Validity and Consequences of Contracts Based on Continental European Legal Systems and Sharia

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***Abstract*— Indonesia is a legal country with a prismatic concept, which adopts various legal systems. In fulfilling the needs of human life in Indonesia, of course we cannot avoid making contracts. The contracts made, apart from being able to refer to the Continental European Legal System, can also refer to other legal systems, one of which is the Sharia Legal System. The results of the research conclude that based on the Continental European Legal System, there are 4 (four) conditions that must be met for the validity of a contract with the legal consequences of the contract covering 5 (five) things, whereas based on the Sharia Legal System in general there are 2 (two) contract conditions with consequences Contract law includes 2 (two) things.**

Keywords*— *Contract; Continental; Sharia

I. INTRODUCTION

Law is born and formed due to social interactions in society. However, the law also influences the social life of the community. Their environment will significantly influence a person's legal awareness. The interests that arise in one's life will significantly influence a person's obedience to applicable laws. In this way, all aspects of human life will influence each other and be influenced dynamically.[1]

The fact that Indonesia is a rule-of-law state is a mandate from the Constitution that is still in effect today. Apart from that, the Indonesian people are expected to live by adhering to the values brought by Pancasila. In this case, Pancasila acts as a ground norm[2]. The government then emphasized this form and spirit as part of the basic guidelines in the Establishing Legislative Regulations Act.

Moh. "Mahfud MD also emphasized that the form of the Indonesian state can clearly and unequivocally be seen in the mandate of Pancasila and the 1945 Constitution. This form appears to adopt a prismatic or integrative concept of 2 (two) concepts of the rule of law (rechtstaats and rule of law)."[2] This concept was built on the basis of the need to provide legal certainty in the concept of recht staats, and the principle of justice in the concept of the rule of law.[2] *A rechtstaats* rule of law is a rule of law concept adopted from the Continental European Legal System (*CELS), while the rule of* law concept of a state of law is a rule of law concept adopted from the *Anglo Saxon Legal System* (*ASLS*). Apart from adopting these 2 (two) legal systems, the Indonesian legal system also adopts the Customary Law System and the Sharia Law System (SLS).

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In legal science, the study of legal substance and its implementation will be significantly influenced by the position of the legal subject. In this case, the legal subject can be interpreted as a human being (natuurlijk person) or a moral person/legal person/legal entity. So then, in the contractual agreement, all parties bound will have the same legal obligations[3]. Law is an important part of human life.[2] As a legal subject, every human being has legal rights and obligations.[3] Humans who are legal subjects are also social creatures, who in fact need other humans to fulfill their living needs.

In order to fulfill life's needs, humans do not escape making written agreements (known as "contracts") with other humans. Henry Campbell was one of the philosophers who developed ideas regarding the legal validity of contracts. For him, a contract is a sign of the emergence of a legal relationship between two or more people who consciously bind themselves.[4] Making contracts to meet the needs of human life is one of the economic activities. According to Bima Kumara Dwi Atmaja, and Mario Churairo: "Law and economics greatly influence each other. Legal events can affect the economy, whereas economic events can affect the law."[5] With contract making being one of the economic activities, contract making is the realm of Economic Law.

In Indonesia, generally the contracts made refer to the CELS, in the sense that the contracts made refer to the terms of contract validity which have been determined in the Civil Code (CC). Apart from that, it is not uncommon for contracts to be made that refer to the Sharia Law System, in the sense that the contract (akad) that is made refers to the conditions for the validity of the contract in accordance with the provisions of the Islamic religion. For example, contracts in sharia banking.

Contracts made with reference to the CELS and contracts made with reference to the Sharia Legal System, of course have legal consequences. In the practice of making contracts based on the 2 (two) legal systems, it is not uncommon to find that the parties making contracts do not understand the legal consequences of the contracts being made, so that problems arise in the form of defaults which lead to disputes, which of course must be resolved based on law. both non-litigation and litigation (through general courts or religious courts).

Regarding the problem of lack of understanding of the legal consequences of the contracts made (referring to the CELS and the SLS) by the parties, it is necessary to study them based on Legal Theory, which further concerns the validity and legal consequences of contracts based on the CELS and the SLS. studied based on the CC and Islamic Religion.

With this study, it is hoped that in the future, parties making contracts (referring to the CELS and the SLS) will generally be able to understand the validity of contracts, and in particular be able to understand the legal consequences of contracts. Thus, in the future it is hoped that the occurrence of problems in the form of defaults which lead to disputes will be minimized, which of course must be resolved based on the law, both non-litigation and litigation. This research is focused on discussing and answering problems regarding the validity and legal consequences of contracts based on the CELS and the SLS.

