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Doctrines Affecting the Principle of Propriety in Indonesian Civil Law

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Abstract

This article examines the teachings that influence the principle of propriety in Indonesian Civil Law. The principle of propriety is contained in Article 1339 of the Civil Code and Article 1365 of the Civil Code. The application of a sas propriety can be seen in the execution of an agreement, where the agreement is carried out based on clausea that has been agreed upon by both parties. In addition, the principle of propriety is also influenced by the teachings of subjective propriety and objective propriety as well as functional propriety.

Keywords
Doctrines, Affecting, Principles of Propriety, Civil Law, Indonesia

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1. Introduction

The principle of propriety is a measure of relationships determined by the sense of justice of the community, so the principle of propriety must be maintained because through this principle the measure of relationships is determined also by the sense of justice in society (Mariam Darus Badrulzaman, 2001).

According to Wery, propriety includes all that can be captured both intellectually and with feelings. Article 1338 paragraph (3) of the Civil Code states "an agreement must be executed in good faith". Mariam Darus Badrulzaman added that Article 1338 paragraph (3) of the Civil Code points to an unwritten norm called objective, because its essence is not reasonableness and propriety according to the respective parties without conforming to the general opinion. Thus, the parties are not only bound to the wording of the agreement alone, but also to good faith. In addition, it is also known as subjective goodwill that lies within the realm of the law of things. Good faith is honesty that has to do with one's attitude (P.L. Wery, 1990).

The principle of propriety is stated in Article 1339 of the Civil Code (hereinafter abbreviated as the Civil Code), this principle relates to the content of the agreement. Article 1339 of the Civil Code reads "an agreement is binding not only for the matters expressly stated therein, but also for everything that by the nature of the consent, is required by propriety, custom or statute". This means that an agreement is not only binding on what is included solely in the agreement, but also what by its nature it is required by propriety, custom or statute.

According to Tan Kamello quoted OC. Kaligis, that propriety is a pillar of law that must be enforced. As a principle of propriety, it has roles and functions, including adding or eliminating the content of the agreement. This is as contained in Article 1339 of the Civil Code. The content of the agreement made based on the principle of freedom of contract must be carried out in good faith contained in Article 1338 paragraph (3) of the Civil Code, in addition to Article 1338 paragraph (1) of the Civil Code meaning the principle of consensuality and Article 1338 paragraph (3) of the Civil Code means the principle of (OC. Kaligis, 2009) *pacta sunt servanda* "the promise is binding".

The principle of propriety in Article 1339 of the Civil Code metanorma is found in various laws and regulations in Indonesia, such as Article 74 of Law No. 40 of 2007 concerning Limited Liability Companies (Marlia Sastro, et.all, 2022), furthermore, in its application the principle of propriety is influenced by several teachings such as the teachings of objective propriety, the teachings of subjective propriety and the teachings of functional propriety. Based on this presentation, the author wants to examine the teachings in the principle of propriety reviewed according to Indonesian Civil Law.

2. Research Methods

The type of research used in this article is legal *research*. Normative juridical research is legal research that places law as a building system of norms. The norm system in question is about the principles, norms, rules of trade regulations, court decisions, treaties and doctrines (teachings). It is said to be normative juridical research because this research covers the entirety of norms, values and principles related to the (Mukti Fajar & Yulianto Ahmad, 2010) teachings of propriety in the perspective of law in Indonesia.

3. Discussion

The principle of propriety in the study of legal science has not been clearly understood considering the existence of the principle of propriety contained in the principle of social norms outside the legal norms. Nevertheless, the principle of propriety has a close relationship with the law. The understanding of the principle of propriety is emphasized on the social conditions that develop in society that are constantly developing and contribute to shaping the sense of justice in the legal order of society.

Haris Soche's view of the principle of justice is related to the principle of propriety that (Haris Soche, 1985):

Justice that must be enforced in Indonesia is justice that contains all aspects of life both juridical, political, economic and socio-cultural, and which can be enjoyed by not only a certain group or group of people or ethnicities or certain elites, but must be felt and enjoyed by all citizens as individuals or members of community groups or humanitarian propriety. Propriety in the sense of being an obligation that encourages man to use what he is entitled to do in an outlawed manner.

