

THE IMPLICATION AND IMPLEMENTATION OF LAW NUMBER 24 OF 2009 ON NATIONAL FLAG, LANGUAGE, EMBLEM AND NATIONAL ANTHEM OVER THE FREEDOM OF CONTRACT PRINCIPLE IN INDONESIA

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Abstract

This article examines the implications and implementation of Law Number 24 of 2009 on the *National Flag, Language, Emblem and Anthem* in conjunction with related regulations such as the Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35 on the Clarification Request concerning the Implication and Implementation of Law Number 24 of 2009 over the existence of freedom of contract principle in Indonesia. Based on the result of study, the provisions of Law Number 24 of 2009 *National Flag, Language, Emblem and Anthem* and the Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35 are discorded with the principle of freedom of contract prescribed in Article 1338 paragraph (1) of the *Burgerlijk Wetboek voor Indonesie* (BW) book III. Such contradiction may raise a concern on the implementation of legal instruments, leading to legal uncertainty and impacting business investment in Indonesia.

Keywords: Law on Language and National, Freedom of Contract Principle, Disharmony

A. INTRODUCTION

In the 19th century, freedom of contract developed into general principle in favour of free competition, any interference conducted by the State over the agreements indicates action against the principles of free market. Freedom of contract evolves into the embodiment of free market principle. The freedom to contract becomes an extolled new paradigm developed into a new form of unlimited freedom.¹ The freedom of contract is defined as manifestation of free will, the reflection of human rights development based on the spirit of liberalism accentuating individual freedom.² Such development aligned the era when the *Wetboek Burgerlijk* was prepared in the Netherlands continued to be adopted and remain enforced in Indonesia until the formation of the

Indonesian *Wetboek Burgerlijk* (hereinafter referred to as BW). This situation pertains to the notion of individualism in which everyone is free to obtain anything they want, meanwhile the philosophical covenant law may be manifested in the freedom of contract principle.

The freedom of contract principle in Indonesia is prescribed in the Article 1338 paragraph (1) of the Civil Code book III states " All legally executed agreements shall bind the individuals who have concluded them by law." This article implies that the word "all" is interpreted that every legal subject can make an agreement with any object, portraying a freedom of legal subjects to determine the form of the agreement. In other words, the principle of freedom of contract grants the right of freedom in concluding agreements or contracts for all legal subjects.

In 2009, Indonesia has created, approved and enforced legal instrument in the form of Law Number 24 of 2009 on *National Flag, Language, Emblem and Anthem*. As stated in the preamble of the Law, it aims to strengthen the unity and integrity of the nation and the Unitary State

¹ Ridwan Khairandy. 2003. *Itikad Baik Dalam Kebebasan Berkontrak*. Universitas Islam Indonesia, Fakultas Hukum Pasca Sarjana. p.1

² Agus Yudha Hernoko. 2013. *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersil*. Kencana Prenada. Jakarta. p. 109

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of the Republic of Indonesia; (b) maintaining honour reflecting the sovereignty of the Nation and the Unitary State of the Republic of Indonesia; and (c) creating order, certainty, and standardizing the use of the flag, language, symbols and national anthem of the State. In conjunction to the principle of freedom of contract, Article 31 paragraph (1) and (2) Law Number 24 of 2009 implies a relevance which states:

- 1) The Indonesian Language must be used in a memorandum of understanding or agreement involving state institutions, government agencies of the Republic of Indonesia, Indonesia's private institutions or individual Indonesian citizens;
- 2) The memorandum of understanding or agreement as referred to in paragraph 1 involving a foreign party is written in the foreign party's national language or English.