II. LITERATURE REVIEW

The concept of a rule of law is closely related to the legal system in that country. With a solid legal order, the government will run optimally.[6] The stability of a country will be significantly influenced by the stability of the legal system, which plays a role in regulating the lives of its citizens. After all, the law has a significant role in shaping the behavior of every citizen. Everyone's rights will be well protected within the corridors of applicable law. Without these limitations, the struggle for one's rights can be carried out by violating other people's rights. For this reason, understanding the validity of applicable legal regulations is very important. Having sufficient knowledge about things that cannot be violated will create harmony in national and state life.[7]

After understanding the importance of the role of a legal system, it is necessary to establish boundaries to observe how a country's legal system works. Referring to the instructions given by Kelsen, understanding the legal system as part of the study of positivism can be done by looking at the source of the validity of the law. As a pure legal theorist,[8] Kelsen's view has been widely known as the Stufenbau theory, which introduces legal validity as a form of ladder. Based on this idea, it can be seen from the rules that form it to see whether a regulation is valid or not. Then, the steps of the legal system formed from these correlated laws will have the same value. For this reason, understanding the conformity of implementing and parent regulations is very important.

III. METHOD

The research was conducted using normative legal research methods. Thus, a review will be conducted on the applicable legal system[9]. Analysis will be carried out and presented in descriptive form. The source of legal materials used in this research is a combination of primary, secondary, and tertiary sources[10]. All the data will then be classified and studied according to the research method used so that the correct results are found to answer the problem formulation that has been created.

IV. Discussions and Results

Mertokusumo in his book has explained that the legal system is a combination of the laws that form it. In this legal system, each element will interact with each other[11]. According to Lawrence M. Friedman: " In the legal system there are rules that really work , because one of the functions of the legal system is related to behavior controlling, namely ordering people what they should and should not do, and the legal system orders them to uphold orders by force ".[12] Indonesia, with the concept of a prismatic legal state, not only adopts the CELS and the *ASLS* . Apart from these 2 (two) legal systems, Indonesia has also adopted the Customary Law System and the SLS.The study of law certainly cannot escape the subject of law. Humans are one of the subjects of law. Humans who are legal subjects are also social creatures, who in fact, in order to fulfill their living needs, need other humans. In order to fulfill life's needs, humans cannot escape making contracts, which is one of the economic activities.

According to Darwin Effendi: "A contract is a written agreement, which means that a contract is considered a narrower definition of an agreement. The agreement is enforced because there are differences in interests between the parties which, by means of negotiations, are formulated into the clauses contained in the agreement."[13] To create an agreement that is carried out based on a valid contractual relationship, the parties need to make an agreement first. This agreement made in written form will contain: the identity of the parties/subjects, objects, rights, obligations and various clauses, which creates legal relations and applies as law for the parties, which are morally and legally must be implemented by the parties in good faith. Contracts made by the parties must not conflict with statutory regulations, public order and decency (decency, thoroughness and prudence)[14].

From the explanations regarding legal relationships arising from a contract, it can be said that contracts can be made between several types of parties. First, a contract can create a relationship between two or more individuals. Secondly, contracts can also be made to create legal relations between an individual and society or between groups of society. The legal obligations arising from the contract must be following the rights of the parties recognized in the contract[15]. Soeroso also emphasized that the legal relationship between the parties must not injure the rights or obligations of other parties. Apart from that, the parties who make a contractual agreement must understand the applicable legal rules so that the boundaries of fulfilling their rights and obligations will become more apparent.

In Indonesia, generally contracts made refer to the CELS, which recognizes that the contract and the validity of the contract must be in accordance with the CC mandate. Apart from that, it is not uncommon for contracts to be made that refer to the Sharia Law System, where the conditions for the validity of the contract must be in accordance with the conditions determined by the Islamic religion. Contracts made with reference to these 2 (two) legal systems have legal consequences.

In the practice of making contracts based on the 2 (two) legal systems, it is not uncommon to find that the parties making contracts do not understand the legal consequences of the contracts being made, so that problems arise in the form of defaults which lead to disputes, which of course must be resolved based on law. both non-litigation and litigation. Given these problems, a study based on legal theory is needed, which further concerns the validity and legal consequences of contracts, studied based on the Civil Code and Islamic Religion. Through the legal studies carried out (especially regarding the legal consequences of contracts), in the future it is hoped that the occurrence of problems in the form of defaults which lead to disputes will be minimized, which of course must be resolved based on the law, both non-litigation and litigation.

