rachmi Sulistyarini (Corresponding author)
Doctorate Candidate of Law, Brawijaya University, Malang, Indonesia
Lecturer of Law Faculty, Brawijaya University, Malang, Indonesia

Abd. Rachmad Budiono
Professor Program of Law Faculty, Brawijaya University, Malang, Indonesia

Bambang Winarno
Postgraduate Program of Law Faculty, Brawijaya University, Malang, Indonesia

Imam Koeswahyono
Postgraduate Program of Law Faculty, Brawijaya University, Malang, Indonesia

Abstract
The meaning of freedom of contract is based on different philosophical point of view from the aspects of the legal system, legal concept and legal history. The freedom of contract, implicitly stipulated in Article 1338 Paragraph (1) of the Civil Code is a western concept that is based on the notion of individualism. Indonesian people are communal-style that prioritizes the public interest rather than individual interests. The distinction raises the legal issue to analyze the meaning of Freedom of Contract under Indonesian Treaty Law. In essence, the objective of law is the rule that includes principles of law, values (norms) and rules of concrete law. In addition to the rule, another important objective of legal science is the discovery of the law. By the discovery of the benchmark of freedom of contract under Indonesian law, from customary law perspective that is based on Pancasila, the legal protection for the parties can be protected in seeking justice to the courts. The discussion of problems is traced through the analysis of the legal system, legal concepts and legal history; the system in the colonial period, the system of customary law and Islamic law. The argumentation is explained because freedom of contract is implicitly stipulated in the treaty law in Article 1338 Paragraph (1) jo Article 1320 of the Civil Code. The particular concern in Indonesia is the colonial period which is designated as the year of codification, legal and historical concepts of freedom of contract concept in which also differs in each legal system. The benchmark of freedom of contract according to Indonesian law of the three pillars of Pancasila values are the pillar of God, the pillar of humanity and the pillar of society (the pillar of community covering the values of nationalism, democracy and justice).The conclusion is that the meaning of freedom of contract in the treaty law of Indonesian is a responsible freedom; the order that is oriented to the values of God, humanity and society in the form of harmony, appropriateness and propriety as a legal framework of Pancasila so as to realize the fair justice.
Keywords: Freedom of contract, Customary law

1. Introduction

The current provision of the treaty law that is applied as positive law in Indonesia is Book III of the Civil Code that is derived from BurgerlijkWetboek and influenced by the civil law system. Freedom of contract is one of the most important principles of the treaty law, (Andrews, 2015). This principle is not only a subjective right but also a human right because freedom is the embodiment of a free will, (McKendrick, 2014). Book III of the Civil Code embraces an open system; the system is embraced by the treaty law which gives freedom in such a way that every person has the right and freedom to make and enter into an agreement based on the will of the parties. The freedom is widely opened to manage and determine the contents of the agreement as long as it does not violate moral value, public order and the law, (Arief, 2012).

The freedom of contract in Indonesian treaty law is not specifically regulated in the Civil Code, but is implied in Article 1320 and Article 1338 of the Civil Code which provides for the validity of a treaty and the literal statement of the freedom of contract. Article 1338 Paragraph (1) stipulates "all treaties that are legally made shall be valid as the laws for those who make them." Concerning to the affirmation of the contents of the article, it is the embodiment of the concordance from the freedom of contract adopted by the Dutch Burgerlijk Wetboek (BW) *"Alle wettiglijk gemaakte overenkomsten strekken dengenen die dezelve hebben aangegaan tot wet"*, (Bouckaert, 2004). When it is literally translated, the freedom of contract in this article means that 'all' treaties shall include either named or unnamed treaties, 'legally made' means that the validity of the treaty is determined by Article 1320 of the Civil Code and 'be valid as the laws' means that the agreements binding for the party who made them.

The historical search of the emergence of freedom of contract began in the Industrial Revolution in England in 1770 which emphasized the need for laissez faire to achieve prosperity, (Smelser, 2013). Adam Smith's classical school assumes that free market controls and restrictions will generally hamper the economic growth, (Hollander, 2012). Adam Smith did not realize that not all business actors want to compete because not all of them have the same power, (Aspromourgos, 2013). This view is similar to the Utilitarian or Benthamite Utilitarianism that believes in freedom of contract, in which the parties negotiate everything that is best for them, (Gamst, 1991). Jeremy Bentham also argued that not all parties have the same bargaining position[1].

The freedom of contract in the 19th century was greatly honored by the philosophers, lawyers and courts, (Weinstein, 2004). The judiciary preferred the freedom to contract rather than the value of justice[2]. In addition, there is even a tendency to freedom of contract to develop to unlimited direction. The judge as a law enforcer creates and implements the law through its provision by standing on between legal certainty, justice and expediency. Another requirement is that the judges are obliged to seek, find out and discover the living laws within the society. Thus, the judge must be able to provide judgments in accordance with the law and the sense of justice. For example, Supreme Court decree No. 3427K/Pdt/1987 May 22, 1991 relates to the absence of good faith in the process of negotiation and contract formulation.

Based on the history of the emergence of freedom of contract which is encouraged by the individualism, Indonesia, that has become independent for more than half a century, should think of the contract legal system in accordance with the soul of the nation. Indonesia, as a sovereign country, has its own typical legal system; it is communal customary law system. Customary law system is a living law. It has been living and developing since the existence of Indonesian nation. The enforcement of colonial law became a concern since the independence proclamation of Republic of Indonesia 17 August 1945. By the independence proclamation, it means that from then on, the Indonesian nation has taken a decision to determine and implement its own law; the Indonesian law, (Lindsey, 2008). The existence of Indonesian legal system which was established since the proclamation is a "break-up" of colonial law and the establishment of national law. The founders of this country agreed that an independent and sovereign country would not be established from western life views but on the basis of the Indonesian national identity. That view of life will be reflected in the living and growing laws of society. Max Sceler called Indonesian law that reflects national identity is customary law. In addition, Sukarno interpreted the law that is in accordance with the identity of the Indonesian nation is a view of life. It is formed from the culture of the Indonesian nation and is displayed in the form of five principles in Pancasila.

The difference of those points of view raises the legal issue to analyze what is the meaning of freedom of contract under Indonesian treaty law.

2. Discussion

2.1 The Position of the Civil Code

The Civil Code applies in Indonesia since 1848; in addition to the Commercial Code and Het Herziene Indonesisch Reglement for civil procedure law. Its validity period is approximately 167 years and now is declared as Indonesian positive law (ius constitutum). Its basic principle is Article II of the transitional rules of the 1945 Constitution as long as it is not contradictory to the value of Pancasila and the 1945 Constitution. The Civil Law of colonial era has progressed since Indonesian independence proclamation on 17 August 1945. By the enactment of Law No. 1 of 1974 on marriage, Book I of the Civil Codeisno longer valid as long as the content has already arranged in marriage law. By the enactment of Law No. 5 of 1960 on Basic Regulation of Agrarian Principles, Book IIis no longer valid as long as it concerns on the earth, water and natural resources except in regard to mortgages. Moreover,by the enactment of Law No. 4 of 1996 on mortgage rights, land mortgage is no longer valid except for mortgages other than land. Meanwhile, based on the treaty law regulated inBook III of Civil Code, there are only a few articles that are stated as invalid under SEMA No. 3 of 1963.