The doctrines that influence the principle of propriety are the doctrine of objective propriety, the doctrine of subjective propriety and the doctrine of functional propriety.

3.1 The Doctrine of Objective Propriety

The doctrine of objective propriety contained in Article 1338 paragraph (3) of the Civil Code is a renewal of objective legal theory. Article 1338 paragraph (3) of the Civil

Code states ".... an agreement must be executed in good faith". The theory of propriety departs from the principle of *billijkheid* which is commonly known in the field of treaty law, namely the principle that regulates that the position, rights and responsibilities between the parties who bind themselves to a treaty must be balanced (M.Natsir Asnawi).

Article 1338 paragraph (3) of the Civil Code, the agreement must be executed in good faith (*uitvoering te goeder trouw*). This means that throughout the modern world it still remains the same as it was two thousand years ago in Roman law, where good faith was called *bona fides*. This means that both parties must act appropriately without disturbing others, not by looking at their own interests alone, but also by looking at the interests of others (P.L Wery).

According to Siti Ismijati, in Indonesian good faith in an objective sense, it is also called propriety, this is in accordance with the formulation in Article 1338 paragraph (3) of the Civil Code which states "an agreement is executed in good faith". The objective here points to the fact that the conduct on the part of it must be in accordance with the general presumption of good faith and not solely based on the parties' own presumptions (Abdul Hakim, 2000).

Wirjono Projodikoro stated that the honesty contained in Article 1338 paragraph (3) of the Civil Code does not lie in the state of the human soul, but lies in the actions taken by both parties in carrying out promises, so honesty here is dynamic which is rooted in the nature of the role of law in general, namely the effort to establish a balance of various interests that exist in society (Wirjono Projodikoro, 2000).

Hoge Raad of the Netherlands in a judgment of February 9, 1923 stated that the treaty should be executed according to the terms of favor and propriety (*redelijkheid en billijkheid). Redellijkheid* is intelligible with intellect, with common sense, with mind. B*illijkheid* is what can be perceived as polite, as proper and just. Thus the formula according to "redelijkheid and *billijkheid* " includes all that can be affixed both by intellect and feeling (P.L. Wery, 1990).

This teaching is according to Article 1338 (3) of the Civil Code that the conduct of the parties to the execution of the agreement must be tested on the basis of unwritten objective norms. The norm here is called objective because the behavior must be in accordance with common assumptions. Unwritten norms can be compared with the unwritten norms contained in Article 1365 of the Civil Code regarding unlawful acts that have the effect of "proper scrutiny in the association of society". The two norms are essentially the same, the difference lies only in the *environment (context)* in which the two terms are used.

The term "good faith" is used when there is a legal relationship between two or more parties, for example a bond born of a treaty, while the term social scrutiny is used if there is no legal relationship, but in society one must heed unwritten norms against everyone (P. Van Warmelo,1967). The goodwill not only refers to the good faith of the parties, but must also refer to the values that develop in society, because good faith is part of society. This good faith ultimately reflects the standards of justice or propriety of society (M. Natsir Asnawi, 2022).

The principle in the formulation of Article 1339 of the Civil Code is: "an agreement is not only binding for the matters expressly stated therein, but also for everything that, by the nature of the agreement, is required by propriety, custom, or statute". Substantively

the importance of propriety in relationto the contractual relationship of the parties, in addition to what has been agreed in the contract.

Hukum contract in the Dutch legal system is implemented on the principle of "de *relatie tussen schuldenaar en schuldeiser wordt door de redelijkheid en billijkheid beheerst"* (free translation: the relationship between debtor and creditor is disputed or based on reasonableness and fairness/ propriety). Then this principle was applied in the imposition of evidence in court until the birth of the theory of propriety (*de billijkheid theorie*) (M. Natsir Asnawi, 2022).