The Law raises a question in concern to whether the legal instrument can serve as a limitation or confinement of the freedom of contract principle as stipulated in the provisions of Article 1338 paragraph (1) of the Civil Code? The Article emerges new issues, especially in making an agreement in the form of a memorandum of understanding or an agreement, in particular on the commercial/business agreements since nearly all private institutions in Indonesia incorporate with foreign corporations have been concluded the agreements using foreign language which on average in English. Whereas in Article 1338 paragraph 1 of the BW Book III adheres to the freedom of contract principle and which ultimately contradicting, where contracts are born *ex nihilo*, namely contracts as the embodiment of the free will of the parties concluded the contract (contractors). The contract is exclusively the free will of the contracting parties. By means of the postulate that the contract entirely creates new obligations and such obligations are determined exclusively by the will of the parties, freedom of contract principle has severed the connection between custom and contractual obligations.³

The issue transforms into more complex matters when the Ministry of Law and Human Rights issued a Letter Number: M. HH.UM.01.01-35 on 28 December 2009 on the Clarification Request concerning the Implication and Implementation of Law Number 24 of 2009. The letter stipulated that the use of English in the agreement does not violate formal terms. This implies that the parties are free to choose the language used in concluding the agreement. The parties are free to vote in accordance with the principle of *pacta sunt servanda* as stipulated in Article 1338 paragraph (1) of the BW.⁴

Due to the contradiction in legal instruments between Article 31 paragraph (1) and (2) of Law Number 24 of 2009 with the Article 1338 paragraph 1 of Civil Code (BW) and the Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35, may raise a concern on the implementation both in the concluding and implementation of contracts in general and particularly in

terms of dispute settlement related to agreements either in litigation or non-litigation institutions in Indonesia.

Based on the foregoing introduction, this article will examine the existence of juridical disharmony between the legal instruments of the Ministry of Law and Human Rights Letter Number M. HH.UM.01.01-35 and Law Number 24 of 2009 in conjunction with the provisions of freedom of contract principle in Indonesia?

B. Study of Implications and Implementation of Law No. 24 of 2009 concerning the Flag, Language, and State Symbol and the National Anthem against the existence of the principle of freedom of contracting in Indonesia.

Prior to the discussion of this article, the authors will first elaborate the position of the legal instrument between the Letter of the Ministry of Law and Human Rights Number M. HH.UM.01.01-35 and Law Number 24 of 2009 and Article 1338 paragraph (1) of the Civil Code in Indonesia. In this discussion the authors will use the theory of statutory principle, in particular the principles of legislations. The theory may use when a discord arises between legal instruments, as a means to identify the hierarchical position of the legal instrument, the author will also additionally use the *Stufenbautheorie* legal theory introduced by a legal expert named Hans Kelsen. Thus, this article will examine the synchronization of statutory regulations, including the types of legal normative studies.

On 28 December 2009, the Ministry of Law and Human Rights of the Republic of Indonesia issued a Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35 on the Clarification Request concerning the Implication and Implementation of Law Number 24 of 2009 stipulated:

- 1) Existing foreign-language private commercial agreements do not violate the obligation as stipulated in Law Number 24 of 2009 as this law applies non-retroactively and assured by the freedom of contract principle
- 2) The agreement made in English version remains valid or not null and void by law or cannot be terminated, as long as the implementation of Article 31 of the Law awaits until the issuance of a Presidential Regulation as stipulated in Article 40 of Law No. 24 of 2009;
- 3) The parties to private commercial agreements have the freedom to determine the language for their agreements. In addition, if the implementing regulation later stipulates that the bilingual version should be used in agreements, the parties are also free to choose which language would prevail.

The hierarchy stipulated in Article 7 paragraph 1 of Law Number 12 of 2011 concerning on the Formulation of Law and Regulation identifies the type and hierarchy of laws and regulations from the highest to the lowest, as follows:

1. The 1945 Constitution of the Republic of Indonesia;
2. The Decree of the People's Consultative Assembly;
3. Laws/Government Regulations in Lieu of Laws;
4. Government Regulations;
5. Presidential Regulation;
6. Province Regulations;
7. Regency and Municipality Regulations

Furthermore, Article 8 paragraph (1) of Law Number 12 of 2011 states " Other kind of Rules than as intended in Article 7 paragraph (1) covers the regulations stipulated

³ Ridwan Khairandy. 2011. *Landasan Filosofis Kekuatan Mengikatnya Kontrak*. Jurnal Hukum Edisi Vol 18 October 2011. p 36-35.