Changes made to the Civil Code were only a patchwork. It is not fully adjusted to the needs of Indonesian people. There is nothing wrong when the law makers do not adjust the Civil Code to the independence condition of Indonesian or creates a new national law to replace the Civil Code; the position of the Civil Code is always disputed. Indonesian independence changes the structure of our society. Moreover, the changing of the structure of society changes the way of thinking. Then, the changing of the way of thinking will also change Indonesian law. Cicero has a point of view 'ubisocietas, ibiius'; it means that where there is society there is law. There is law in society, even ifthey are just simple and small the society; every of them has its own culture with its own style and character. It is called as 'geestesstructur' which means having its own way of thinking, having its own character so that each society is different[3]. Von Savigny explains that the law follows the 'volkgeist' of the

[1]Khairandy (2014), Good Faith in Freedom of Contract, University of Indonesia, Faculty of Law, Post Graduate, page xi
[2]Khairandy (2004), Indonesian Contract Law in the Perspective of Comparison, Faculty of Law, Islamic University of Indonesia Press, page 99
[3]AgusYudhaHernoko, Treaty Law, Principle of Proportionality in Commercial Contracts, Yogyakarta, Laks Bang Meditama, 2008, page 20

society which means that Indonesian law has existed since the Indonesian nation exists. That kind of law is customary law in the form of custom values and religious values that become the basis material of Pancasila.

2.2 Legal Principles and Systems

Discussion on the legal principle is important because it becomes the foundation in the law making. Poerwodarminto defines the principle as the truth that becomes the focus of thinking or opinion. Principle of law is defined as the focus of thinking and making an opinion in law enforcement. Eikema Hommes argues that the principle of law is not considered as concrete legal norms but it is considered as a general basis for the applicable law. Practical law making is oriented to the principle of law. Thus, the principle of law is the basis or direction in positive law making.

Furthermore, Nieuwenhuis stated that the principle of law has two foundations: first, the principle of law is rooted in the reality of the society; second, it is rooted in the value chosen as a guide to life together. The unification of legal real and state factors is the function of the legal principle. In addition, Sudikno stated that the function of legal science is to seek the principle of law in positive law. The legal principle becomes the source to support its legal system with the ethical, moral and social value of its society. Regarding to the opinion, Satjipto Rahardjo mentioned that the legal society consider the principle of law as 'basic truth' or fundamental truth because by having this principles, ethical and social considerations of society enter into the law. Things to be considered are the principle of law not the concrete law. It is the general basic thought that becomes the background of concrete law contained in the legal system. Kermanerman affirmed that the legal function has legal character, has a normative influence and binds on the parties. Generally, the principle of law changes according to the law and the law changes according to the development of society in which it is influenced by time and place.

Freedom of contract is a legal principle of treaty law which is a general basis that becomes the background of concrete rules contained in the legal system and contained in the legislation and judge decision. It is necessary to find a clear benchmark according to Indonesian law in order to achieve social justice.

2.3 Analysis of Law as a Legal System

The enactment of the legal system of a country is part of the law of a country. The general view of a system is considered as a complex entity containing of parts that relate to each other. Thought of this legal system has two dimensions: as the form and the methodology. According to Salman and Susanto, (2007) when a system is a form or entity, the ordinary system is considered as a set of interrelated parts, which form a unity which then so-called as system approach.

Each country has its own law in accordance with the system it embraces. Indonesia as an independent country also determines its own laws including civil and public law. Differences in the legal system are embodied in terms of contract law. Referring to the right legal system makes it possible to achieve the objectives because it refers to these criteria. Generally, the legal system has the following criteria:

a. Objective-oriented system
b. The whole is more than just the total of its parts (wholism)
c. A system interacts with a larger system or its environmental system (open system)
d. When the parts of the system run, it creates something valuable (transformation)
e. Each section should match each other
f. There is a unifying force that binds to each other (control mechanism).

Fuller provides a standard to measure whether the rule is a system with 8 (eight) principles that so-called the principles of legality:

a. A legal system must contain rules. The rules mean not only containing ad hoc decisions (for certain matters)
b. The rules should be made public
c. No rules shall apply retroactively
d. The rules should be made in an easy-to-understand language
e. A system should not contain contradictory rules
f. The rules should not contain demands that exceed what can be performed
g. There should be no habit to frequently change the rules causing the society to lose their orientation
h. There should be a match between the enacted rules with day-to-day implementation.
i. There is a relationship among the parts or elements in the system that so-called the structure. Structure determines the identity of the system, so that each element can be changed and even replaced without affecting the system community.

The unity or 'structured whole' is not just a collection of independent elements but it is a collection of elements that have limited independence to other systems that reduce the overall complexity. To be an independent entity, a legal system must be indistinguishable from other legal systems and other types of normative legal systems, including religious systems and moral manners. System is not a logically closed entity

but it is an open system. An open system means that the rules in the legal system open up the possibility of different interpretations, hence the rules always change.

The system-building element is the rule or judge decision of how something works and it is called the normative system. Legal system is an abstract system; the elements are immaterial that cannot be seen and are the unity of thought. Another abstract category is a normative system that is a separate group and its elements consist of rules. The prescriptive rules are provisions that should be done; so-called legal system, religious norm and moral system.

The legal system relate to time and place. It means that the characteristics of the system at some point become invalid because it is not in accordance with the change of society so that the legal system is continuous, sustainable and autonomous.

2.4 The Meaning of the Principle of Freedom of Contract According to the Legal System

2.4.1 According to the Colonial Legal System

The enactment of the legal system of a country is part of the law of a country. The general view of a system is considered as a complex entity containing of parts that relate to each other. Thought of this legal system has two dimensions: as the form and the methodology. According to Salman and Susanto, (2007) when a system is a form or entity, the ordinary system is considered as a set of interrelated parts, which form a unity which then so-called as system approach.

The colonial legal system began in the process that occurred as a part of the history of the colonial rule development in Java which lasted for a century from 1840 to 1950. The colonial powers of the history in that year continued with the process of modification and adaptation for the development of a modern national country in the following period from 1945 to 1990.It means that there was development of the law from colonial law to national law.