This principle of propriety is applied by Hoge Raad Nederland with reference to Article 177 Rv as follows: "de *partij die beroept op rechtsgevolgen van door haar gestelde feiten of rechten, draagt de bewijslast van de feiten of rechten, tenzij uit enige bijzonderregel of uit de eisen van fedelijkheid en billijkheid een andere verdeling van de bewijslast voorvloeit*". ((Pitlo, 1986) free translation: a party who postulates certain facts or claims to have a right, bears the burden of proving the fact or right in question, unless there is a specific provision or problem in enforcing justice if the provisions of the law are still implemented, will be appropriately charged).

Propriety (kepantasutan) is used in the imposition of evidence done appropriately to seek justice for the parties to the dispute. This is in line with what Pitlo has revealed that the application of the principle of propriety of a case heard in court is necessary if in matters where the law gives very little certainty, the judge's opinion on propriety is the last pillar that supports legal certainty (Mariam Darus Badrulzaman, 2001).

The principle of propriety derives the doctrine of objective propriety which is metanormized into Article 74 of the PT Law which requires companies to carry out social and environmental responsibilities taking into account propriety and fairness. Thus, social and environmental responsibility is carried out based on the principle of propriety contained in society and propriety contained in the company. So that the propriety of the parties can be accommodated in the implementation of social and environmental responsibility.

3.2 The Teaching of Subjective Propriety

The teaching of subjective propriety related to unlawful acts (*onrechtmatigedaad*) contained in Article 1365 of the Civil Code which states "Any unlawful act, which brings harm to another person, obliges the person who for the wrongful issuance of the loss, indemnifies the loss".

Article 1365 of the Civil Code specifies that "any unlawful act that brings harm to another requires that the person for the wrongful issuance of the loss compensate for the loss". Through Article 1365 of the Civil Code an unwritten law is noticed by law, so this article is very important (Mariam Darus Badrulzaman, 2001).

The conditions that must be in place to determine unlawful acts are (Rachmat Setiawan, 1982):

1. There must be an act, that is, the deed is both positive and negative, meaning that every behavior does or does not do;
2. The act must be unlawful;
3. There are disadvantages;
4. There is a causal relationship between the unlawful act and the loss;

5. There is an error (*schuld)*.

Dua the definition of *onrechtmatigedaad* is the understanding before 1919 and the understanding after 1919. The definition before 1919 *onrechtmatigedaad* was an unlawful act in the narrow sense that an act against the law was the same as an act against the law where the law at that time was equated with the law (Mariam Darus Badrulzaman, 2001).

After 1919 in Lindenbaum Cohen Arrest,H.R gave a broad meaning to the law which included laws and written laws, such as decency, propriety contained in the traffic of society. Thus, unlawful acts are not only defined as acts that are contrary to the law, but do or do not do that violate the rights of others or are contrary to the obligations of people who do or do not do, contrary to decency or prudence as appropriate in community traffic. Thus all the traffic norms of society which are not included in the law are in place in Article 1365 of the Civil Code namely that the maker in general must have his accountability, i.e. he insinuates the consequences of his actions (*toerekeningsvatbaar*) (Untrech, 1957).

Some expert understanding of onrechtmatigedaad, according to Utrecht, onrechtmatigedaad is an act that is contrary to the principles of law, Wirjono Prodjodikoro gives the term onrechtmatigedaad is an unlawful act, furthermore according to S.Kartohardiprojo translating *onrechtmatigedaad* (Moegni Djojodirjo, 2000) is an unlawful act (Moegni Djojodirjo, 2000).

An unlawful act (*onrechtmatigedaad*) is that it results in a shock in the balance sheet of the community. Shock occurs when the rules of law in a society are violated directly and the rules of decency, religion, and manners in society are also violated (Wirjono Prodjodikoro, 1960). Based on Article 1365 of the Civil Code, a person has harmed another person and is obliged to pay compensation. Estimologically the term "indemnity" is essentially something that becomes an exchanger that does not exist, either because it is damaged, shrinked, lost and so on. So indemnity is to return something to its original state. Thus every person who by his fault has harmed others is obliged to pay indemnity (Munir Fuady, 2005).