⁴ <http://www.hukumonline.com/berita/baca/lt5258d22c06dfe/uu-bahasa-batalkan-kontrak-bisnis-internasional> accessed on 15 February 2020

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by the People's Consultative Agency, House of Representatives, Regional Representatives Council, the Supreme Court, the Constitutional Court, the State Audit Board, the Judicial Commission, Bank of Indonesia, the Minister, agency, institution, or same level commission established by Law or Government". Meanwhile, Article 8 (2) of Law Number 12 of 2011 states " Rules as intended in paragraph (1) recognized and have the force of binding all ordered by higher Rules or established based on authority."

Thus, the position of Ministerial Letter is clearly under the Law, meaning that the legal instrument of the Ministry of Law and Human Rights Letter Number: M.HH.UM.01.01-35 is under the provisions of Law Number 24 of 2009 and the provisions of Article 1338 paragraph (1) of the Civil Code which based on the statutory principle, such as *lex superior derogate legi inferiori*, which implies that a law higher in the hierarchy repeals the lower one. The philosophy is as stated in the *stufenbautheorie* legal theory which states that "the legal system is hierarchical in which a certain legal provision comes from other higher legal provisions originates from and is based on higher norms, and so on until a norm that cannot be traced further and is hypothetical and fictitious, called the Basic Norm (Groundnorm)".⁵ Furthermore, according to Hans Kelsen, the relationship between norms that govern the establishment of other norms and norms created in accordance with the first norm imply as a relationship between superordination and subordination. The norm that regulates the creation of other norms has a higher position. Higher norms become sources of lower norms.⁶

However, the relevance between the Letter of the Ministry of Law and Human Rights Number: M.HH.UM.01.01-35 with the provisions of Article 31 of Law No. 24 of 2009 is substantially an indication of disharmony because in the provisions of Article 31 paragraph 1 and 2 of Law Number 24 of 2009 which states "The Indonesian Language must be used in a memorandum of understanding or agreement involving state institutions, government agencies of the Republic of Indonesia, Indonesia's private institutions or individual Indonesian citizens, while Article 31 paragraph (2) states that "The memorandum of understanding or agreement as referred to in paragraph 1 involving a foreign party is written in the foreign party's national language or English". This provisions imply a meaning that if an agreement is concluded, it is obligatory to use the Indonesian language in addition to other foreign languages or English used in an agreement. In addition, an agreement using only foreign languages violates the provision of Article 31 of Law Number 24 of 2009. Even though the provision does not regulate the consequences of using only foreign languages, does it terminate the agreement (null and void) or is it still valid? This is the core of the problem. Since the issuance of the Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35 and the legal instrument of Article 31 of Law Number 24 of 2009, the use of one foreign language

in the making of the agreement can cause the agreement to be null and void. Portraying in the cases as follows:

⁵ Hans Kelsen. 2008. *Teori Hukum Murni Dasar-dasar Hukum Normatif*, Nusa Media, Bandung, p. 244. Official Translation on Hans Kelsen *Pure Theory Of Law*, Berkley University of California Press, 1978