This period was a period of development that was influenced by liberalism policies that tried to exploit private capital opportunities from Europe to put a large plantation effort in the colony area. The influence from the Dutch country brought the consequences of change towards the legal policy in the Dutch East Indies colony. The change was started by the enactment of a new legislation (grondwet) in Holland in 1848 that was followed by a new regulation to regulate the governance of the colonies (Netherlands Indies) so-called Het Reglement op Het Beleid der Regering van Nederlandch Indie; abbreviated as RR or Regerings Reglement. This era was then so-called conscious policy of the law (bewusterechts polititiek). The year of 1848 was known as the year of codification, an important period for changes in the applicable legal policies to the colonial state (the Indies) in which some codified rules were applied for the first time in the colonial territory based on the principle of concordance, they are: 1. Reglement op de Rechterlijke Orgasisatie (RO) or the rules of the Court Organization (POP), 2.AlgemeneBepalingen van Wetgeving (AB) or General Provisions on Legislation, 3. BurgerlijkWetboek (BW) or Civil Code, 4.Wetboek van Koophandel (WvK) or Commercial Code, 5.Reglement op de Burgerlijke Rechtsverdering (RV) or Regulation of Civil Code. The principle of concordance and the principle of legal unity (eein heids beginsele) are the principles of legal politics that is known at that time. Thus, the applicable law to the population of the Netherlands East Indies was concordance or similar to the applicable law in the Netherlands.

Civil law is commonly used to refer to European legal systems derived from Roman law and is different from common law systems. Civil law tradition follows the logic of Roman law and Alan Watson that sees it as a system derived from the Justian Code, Corpus Juris Civilis. Corpus Juris Civilis is the main body of private law that becomes the guideline for the Indonesia people which is subject to the western law, Dutch law which contained in Burgerlijk Wetboek or Civil Code.

The applicable freedom of contract in the treaty law of the colonial period was stipulated in Burgerlijk Wetboek.It is contained inArticle 1338 Paragraph (1) of Burgerlijk Wetboek “Alle wette glijkgemaakte overeenkomsten strekkendengenen die dezelvehebbenaangegaan tot wet”.The free translation has no different from the Article 1338 Paragraph (1) of the Civil Code is “all agreements made become legally to the law maker”.

2.4.2 According to the Customary Law System

In the 1945 Constitution of the Republic of Indonesia, there is no Article governs the applicable law in Indonesia; the transitional rules are only implied in Article II. It is stipulated that “all state bodies and existing regulations are still effective as long as the new constitution has not been implemented”. Furthermore, the government issued Regulation number 2 on October 10, 1945, which was retroactively since August 17, 1945, and stipulated that “all state bodies and the existing regulations are still effective until the establishment of the Republic of Indonesia on August 17, 1945, as long as the new constitution has not been implemented and is not contradictory to the Constitution. With the provisions from Article II, the transitional rules of Burgerlijk Wetboekare still valid as a law. If there is a provision that is contrary to the Constitution, the judge may create the law as mandated in Article 104 Paragraph (1) of the 1950 Constitution “that the judge in making a sentence

should be based on the decision on the Law or Customary Law". The term of customary law is expressly and clearly stated in this article so that it can be said that based on Constitution of 1950 the legal system of Indonesia is applied based on customary law system. By this statement, the existence of customary law is properly recognized and has the force of law which means that the value of obedience to both written and written law is the same.

Soepomo defined Customary Law as non-statutory law the most part is a customary law and the small part is Islamic law. Customary Law also includes the law of judge decision that contains the principle of the applicable law within an environment. Customary Law is rooted to traditional culture as a living law because it embodies a real legal feeling of the people. From the enactment of this customary law, there is a dualism of the law enactment; on the one hand it is subjected to western civil law and on the other hand it is subjected to customary law.

Treaty law, according to the Customary Law system, has a different understanding with European law in terms of meaning, scope and its legal principles. The Customary Treaty Law covers liability law (schulden recht) including the issue of land transactions (grond transakties) and all transactions related to land (waarbijtransaktiesgrondbetrokken is). Ter Haar mentioned that the liability law is a law that demonstrates the overall legal rules that controls the right of goods. The scope of the liability law is the goods law and treaty law. The customary treaty law is different from western treaty law. The difference comes from cultural background of society which makes the law is different. Von Savigny mentioned "wirdnich das recht gemacht, esist und wirdmitdem volke" which means that the law is not made but it is something within the society[1].

The main characteristics of liability law are:

a. "It is just ahead of individualistic characteristic"
b. It enacts only the basic lines without any supplementary laws and presumptions under the constitutions
c. The important thing in the classification of the material is the motive
d. It has no general rules
e. The law is real in which all relationships are described and realized in the real terms[2]

Such characteristics are adhered to by customary law because of the difference in the legal system. Customary law system is based on the different minds of the Indonesian people who control the western law which is individualistic-liberalistic whereas customary law has the following characteristics:

a. It has strong communal characteristic,
b. It has a magical religion style associated with the natural view of life of Indonesia
c. It is overwhelmed by the concrete mind
d. It has visual characteristic; the legal relationship is occurred and set by a bond whose sign of bonding can be clearly see.

Van Vollenhoven and Ter Haar asserted that in understanding particular legal system, it requires the use of technical law in a consequential manner and it requires appropriate legal language. Whereas the western law has a term of technical law both by the Constitution and judge, the legal language of the customary law requires the attention of jurists because various circles of customary law have certain content. The related society language is the language that is able to describe the feelings of the society apropriately. Because of this different system, the western legal system is different than customary law system. For instance, the term "sell" in customary law differ from the term "sale" in western law. According to the western law, "sell" is verkopen, an obligatory legal act in which the seller promised and obliged to pass the goods in 'verkoop' to the buyer with no question whether the price of goods have been paid cash or not. In the customary law, "sell" is 'overdracht', passing of the right for

[1]The opinion of Von Savigny was agreed by Subektiand alsoWiryono by the following statement: there is an apparent distinction between western treaty law and customary law that lies in its psychological basis. Soebekti stated that a treaty is an event in which a person promises to another person or where two people promise to do something. The treaty issues an agreement between the two men who made it. WirjonProdjodikoro argued that the agreement as a legal relation, concerning property between two parties, in which one party promises or is considered make a promise to do something or not doing something, while the other party is entitled to demand the realization of the promise. The conclusion of these two matters is that the western treaty law begins on the basis of psychology of private and material interests, whereas the customary law refers to the psychological basis of family harmony and is helpful. The treaty based on western understanding is issuing the engagement while based on the customary law is not always related to the relationship laws about the property but also including the intangible treaty of things, for example the works of the mind.

[2] Sudiyat quoted van vollen hoven who described the following key features:

1. Sentences leading up to individualistic trait point to communion style and non-individual style. This style appears in the helpful traits in the life of customary society law.
2. There is no detailed provisions in which based on the nature of the customary law
3. That the contract's driving motive is important and the motive determines the nature of the contract
4. It is considered casuistically
5. The object of an independent asset is the object of enjoyment of benefits based on ownership, lease, pledge and is not a receivable over the right of claim

penance with cash payment. In the customary law system, purchasing goods with no cash payment is not a selling act but includes debt of accounts payable.