This study shows that legal science is closely related to legal theory, which then produces views regarding the law that lives in society. Legal theory itself has a place between legal dogmatics and legal philosophy. Legal dogmatics are concretized in the form of statutory regulations. According to Ramlani Lina Sinaulan: "Legal Theory consider people who deal with laws, various treaties, contracts, customs, juridical practices, engagements of all kinds, and judiciary. The standing point from which Legal Theory examines law is the *insider's* standing point, not that of outsiders who have an interest. Thus he distinguished himself from other disciplines whoalso chose law as an object of his studies, philosophy, sociology, economics, history, psychology, and others. The legal theory in question is teori law regarding koncontract.

According to Nieskens Ipshording: "According to the Theory of Will (*Wils Theorie*), the factor that determines the existence of a contract is the will. However, there is an inseparable relationship between will and statement. The will is the basis of the entire Civil Law. Denial of the autonomous will of the person doing the deed will not solve any problem, but more than you will at the same time deny the Civil Law".

A will must be revealed. According to Budiono H.: "The Theory of Statements was born as an answer to the weaknesses of the Theory of Will". Based on the CELS, in accordance with the provisions of CC, there are 4 (four) conditions for the validity of a contract: 1. the parties agree on something; 2. Skills; 3. there is an agreement on the matter that is the object of the engagement; 4. causa. These conditions can be divided into subjective and objective requirement.[20] According to the Theory of Statements, the formation of the will occurs in the realm of the psyche of the person, so that the opposing party cannot possibly know what is actually in one's mind. Thus a will that cannot be recognized by the other party cannot possibly be the basis for the formation of a covenant. Subjective requirements, namely requirements regarding the subject of the contract, which must be fulfilled by the parties (subject), namely regarding the agreement to make a contract and being competent to make a contract. If

the 2 (two) conditions are not met, the contract can be canceled *(vernietigbaar /voidable)*. Objective conditions, namely conditions regarding the object of the contract, namely a certain thing and a lawful cause. If the 2 (two) conditions are not fulfilled, the contract is null and void *(nietig/ null and void/void ab initio/fraus omnia corrumpit)*. According to Ningrum Natasya Sirait: " These 4 (four) conditions are the basic requirements for every contract based on Contract Law in Indonesia. This means that every contract must fulfill these 4 (four) conditions in order to be valid and binding on those who agree." Contracts that have been made in accordance with the conditions specified in Article 1320 of the Civil Code are of course valid and also apply as law to the parties. This is in accordance with the provisions of Article 1338 of the Civil Code, which is commonly known as the "principle of *pacta sunt servanda* ". The contract that has been made of course also has legal consequences.

Based on the opinions of Ningrum Natasya Sirait, and R. Soeroso, it is emphasized that the legal consequences of contracts: 1. The contract applies as law for the parties, the contract must not conflict with statutory regulations, public order and morality; 2. Contracts can bind third parties if they have been agreed upon; 3. The parties cannot unilaterally withdraw from the legal consequences of the contract; 4. The contract can be terminated unilaterally if there are reasons which based on statutory regulations are deemed sufficient to do so; 5. The parties must carry out the contract in good faith.

The Sharia Law System, of course, refers to the provisions of the Islamic Religion, with the 2 (two) main sources of law being *the Al-Quran* and *Hadith* . Based on the Sharia Law System, there is also the Theory of Will, which is a legal principle. According to Syamsul Anwar: "Based on the Sharia Legal System, the statement of will in a contract must meet the following conditions: 1. The existence of the correspondence of *ijab* and *kabu*, in other words the achievement of agreement; 2. Unity of *the covenant council*". The will reflexes theprinciple of freedom of contract under the Sharia Legal System. Based on the Sharia Law System, there are various things that must be fulfilled for the validity of the contract. According to Chairuman Pasaribu, and Suhrawardi K. Lubis: "Requirements for a valid contract: 1. Do not violate agreed upon Sharia Law (*al-muttafaq alayh*); 2. It must be mutual (*an taradhin*) and there is a choice (*khiyar*); 3. It must be clear and unambiguous."

According to Sohari Sahroni, and Rufah Abdullah: "Conditions of contracts: 1. Conditions are general, namely conditions that must be perfect in various contracts, which include: a. The parties entering into the contract are deemed capable of acting according to the law (*mukallaf*). If it is not yet possible, it must be done by the Guardian; b. The object of the contract is known *according to the sharia* . The object of the contract must meet the requirements in the form of property, be owned by someone, and have property value according to *sharia* ; c. The contract is not prohibited *in the Sharia text* ; d. Beneficial contracts; e. Fulfillment of *consent* and *qabul* ; 2. Conditions are special, namely conditions that must be present in some contracts. Special requirements are additional (*idlafi*), which exist apart from the general requirements. If the conditions related to *sharia* are not fulfilled, then the contract is damaged.