⁶ Ibid p.246

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Number	Subject Matter I	Subject Matter II
Parties	Case I between Nine AM Ltd, a company located in the State of Texas, United States of America and PT Bangun Karya Pratama (hereinafter simply referred to as BKP) regarding a Loan Agreement on 23 April 2010.	The case over an agreement dispute between Sumatra Patners and PT. Bangun Karya Pratama (BKP)
Problem	BKP sued Nine.Ltd through the West Jakarta District Court based on the fact that the agreement did not comply formal requirements according to Article 31 paragraph (1) of Law Number 24 of 2009 because the agreement is concluded only in English, without Indonesian. Therefore, BKP claimed the agreement violates the Law	BKP claimed that the agreement is also in contrary to Presidential Decree Number 36 of 2010 in conjunction with Law Number 25 of 2007 concerning Investment. These regulations prohibit foreign companies from becoming heavy equipment rental companies. BKP claimed that there are indications that Sumatra Partners have become a heavy equipment rental company in violation of Article 31 paragraph (1) of Law Number 24 of 2009 on <i>National Flag, Language, Emblem and Anthem</i> . ⁷
Dispute Body	Settlement Court	Court
Verdict	The Panel of Judges declare that the agreement was contrary to Article 31 paragraph (1) of Law Number 24 of 2009 Law Number 24 of 2009 on <i>National Flag, Language, Emblem and Anthem</i> . The Law stipulates that Indonesian is the language that must be used in an agreement. Null and void	Based on the clause, panel of judges rejected the lawsuit according to the absolute competence in examining and adjudicating the case.

⁷<http://www.hukumonline.com/berita/baca/lt52a8190540a82/pn-jakbar-serahkan-kasus-kontrak-berbahasa-inggris-ke-bani>, accessed on 22 June 2020.

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In the situation where this case examined by Article 1320 of the BW, In order to be valid, an agreement must satisfy the following four conditions:

1. There must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject;
4. there must be an admissible cause.

The four elements are furthermore classified into First, the two main elements concerning the subject (party), such as the agreement that binds themselves and the ability to make an engagement or known as the subjective element. Second, two other main elements are directly related to the object of the agreement, including a certain subject matter and an allowed cause or known as the objective element. Failure to fulfil (one) of the subjective conditions may result in the termination of the agreement, implying that the agreement will be terminated if someone requests termination. Meanwhile, the failure to fulfil (one of) the objective conditions may result in the agreement being null and void, implying that the agreement has never been concluded and there has never been an agreement. Therefore, according to Article 1320 of the Civil Code, the panel of judges shall not declare a Legal Termination Agreement, since the agreement has complied the four elements stipulated in Article 1320 of the BW. Besides, Article 1320 of the Civil Code number (4) mentions "admissible cause" as the basis for the parties to conclude an agreement. All agreements can be concluded (anytime, anywhere, any matters, any form) as long as the agreement is a lawful/ does not imply violation.⁸ Moreover, there are limitations in Article 1337 of the Civil Code which states that a cause is prohibited if:

- 1) Prohibited by law;
- 2) Violates good conduct;
- 3) Violates public order.⁹

Article 31 paragraph 1 of Law Number 24 of 2009 on the *National Flag, Language, Emblem and Anthem* with Article 1338 paragraph 1 of the Civil Code as mentioned above is contradicting one another, on the one hand it requires the use and/or inclusion of Indonesian in any agreement concluded between an Indonesian legal subject and a foreign legal subject. On the other hand, the freedom of contract principle allows subjects to decide the form and accept or deviate from optional legal provisions (*aanvullend* optional) in concluding agreements between Indonesian legal subjects and foreign legal subjects. These two matters are interrelated provisions however the formulation of the article is in disharmony to one another. As known, Article 31 paragraph 1 of Law Number 24 of 2009 and Article 1338 paragraph 1 of the Civil Code have hierarchically balanced position. Therefore, the authors will attempt to use the principles of legislation. In this issue, there are 2 (two) applicable principles:

- a) The principle of *specialis derogate generali*;
- b) The principle of *lex posterior derogate legi priori*.