In addition to the terms in customary law, various circles of customary law contain also "customary proverbs" for examplekatoadat, petitih, umpama, pitua. Tapanulihas a proverb says "togu vein nibalu, soguanuratnipadang, toga pen nidokniuhum" which means the bamboo root is strong, but the grass root is even stronger. This personification contains the legal basis that the positive law is strong but an agreement is stronger than the law. Minangkabau has a proverb says "sekali aie gadang, sakali tapian beranjak, sekali raja berganti, sekali adat berubah" which means when the water overflow the bathing spot is shifted, when there is replacement of king then there is a change of custom too. This proverb means that customary law is not static but is changing to the applicable changes by the customary head replacement. Snouck Hurgronye asserted that customary proverb should not be considered as sources or foundations of customary law. A proverb must be interpreted in a precise sense of meaning. Proverb is not considered as a positive law. Therefore, to know whether there are rules that reflect the flow of law as embodied in an customary proverb, it should look at the decision or determination of the legal officer who can give a conclusion about the existence or the absence of the law.

2.5 The Meaning of Freedom of Contract Based on the Concept of Law

2.5.1 According to the Concept of Colonial Law

To understand the concept of freedom of contract in this colonial period, it was intended during the experimentation period because of the political development of the laws in 1860-1890. The reasons for this year's determination are as follows:

a. The developments in this period were dominated by the concrete efforts of liberals, with prongly pragmatic tendencies, to realize the enforcement of European law in the Indies through thelaw, especially in Java, to build an economy in the colony in the way of the cultuurstelsel;
b. In development period of 1860-1890 the problem of cultural conflict started to appear, as well as in terms of law as the unification of European ideas with the nature of indigenous ideas in various aspects of life, especially economic, government and law

The principle of freedom of contract according to the current concept of colonial law started in the enactment of Regerings Reglement (RR). There are two regulations that contribute to the interests of the law of indigenous people in the colonies; it was the Ground wet of 1848 and RR of 1854.In juridical view, the normative of these two regulations became the force of change colonial policy in Dutch East Indies. The two laws of regulation as the basis of the referral are about land and labor; it is the Cultuurwet regulation, the law on agricultural business and the provisions in Stb 1819 No. 10 joStb 1838 No. 50 which regulates the contractual requirements made between indigenous people and non-indigenous population[1]. Cultuurwet essentially contains the wishes of the Europeans and the indigenous people to be governed by their respective laws, as required by Article 75 Paragraph 3 of RR "de godsdientigewetten, instelinngen, en gebruiken der inlanders" the original law of the indigenous people including the law of covenant and object. The policy of the prime minister at that time was for the original law of the indigenous people to be preserved[2]. The subsequent developments was the situation of positivism development which brought the consequences to a condition which originally wanted to keep the customary law then was changed to the rule of European law which was considered to have legal certainty due to its written form (positivism).

In terms of labor regulations of the 1860s of post-RegeringsRegement 1854 development, it liberated indigenous labor and all forms of slavery, directed government policy towards possible deployment of indigenous labor for the need of private business through contractual contracts made on the basis of free agreement. This labor regulatory policy is based on two issues that arise at the same time as the introduction of cultuurwet or plantation rules. The two considerations are:

a. How to protect the workers and provide guarantees for them to avoid the consequences of the employer's penance;
b. How to help employers are protected from the disgrace of workers who disobey the contents of the agreement.

The crucial setting of the treaty law is Stb 1819 No. 10 joStb 1838 No. 50 of the contract terms made between indigenous and non-indigenous people. Stb 1819 No. 10 says that any kind of contract made by indigenous and non-indigenous people upon agreement has to be registered to the Resident's office. Furthermore,Stb 1838 No. 50, containing treaties may be made by a leader in the village on behalf of the

[1]In the cultuurwet, it is proposed that 1. The indigenous people shall be grantedeigendom rights under European civil code for the lands they have occupied individually and through generations, 2. The indigenous people will also be given the possibility under the laws to rent their land to anyone, also to non-indigenous people, 3. State-controlled wilderness will be given to those who wish to work on it with erpacht rights.

[2]Wignjosoebroto (2014). From Colonial Law to National Law, The Dynamics of Socio-Politics in the Development of Indonesian Law, PT Raja GrafindoPersada, Jakarta, page 99.

collectivist population, not individual. These two arrangements are obstacles to the realization of free land and free labor because:

a. The provisions of 1819 require that contracts made by indigenous and non-indigenous people should be recorded must be written, and this is the form of government intervention on treaty law;
b. The provisions of 1838, become obstacles, because the village head can make business contracts with non-indigenous people without asking the opinions of villagers who may not want it.

Such provision means that the efforts want to restore the necessity of individuelecontracsluiting in the case of lease and employment agreement and is realized in the regulation of Stb 1863 No. 52 and known as KonluwlijkBesluit Design.

The design of the KoninklijkBesluit resulted in the idea of freedom of contract adopted by universal liberalism, which means:

a. Disallow the intervene controller and the police in the case of a civic contract;
b. Implement the provisions on treaties set out in the Civil Code to be applied to indigenous people.

It can be concluded that the meaning of freedom of contract according to the concept of colonial law is that the provisions of the European invitation legislation which are seen as perfect provisions since the Roman era and must be applied in the Dutch East Indies to all population groups based on the lex loci principle, the law that will apply to land and labor is European law.

2.5.2 According to the Concept of Customary Law

It is known that every country has its own laws. The legal system applied in Indonesia is known as the three legal systems containing of western legal system, Islamic legal system and customary law system. In the positive legal science discourse, there is the assumption that the law must be released from non-juridical elements. Such a concept was introduced by John Austin in 1879 inpositivism[1].

In contrast to this teaching, von Savigny stated that the source of the law is the law consciousness of society embodied in both customary law and the constitution. The two are equals since the law is a formulated custom[2]. The volkgeistterm or the soul of the people of von Savigny is termed in other word by Ehrlich with special and rational terms namely the facts of law (rechtstaatsachenfact of law) and the living law of the people. Ehrlich argued that state protection against the special means of coercion is never essential even if it is established. An essential legal institution is a legal fact which emphasizes the whole law on custom, power and declaration of the will. The obedience to the law is not due to the existence of norms of law but because of social compulsion. From some view of experts, von Savigny viewed the law as a historical phenomenon; Ehrlich mentioned the law as a social phenomenon, Austin and Kelsensaw law as a normative phenomenon, which certainly can provide a picture for justification of the original law of Indonesia.

Customary law calls for an engagement, according to Hadikusuma (1980) it is a legal relationship between two parties that occurs because of an act or agreement in the form of consent of interest. The element of interest in the law of engagement according to western law is not discussed. Roscoe Pound defined interest as "interest asa demand or desire which human beings, either individuality or through groups or association in relations seek to satisfy" meaning importance as a demand or desire to be satisfied human, both individually or group. The basic framework used by Roscoe Pound is the wider interest of social interest and the human desire to fulfill it, both personally or group. On this basis, it is distinguished on the various interests that should be protected by law, including personal, public and social interests.