Contracts made based on the Sharia Law System also have legal consequences. Based on the Sharia Law System, a contract that is legally made has 2 (two) legal consequences: 1. The contract must be carried out by the parties voluntarily and in good faith; 2. If a contract is ignored by one of the parties, he will be subject to sanctions from Allah SWT in the afterlife.

V. CONCLUSION

Contracts can be made based on the Continental European Legal System or based on the Sharia Legal System. Based on the Continental European Legal System, the validity of contracts is determined in Article 1320 of the Civil Code, which includes: 1. Agreement; 2. Skills; 3. A certain thing; 4. A lawful cause. The legal consequences of a contract are: 1. The contract applies as law for the parties, the contract must not conflict with statutory regulations, public order and morality; 2. Contracts can bind third parties if they have been agreed upon; 3. The parties cannot unilaterally withdraw from the legal consequences of the contract; 4. The contract can be terminated unilaterally if there are reasons which based on statutory regulations are deemed sufficient to do so; 5. The parties must carry out the contract in good faith. Based on the Sharia Law System, the validity of the contract includes 2 (two) conditions: 1. General conditions, which include: a. The parties entering into the contract are deemed capable of acting according to the law. If it is not yet possible, it must be done by the Guardian; b. The object of the contract is known *according to the sharia* . The object of the contract must meet the requirements in the form of property, be owned by someone, and have property value according to *sharia* ; c. Contracts are not prohibited *in the Sharia text* ; d. Beneficial contracts; e. Fulfillment of *consent* and *qabul* ; 2. Conditions are special, additional in nature, and are only contained in part of the contract. The legal consequences of contracts are: 1. Contracts must be carried out by the parties voluntarily and in good faith; 2. If a contract is ignored by one of the parties, he will be subject to sanctions from Allah SWT in the afterlife.

VI. REFERENCES

[1] S. M. Hangabei, K. Dimyati, Absori, and N. Surbakti, "The Ideology of Law: Its Reflection in the Legal Products of Indonesia," *Varia Justicia*, vol. 16, no. 1, 2020.

[2] M. Riananda, M. Evendia, and A. A. Firmansyah, "Legal Framework for Development of Micro, Small and Medium Enterprises by Local Governments as an Effort for Economic Recovery," *Advances in Social Science, Education and Humanities Research*, vol. 628, 2021.

[3] M. A. Al Fikri, "Implementation of Strict Liability by Companies in Cases of Environmental Damage in Indonesia: An Overview of State Administrative Law in Indonesia," *Indonesian State Law Review*, vol. 5, no. 2, 2022.

[4] M. N. Asnawi, *Hukum Acara Perdata*, Cetakan 2. Yogyakarta: UII Pess.

[5] I. D. G. Atmadja, *Teori Konstitusi & Konsep Negara Hukum. Denpasar*. Malang: Setara Press, 2015.

[6] S. Mertokusumo, *Mengenal hukum (suatu pengantar)/ Mertokusumo*. Yogyakarta: Liberty, 2018. [Online]. Available: https://onesearch.id/Record/IOS4317.laser-0585702

[7] S. Wignyodipuro, *Pengantar Ilmu Hukum*. Jakarta: Ikhtiar, 1983.

[8] S. L. Paulson, "How Merkl's Stufenbaulehre Informs Kelsen's Concept of Law," *Revus*, no. 21, p. 2945, 2013, doi: 10.4000/revus.2727.

[9] Aminuddin and Z. H. Asikin, *Pengantar Metode Penelitian Hukum*, Revisi : 10. Jakarta: Raja Grafindo, 2018.

[10] D. P. Rahayu, *Metode Penelitian Hukum*. Yogyakarta: Thafa Media, 2020.

[11] E. Effendi, "Granting of Legal Experts as an Invention of Law Model Through Legal Research on The Criminal Justice System," *ULRev*, vol. 3, no. 1, 2019.

[12] L. M. F. A.-W. Basuki, *Hukum Amerika Sebuah Pengantar*. Jakarta: Tata Nusa, 2001.

[13] E. Azizah, Armansyah, and Yulianingsih, "Development of Indonesian Business Contract Law in The Globalization Era," *International Journal of Social Science and Education Research Studies*, vol. 3, no. 4, 2023.

[14] E. A. Priyono, Budiharto, and A. H. Wulandari, "Regulations for E-Commerce Agreement According to ICT Act and Title III of Indonesian Civil Code," *Diponegoro Law Review*, vol. 4, no. 1, 2019.

[15] B. P. A. Wijaya, R. Dewantara, and P. A. Ruslijanto, "Legal Aspects of Artificial Intelligence based on Legislation Regulations in Indonesia," *International Journal of Multicultural and Mulireligious Understanding*, vol. 9, no. 10, 2022.