According to the principle of *lex specialis derogate generali*, the problem of Article 31 of Law Number 24 of 2009 on the *National Flag, Language, Emblem and Anthem* with Article 1338 paragraph 1 of the BW, it can

be identified that Article 31 of Law Number 24 of 2009 is a special provision, meanwhile Article 1338 of the Civil Code is a generalist provision. Is that right? Since the provision of Article 31 explicitly stipulates that the memorandum of understanding or agreement shall include Indonesian, while Article 1338 paragraph 1 of the Civil Code assures the freedom of contract, however the provision does not explicitly require to use the language which must be used in the agreement or contract.

Meanwhile, according to the principle of *lex posterior derogate legi priori*, the problem on Article 31 of Law Number 24 of 2009 on the *National Flag, Language, Emblem and Anthem* with Article 1338 paragraph 1 of the Civil Code. It implies that Article 31 of Law Number 24 of 2009 is a new/recent law, while Article 1338 paragraph (1) of the Civil Code is the latter law. As it is known, the principle of *lex posterior derogate legi priori* means a later law repeals a prior one. This implies that Article 31 of Law Number 24 of 2009 is the valid Law.

Thus, it can be identified that in Indonesia the provision of Article 31 of Law Number 24 of 2009 is a special provision restricts the implementation of freedom of contract principle in Indonesia. As a consequence, all agreement concluded in Indonesia and subject to the statutory provisions in Indonesia shall use 2 (two) languages; Indonesian and other foreign languages. Restraining to a crucial reason where any dispute arises, the examination used in the Indonesian judiciary is Indonesian, because in general and culture among legal practitioners, the dispute settlement mechanism is preferred to use Judiciary instead of Arbitration. On the other hand, if an agreement is concluded in Indonesia but subject to the provisions of other countries or legal instruments outside the territorial jurisdiction of Indonesia, the applicable language can only use foreign languages or languages recognized by the United Nations, such as English, Arabic, Mandarin, Russian, French language.

C. CLOSING

Conclusion

According to the elaboration in the foregoing discussion, it can be concluded that the level of Letter of the Ministry of Law and Human Rights Number M.HH.UM.01.01-35 is lower than the provisions of Law Number 24 of 2009 and Article 1338 of the BW on the freedom of contract principle in Indonesia. Among these instruments, there is a disharmony between one another. However, based on the theory or statutory principles both the *lex specialis derogate generali* principle and the *lex posterior derogate legi priori* principle, it can be identified and concluded that the provisions of Article 31 of Law Number 24 of 2009 is a restriction over freedom of contract principle in Indonesia.

Suggestion

In general juridical settlement over the laws and regulations in Indonesia as described in the previous subsection, to resolve juridical dispute in Article 31 of Law Number 24 of 2009 on the *National Flag, Language, Emblem and Anthem* and Article 1338 paragraph 1 of the BW and the Letter of the Ministry of Law and Human Rights Number: M. HH.UM.01.01-35, there are several solutions, the first is the President forms and issues a Government Regulation which stipulates:

⁸ Nur Syarifah dan Reghi Perdana. 2015, *Hukum Perjanjian*, Penerbit Universitas Terbuka, Tangerang Selatan, p. 2.6

⁹ Ibid p 2.6

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- 1) Whereas every agreement concluded between an Indonesian legal subject and a foreign legal subject shall include a dispute settlement mechanism clause, whether through the court or Arbitration body or other body in Indonesia, the inclusion of Indonesian must be obeyed and carried out. This clause will allow parties to obtain legal certainty and fast dispute settlement, as a means of assurance with the principles of justice in Indonesia, such as the principles of simple, fast and low-cost justice.
- 2) Whereas if the parties wish to use one language, such as only the foreign language of commercial agreements, they are advised to include a dispute settlement clause through an overseas arbitration body or judicial body.
- 3) Whereas if the parties between national legal subjects and foreign legal subjects contend to use foreign languages only in commercial agreements between them and remain subject to the law in Indonesia and use court and arbitration body in Indonesia, they shall use an official translator from a judicial body or arbitration in Indonesia.

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