Compared with the concept of the Civil Code, the notion of engagement is certainly different. Article 1313 of the Civil Code stipulates "an agreement is an action by which a person or more binds himself to one or more persons". There is a difference in the meaning of the engagement between the two systems but between them there is a similarity that the legal relationship occurs because there is agreement. In customary law, the agreement raises an individual liability or a group of individual liability. The term given by ter Haar is crediethandelingen (credit deed, liability or trust). The provision of customary law as "individualuelecedithandeingen" in addition to individual liability is group liability crediet hamdelingen. The two are mutually filling and influencing each other that is caused by the engagement according to the concept of customary law; it is not only socio-economic but also socio-cultural and there are signs of bonding between them.

The freedom of contract is assumed to be subject to treaty because of certain freedoms within society that are

[1]John Austin in Lecturees on Jurisprudence or the Philosophy of Positive Law, contains the efforts of pure legal theory to obtain the result through positive law (the law released from non-juridical elements). It mentions that every science of law should base itself on positive legal order or material comparison to a number of legal arrangements. Austin's criticism mentions that positive is defined as a law made by a person or institution that has sovereignty and is applied to members of an independent political society. The members of the public recognize the sovereignty or supremacy of the concerned law-making institution. Thus, to him, it is valid as law if the constitution requires the custom to be expressly stated.

[2]Salman and Susanto, (2007), Reconceptualization of contemporary Customary Law, Alumni publisher 2002, Bandung page 4

willing to participate in legal traffic. In the case of the agreement of the parties, western law adheres to the principle of obligatory that means the agreements has occurred with the existence of agreement and then occur rights and obligations. Customary law adhere the principle of light and cash means to have only the agreement has not taken place the transfer of rights.

The concept of light and cash is not about the characteristic or form of payment of the purchase price. The cash meaning in legal action is the simultaneous repayment of magical powers. The magical value is a concurrent release (gelijktijdigenovergang). Light means that the transfer of rights must be performed in the presence of authorized officials and witnessed by several witnesses. Kartini Soedjendroargued that if the transaction is not performed with the support (mederwerking) of the head of the tribe/legal or rural community that is considered to be illegal, invalid and not applicable to a third party[1].But Soepomo argued that not all legal acts in the customary law system must be endorsed by special officials who are involved in civil rights and society. Special officials in customary law are officials who serve as a liaison between the two worlds of cosmology; it is human with nature in maintaining the balance and the harmony of human relationships with the universe.

The conclusions for the light and cash are contingent (kontantehandeling); it is a character that has meaning as participation, especially in the determination of achievement, that every determination of achievement is always accompanied by counter-achievement that is given immediately (instantly). In addition, cash or concrete is a characteristic that is defined as a very clear or real style, indicating that any legal relationship that occurs in society is not performed by silence. The occurring transaction always shows the existence of real action, every agreement is always accompanied by the transfer of objects or agreement object or object agreement.

2.6 The Meaning of Freedom of Contract According to Legal History

The freedom of contract according to the history of colonial law is a unity of discussion with the history of customary law because in the colonial period there was an upheaval of political developments related to customary law. Historically, politics relating to customary law began in 1848, on 1 May 1848 the new law (nieuweWetgeving), which contains legal reform of the entire field of the judiciary was applied.

In the period of VOC power in Indonesia, customary law was received less attention. The people of Indonesia are allowed to live by their respective laws, the indigenous law. Customary law is often referred to the king Law or Islamic law (Mohamadad law).There is no secrecy that customary law is the law of the people. In 1848 after the enactment of the Civil Code, Commercial Code, and HIR for the Dutch and the European, a problem arose against customary law. It was because the colonial government faced the problem of the existence of customary law in which can be used to support Dutch politics, especially to meet the interests of the economy.

It was Dutch government's efforts to run the legal politics of the Indonesian nation in the field of civil law, especially under the government of Mr. Wichers, the general governor of the time. Then it is to investigate the possibility of replacing the customary law of Bumi Putera and Eastern groups with codification based on European law. At first, the idea of Mr. Wichers was approved by Raad van Indie, arguing that:

a. The application of European law to the Bumi Putera and Eastern groups favored the European business
b. The importance of codification is valued more because of the strong influence of legist which considers the law is identical to the constitution
c. The existence of customary legal judgment is lower than western.

The effort was finally opposed by the general governor, Rochussen, with the following reasons:

a. European law is identical with Christian religion, while the majority of the people are Muslim and other beliefs other than Christianity. When the people are not yet Christian, European law cannot develop properly.
b. If European law affects HIR formation then surely the judges and employees who are entrusted with the task of judging Bumi putera people will lose time to do the principal work of the cultuurstelsel, the state administration and finance affairs.
c. Implementation of European Even Code will result that the civil code will be given many rights to the nation of Indonesia so that it may endanger the position of the Dutch East Indies government.

Finally the first attempt to replace indigenous law was failed and was followed by a subsequent attempt in 1904 to institute legal unification based on the European legal system and it was failed again. The subsequent attempts of 1927 and 1928 were referred to as the turning point (keerpunt), which essentially stated that the treatment of customary law has two opinions:

a. Customary law is retained if local legal needs them,
b. Original law applicable to Indonesian people shall be determined later after a study on the legal needs of Indonesian.

Finally, the function of Article 131 Paragraph 2 of IS concludes the existence of two principles:

[1]KartiniSoedjendro, Conflict Agreement on Convertible Land Rights, Kanisius Publisher, Yogyakarta, page 50

a. The principle of dualism, which let non-European groups remain in its own law (Customary Law). It means that there is a separation of civil law applicable to the ruling class with the ruled group;
b. The principle of concordance, civil code applicable to the ruling class (European class) must be the same as the civil code applicable in the Netherlands.

Both of these principles influenced the codification of civil code in the Netherlands East Indies and received opposition from the members of the grand judgment council, van der Vinna. The policy also received support from the Scholten van oud Haarlem commission and the government. The government some reasons:

a. The existence of western civil code mission will be applied to Bumi Putera group and the Foreign East;
b. Western civil code is considered to be higher than customary law.

Based on these considerations, the effort of enactment of western civil code for groups other than European class is taken in two ways:

a. By declaring the enactment of western civil code against the Bumi Putera groups and the Foreign East (toepasellijkverklarings, article 11 AB, article 75 paragraph (2) RR, section 131 paragraph (2a) IS);
b. By opening the opportunity for the Bumi Putera and the Eastern Foreigners to submit to the Western civil code(vrijsvillageonderwerping), article 11 AB,, article 75 paragraph (2) RR, article 131 paragraph (4) IS).

The next voluntary submission arrangements shall be specifically regulated according to Stb 1917 No. 12 on "Vrijsvillageonderwerpingaan het EuropeeachPrivaatrecht" (provisions on voluntary submission of European Civil and Commercial Code):

a. Voluntary self-submission to the whole Western civil code;
b. Voluntary self-submission to some Western civil code;
c. Voluntary self-submission to Western civil code on certain actions
d. Voluntary self-submission of presumption to Western civil code;

Under such an arrangement, freedom of contract according to legal history is based on the statements of attitudes (tolingellijk) and the voluntary self-submission of western civil code, and in accordance with the original concept of article 1338 paragraph (1) and paragraph (3) of the Civil Code.

2.7 The meaning of the freedom of contract according to the pillars of Pancasila

In terms of the legal structure, law is an autonomous institution operating under rules, principles and concepts. The objective is legal certainty. The law aims to create certainty in the relationships among people in society. One thing related to legal certainty is where the law came from. Certainty about the source of the law becomes important since law becomes an increasingly formal institution. It is then considering the valid source.

Indonesian becomes the focus of discussion which means the source that is considered as valid it is based on the constitutional basis of Constitution of the Republic of Indonesia 1945. In careful observation, it can be concluded that the 1945 Constitution is not yet satisfied with the results of the legislation and then build up the spirit of being an important supporter of legal practice. The explanation of the 1945 Constitution states that "... the important thing is ... spirit". Although the Constitution is arranged with familial words, if the spirit of the state organizers are individual, the constitution is of course having no consequence in practice. The 1945 Constitution of the State of the Republic of Indonesia is only implemented on the basis of Pancasila. Implementation of the 1945 Constitution of the Republic of Indonesia which is contrary to the spirit and soul of Pancasila means to manipulate the Constitution and becomes betrayal to Pancasila.

Treaty law based on Indonesian law means using the benchmarks of Pancasila because the Indonesian law in fact is the Customary Law which contains the values that is contained in Pancasila. Pancasila's Legal System is a legal system whose translation is oriented to the three pillars:

a. Orienting to the value of God
b. Orienting to the value of Humanity
c. Orienting to the value of Society (including nationalitarian, democratic and social justice)

The founders of the state have reached agreement that Pancasila is the highest ideals, principles and legal norms. The outcome of the agreement is set forth in the 1945 Constitution of the Republic of Indonesia, as contained in the main idea[1].Pancasila is positioned in the legal system of Indonesia, predicated as the soul of the nation, the outlook on the life of the nation, the ideology of the state, the ideals of the country, the source of all sources of law or the ideals of law. Salman and Susanto, (2007) called Pancasila as the rechsidee by giving the following explanation: "*Pancasila's constitutional pontification, in the preamble of the 1945 Constitution, is the recognition of Pancasila as the rechtsidee. It is the foundation of the constitution of thought which is a necessity to direct the law to the ideals which society desires and serves as a guide or guiding star (leitsiern) for the*

[1]It is mentioned in the main idea that: The State ... protects the entire nation of Indonesia and the entire blood of Indonesia based on unity, by bringing about social justice for all Indonesian people. In this preamble, it accepts the understanding of a united state. A state protects and encompasses the whole nation. The state overcomes all classifications, overcomes all the individual ideals ... wants "unity" ... this is the basic of a state that should not be forgotten.

achievement of society's ideals[1]*."*

Koesnoe mentions rechtsidee in the National Law system called Pancasila Philosophy which occupies a central and fundamental place. In the rechtsidee of Pancasila contains the principle of law (rechtsbeginselen) which is the general purpose (ratio legis) of positive law. Precisely, the ideology of Pancasila is a framework limiting the movement of the contents of positive law, both written (laws and regulations) or unwritten (customary law) in order to not exceed the authority of the arrangement. Therefore, the agreement in Indonesia should be based on the values of Pancasila

The beginning of the freedom of contract in England, according to Treitel declared as 'freedom of contract' is used to refer to two general principles:

a. The scope of freedom of contract includes the freedom of the parties to determine the contents of the agreement
b. The freedom of contract includes the freedom of the parties to determine with whom they want or do not want to make an agreement.

The application of freedom of contract by the judge decision is not unlimited but it is limited. In the system of common law it is limited by legislation and public policy. It means that if there is an agreement that violates the two restrictions, the agreement becomes illegal. It is considered in violation of legislation if a particular law has included provisions that may or may not be included in the contract. Public policy is related with the measure of propriety according to the society's assessment.

The provisions of freedom of contract under Indonesian law are not expressly stipulated either in the legislation or the 1945 Constitution of the Republic of Indonesia. The basic law is article 1329, article 1332, article 1320 and article 1337 of the Civil Code.

Article 1329 of the Civil Code stipulates "each person is competent to make engagement, if he/she is not declared incompetent by law". Article 1332 of the Indonesian Civil Code stipulates that "only merchandise that can be traded can become the subject of approval". Article 1320 Paragraph (4) states that halal cause means as long as it is not about the causation of the law or is contrary to good morality and public order everyone is free to commit it. Article 1337 of Civil Code states "a cause is prohibited when it is prohibited by law or is the opposite with good morals or public order".

Pancasila is a "roadmap" for Indonesian law in the care and management of Bhinneka Tunggal Ika. Pancasila manages the Indonesian-based problem based on solid moral foundations. The moral fundament is the principle of the God, it is mentioned that "the God of the Almighty ... gives the soul to the effort to administer all that is righteous, just and good ..." The moral basis thus contains the meaning of ontology, the deep philosophical values of the state and Indonesian people are the existence of the state, Indonesian people who have interaction to God which is believed to be the source of all, noble, good and just. Related to the agreement, this moral basis is in accordance with the religious nature of religious magic or participerendcosmisch, it is a mindset based on religiosity. The religious magic is also interpreted as the belief of a society that does not recognize the separation between the real world (fact) and the unseen world (the hidden meaning behind facts) which must always be balanced. Society must maintain disharmony which means fostering harmony - the balance between the real and the inner world, (Tanya et. al., 2015). The people who are familiar with the religious law system, the religious magic is manifested in the belief in God, to Allah, every act performed always gets reward and punishment from God according to the deeds. The good, righteous and fair values are reflected in the God of the Almighty as moral foundation is manifested in the form of worthy and harmonious principles. It is a notion that refers to morality and immediately to a healthy mind which is directed to the judgment of an event both in the form of act and condition. The understanding should contain elements derived from decency that is good value and bad value, in addition to the common sense element that is acceptable based on the acceptable law.

Thus, freedom of contract in the treaty law based on the value of God is the clause that harmonious and proper should be included because this principle is the embodiment of good, just and fair value as contained in the first principle of Pancasila as the moral basis of religious dimension.

A just and civilized human spirit based on the formulation of the two principles of Pancasila is in accordance with the pattern of customary law. Customary law provides an aspect of justice by emphasizing the value of humanity. Tanya et. al., mentioned that human dignity is honored, civilized way of life is put forward, and barbarityis kept away and should able to act justly according to the principle of justice. Indonesian people who are based on God must be able to uphold humanity, civilization and justice[2].

The value of humanity which is derived from the second principle of Pancasila is typical of Indonesia which is different from western concept. Western law considers human to be free or independent and equal to others. The freedom is basic for every individual.

[1]Otje Salman Soemadiningrat, Reconceptualization of Traditional Customary Law, PT Alumni, 2002, Bandung, page 136-137
[2]Tanya et.al., Pancasila the Frame Law of Indonesia, page 4

In the concept of customary law, there is nothing as free individual. The individual is an inseparable part of society. Individuals exist and mean because of society. In customary law, society is primary, individuals do not form the community, and the individual is part of society that has their respective functions for the sake of community survival. The existence of human in the view of togetherness means having the same position, there are equations of degrees. The humanitarian aspect that leads to equality of degrees, equality of rights and obligations upholds human values in accordance with traditions that apply based on the customary law.

The meaning of justice in the second principle is not separated from the understanding of the principle. It means as the outside meta-norm and underlying and animating the legal norms that emerge as rules of behavior. The Supreme Court in the norm of honor of the Supreme Court declared that justly means to put things in its proper place and give to everyone what is rightfully based on the principle that everyone is equal. The meaning of justice thus corresponds to the value of humanity based on the understanding of the second principle of Pancasila saying everyone is in equal position and degree. Therefore, the benchmark of freedom of contract based on Pancasila is to uphold humanity and justice.

Based on the social values, freedom of contract includes national values, democratic and social justice. Customary law is based on togetherness or communal, based on kinship and harmony, therefore the aspect of mutual interest gets priority over personal and group interests. Nationalistic value, in the precepts of Indonesian unity, is an estuary to take care the nation's life by seeking national integration. The unity of Indonesia that has nationalistic character will be firm when each group respects each other's rights and obligations and respects each other's differences.

The fourth precept of Pancasila is the Indonesian doctrine of the life of the state is the society. It means that the basis of state administration is the society and the interests. The pillar of democracy is democracy is in the sense of democracy in the life of the Indonesian nation. In Customary Law, this principle has meaning that is known by the three principles of work namely the terms of worthy, harmony and harmonious. These three principles of work are embodied in the doctrine of mutual will and work together. The doctrine of mutual will is distinguished on the doctrine of consensus, while the doctrine of mutual work is manifested in the doctrine of mutual cooperation and the doctrine of help. Based on this description, it seems that the conformity of views on the value of the people related to the freedom of contract in the treaty law is the intangibles to the conformity of opinion.

The values of justice that enter the pillars of society mean that justice is based on God, humanitarian justice, national justice, and social justice. Social justice is based on and animated by the essence of the human justice as listed in the second precept, a just and civilized human being. The deeper meaning implies that human should be just to himself, just to his God, just to others and society and just to his/her natural environment. This statement is in accordance with the opinion of Notonagoro about the realization of social justice. According to him, there are three of them namely (1) distributive justice (justice divide); the state against its citizens, (2)legal justice (justice); the citizens against the state to comply with legislation, and (3) commutative justice (justice among the citizens); the relationship between one citizen with each other mutually.

The spirit of justice is back to the people's conscience that justice is the right of all the people as in the 1945 Constitution's explanation on the first main idea which implies "the State wants to bring about social justice for all society". The concept of customary law means that justice has a higher position than the term worthy. It is mentioned that justice refers to an abstract understanding, which is not aligned with proper, decent and worthy. Fair understanding is a notion that contains the purpose of law. Indeed, Indonesian people realize the same rights and obligations in people's lives by developing noble deeds reflecting the attitude and atmosphere of kinship and mutual cooperation.

The judiciary, from the word just, according to customary law is seen as a process whereby a problem which creates an imbalance of the cosmos can be solved. This institution is a place of law to restore the sense of justice and the public's merit for the acts of lawlessness.

2.8 Benchmark of Freedom of Contract Based on Indonesian Law

The Indonesian Legal System is a legal system of Pancasila. A legal system that contains values derived from customary law systems and has distinctive characteristics that are different from other legal systems that become the benchmark of law in Indonesia. For the Indonesian nation, the life of nation and state is “the general goal of society or the general acceptance of the same philosophy of government” that is the purpose of the state based on the principle of “social justice for all Indonesian people”. The ideal of the Indonesian state and a source of legal value in determining the various policies of the state is realized through the objectives of the state in the Preamble to the 1945 Constitution, “the State protects the whole nation and the entire blood of Indonesia, as the character of the formal legal state and promotes prosperity, enrich the life of a nation as the characteristic of the constitutional state, while in general is participating in the implementation of world order based on the eternal

peace and social justice."[1]

Discussion of freedom of contract according to Indonesian Law means a benchmark on the limitations set forth in article 1338 paragraph (1), article 1337 of the Civil Code according to the legal system of Pancasila. Article 1338 paragraph (1) Civil Code: any agreement made legally becomes the Act for the legal maker.

The formulation of this Article is on the effect of the treaty; it means that it explains the aspect of the law after the promise exists. The literal meaning of the word "lawfully" means to fulfill the requirement of the validity of the treaty as prescribed by law. The one should be noticed is that the word is the translation from "wettiglijk" not "wettelijk". The word "wetteglijk" means to fulfill the requirement of the constitution, but if "wettilijk" has a wider understanding of the scheme covering the unwritten legal requirement. The word applies as a law to bind the parties closing the assessment, for example, the constitution is also binding to whom the law applies. The important thing in a treaty is content, so that being bound of the parties to the treaty is being bound to the contents of the treaty.

Civil code recognizes the general principle “basically people are free to do something, as long as it is not forbidden”. According to this principle, there is a freedom to act, the prohibition is an exception ". This statement does not mean that the law provides absolute freedom. Article 1337 of the Civil Code “a cause is prohibited, if it is prohibited by the constitution or when it comes to good morals or public order”. It means imposing limitation on constitutions that are coercive, ethical and public order.

2.8.1 Morality

Morality or ethics is part of philosophy. The word susila (morality) comes from Sanskrit language that means principles, rules of life (sila), and better (su). Essentially, ethics has a section that studies the motive of a person to behave, the part that studies the norm for the behavior. Therefore, morality or ethics refers to the applicable rules of ethical rules. Ethics gives bad or good value to one's deeds, whether something can happen. How it happens is not important because it wants to answer the question of how a person should behave, what is good and what is bad. Ethics prevailing in Indonesia has variation to its benchmarks. A very strong place of morality stems from the native custom but there is also a strong ethical value and religion is very influential. In areas where religion is as strong as religion occurs synthesis, such as in Minangkabau and formulated with "adat bersuduk syarak and syarak bersendi kitabullah". In this field of ethics values and norms are attached. The value that belongs to the society becomes a measure of consideration for behavior.

Satrio (1995) acknowledges that it is difficult to determine whether the causation is in contravention with morality (goedezeden) because the decency is an abstract term whose contents differ in one area to another. Besides, people's judgments change time to time. Satrio (1995) interpreted broadly and narrowly. The narrow sense is accepting morality in limited part, if it is a general moral affirmation of a particular legal relationship. Thewide sense is accepting morality in a limited circle of origin does not contradict public morality.

A clause against the public morality is prohibited by law, as well as clauses contrary to public order also against the law because the law is obliged to uphold public order.

Wiryono Prodjodikoro has the same opinion with Satrio (1995) about moral (geode zeden) and propriety (openbbareorde). The benchmark for both is relatively unequal across the world, depending on the nature of each country's life. Wirjono's morality is mentioned as moral; it is the morality in a society that is generally recognized, whereas public order is the public interest which is opposed to the interests of individual.

The relationship of morality and propriety is explained by J. Satria that propriety has a broader content of morals and public order so that what is morally incompatible and violates public order is also inconsistent with propriety.

2.8.2 Justice

Plato gives the concept of justice in the four basic virtues: wisdom courage, discipline and justice. Gie (1977) comprehends justice as a value. Further explained by quoting the expert’s opinions:

a. Value according to Howard Becker refers to an object of need, attitude and desire;
b. According to the dictionary of Thedorson, it mentions a generalized abstract behavioral principle which is considered as a strongly emotionally positive attachment and provides a measure for assessing special actions and objectives;
c. Benjamin Wolman defines value as the degree of award or superiority given to or derived from an object.

Based on the value of justice in the principle of Pancasila, Gie (1977) formulated a social (non-individualistic) value that is patterned on two things:

a. Values that are the objectives of a commonly agreed objective of society (the object of socially approved ideals or purposes)
b. Value as the ability to bring prosperity to the society (conduciveness to the prosperity of society)

Justice is a social value that one side concerns the union of human in a group and other aspects include a person in human life. Finally, justice is an intrinsic value that becomes the value agreed upon by the members of

[1]Kaelan (2013), the Country of Pancasila, Paradigma Publisher of Yogyakarta, 2013 page 389

society and endeavors to achieve it for the sake of justice[1].

Justice is the ultimate goal of a system related to its function that aims to maintain value in the society which is implanted in a truth. Sometimes positive laws do not fully guarantee justice, and justice does not have legal certainty, so there is a compromise on how to make positive laws reflect a sense of justice. It is prioritized on the understanding of equity which is conceptualized as a fairness idea in the implementation of the law in order to provide an opportunity to complement the general nature of the law.In addition, equity is very considerate of the aspect of good faith in a particular case.

2.8.3 Good Faith (GoederTrouw)

The freedom of contract formulated in the Civil Code article 1338 paragraph (1), confirmed in paragraph (2) further in paragraph (3) stated that "an agreement must be carried out in good faith". This article establishes good faith in the execution of the agreement. The interpretation of article 1338 paragraph (3) raises the problem, even Satrio (1995) mentioned the article is not clear, because good faith has abstract understanding and if you want to understand people it is difficult to formulate it[2]. According to doctrine as quoted by Satrio (1995) in Rutten, Pitlo, Hofmann and Vollmar, what is meant by good faith in article 1338 paragraph (3) of this Civil Code is the agreement that should be carried out properly and appropriately. The example is Hogeraad in the arts of "artist de Labobourer", 9 February 1923, NJ 1923: 676. Firmly states: observing good faith in the implementation of the treaty is nothing but interpreting according to the measure of justice and propriety, even Hogeraad mentioned that good faith is morality[3]. The propriety benchmark is very difficult because of its relative nature. Indonesia with Pancasila philosophy has the benchmarks that are oriented to the three pillars: God, Humanity and Society as follows:

a. By the pillar of God, it is respecting and cooperating between different believers in order to build harmony in life.
b. By the pillar of humanity, human is acknowledged and treated according to their dignity as the creature of God Almighty, equal degree, same rights and basic obligations without the distinction of race, heredity, religion and belief.
c. By the pillar of society: it is the attitude of harmony, mutual cooperation, protection to the weak in order to achieve justice.

In line with this statement, Moh Hatta argued:

a. Indonesian society is a society based on collectivism; society must take precedence of its importance rather than self-interest.
b. The idea of liberalism or individualism is not desired in Indonesia
c. The State in accordance with its function as a tool of society to improve public safety in which shall establish rules that prohibit exploitation of the weak by others who have capital.

In order to ensure good faith, the judge has discretionary authority to oversee the implementation of a contract and to ensure such goodwill by applying the principles of justice and accountability[4]. In the matter of dispute resolution of the judge through article 1338 paragraph (3) of the Civil Code, it may distort the contract and exclude the word of the agreement. The judge has the right to add, alter or eliminate the rights and obligations of the parties to the treaty. Basically, the content of the treaty is determined by the good faith, morality and propriety. It does not mean that good faith and propriety change the treaty but it establishes the actual contents of the treaty. Satrio (1995) asserts that the actual phrase of the contents of the treaty should be interpreted as the purpose of the treaty in line with the value of propriety because interpreting the word in the treaty sometimes does not reflect the propriety and will cause disagreement[5]. Interpreting is an attempt to find the intentions of the parties based on the rules that apply either historically, grammatically, authentically or the otherwise. Normatively, the judge may interpret, expand or minimize the obligations of the parties for the sake of propriety. The consideration is article 1338 paragraph (3) of the Civil Code that is a type of negotiabonaefidei and not the type of strictiiuris.

Treaty of negotiabonaefideiis whenthe judge, in the matter of propriety, may expand or minimize obligations of parties in the concerned treaty. Treaty of strictijuris is when the judge does not have the authority to interpret, expand, or minimize the obligations of the parties to the treaty. The good faith here is the objective good faith (objective geodes trouw) that is related to public opinion and not the subjective good faith (subjectief geode trouw) which is in line with article 1977 of the Civil Code. The principle of good faith is casuistic and the judge has the authority for it.

[1]Gie (1977), Theories of Justice, Yogyakarta, page 15
[2]J. Satrio, Treaty Law, First Print from Citra AdityaBakti, Bandung, 1992 page 365
[3]Law of Obligations, Obligations from the Agreement, Citra AdityaBakti, Bandung, 1991 page 177
[4]Rosa Agustina et al, Law of Obligations, PustakaLarasan, Denpasar, 2012, page 81
[5]J.Satrio, op.cit. page 85

3. Conclusions

The benchmark of freedom of contract according to Indonesian law is discussed through the three pillars of Pancasila values; the pillar of God, the pillar of humanity and the pillar of society (the pillar of society covers the values of nationalism, democracy and justice). Based on the findings of the analysis, it can be concluded that the meaning of freedom of contract in the treaty law according to Indonesian law is a responsible freedom; it is the order that is oriented to the value of God, humanity and society in the form of harmony, appropriateness and propriety as a legal framework of Pancasila so that it realizes the justice of society or fair justice.

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