This also applies to a person who has committed an unlawful act caused by negligence, as stated in Article 1366 of the Civil Code that "every person is liable not only for losses caused by his actions, but also for losses caused by his negligence or lack of caution". Article it relates to action exceed laws that cause negligence, thereby causing others to suffer losses.

The theoretical basis for the Anglo Saxon version of the law called "*tort*" is "everyone is free at his own risk" (*a man acts at his peril*). Therefore, he must be responsible if he has shirked his "duty" so that the element of obligation is the main pillar for a legal act. Violation of obligations only occurs when there is an element of "*intentionality*" and an element of "negligence", although in very limited cases it is also recognized as an unlawful act that arises from a *strict liability act* (Munir Fuady, 2005). In the United States, the legal concept of *tort* has been known before, which is characterized by the development of the theory of *strict liability*. The doctrine of *strict liablity* is characterized by the absolute responsibility of objects that have properties that can come out of the territory of their owner. According to Blackstone's jurist, a human being has a responsibility, not only for his own actions, but also for the actions of objects under his power, such as cattle that are released into other people's yards (Bambang Haryanto, 2010).

Unlawful acts committed by doctors in cases of medical malpractice, there is relevance to unlawful acts of Article 1366 of the Civil Code and Article 1364 of the Civil

Code, namely *first,* the patient must suffer a loss; *second*, there is an error or omission (in addition to individuals, the hospital can also be responsible for the mistakes or omissions of its employees); *thirdly*, there is a causal relationship between loss and error; and fourth, the act is unlawful (Rosa Agustina, 2004).

If a person at the time of committing an unlawful act knows very well that his actions will result in a certain circumstance that harms the other party, it can be said that in general the person can be accounted for. The requirement to be said is that one knows very well the existence of circumstances that cause the likelihood that the consequences will occur. This act error occurs because (Alexandra Indriyanti, 2008). The lack of accuracy of doctors in observing patients so that unwanted things happen together. This inaccuracy is an act that falls into the category of unlawful acts, causing losses that must be borne by the patient (Moegni Djojodirjono, 1982).

According to Vollman, the condition of guilt must be interpreted in its subjective sense then regarding the perpetrator in general it can be examined whether his deeds can be blamed on him, whether the state of his soul is such that he can realize the meaning of his deeds and whether the perpetrator in general can be accounted for (Syamsul Anwar, 2007).

3.3 Teachings of Functional Propriety

The teaching of functional propriety is the teaching of propriety derived from unwritten laws such as customs, customs of a society. Where the propriety is guided by local customs, norms and wisdom prevailing in a community, thus local customs, norms and wisdom must be obeyed by the community and the people who come in the area. If this functional propriety is violated, it will be sanctioned according to the decision agreed upon by the community.

Functional propriety comes from the habits and customary laws contained in society, such propriety is the community's acceptance of something appropriate and worthy in accordance with the customs and values that exist in that society. The teaching of functional propriety according to Islamic law comes from '*Urf* i.e. a thing that is recognized for its existence and followed by and becomes customary in society, both in the form of words and deeds as long as it does not conflict with the provisions of *nash-nash* or *ijma'* (Ika Yunia Fauzia & Abdul Kadir Riyadi, 2015). According to the term *syara', 'a deed urf* is like human understanding of buying and selling with execution without a spoken *shighah* (Titik Triwulan Tutik, 2008).

Based on the aforementioned exposure, that the teaching of functional propriety is a functioning propriety derived from habits, norms in society, thus any deed corresponding to this teaching will be accepted by all communities in an area. The meaning of propriety refers to a measure about the relationship of a sense of justice in society. The state philosophy of Pancasila displays the teaching that there must be harmony, harmony, balance between the use of human rights and human obligations, meaning that in freedom there is responsibility (Otje Salman Soemadiningrat, 2011).

Pancasila is the basis of the highest legal norm (rechtsnorm) or also known as the basic state norm (*staatsfundamentalnorm),* which is a rule, pattern or standard that must be followed and obeyed and has coercive power, is regulating or governing (*imperative).*
Juridically, the concept of Pancasila as the fundamental (highest) legal norm can be seen in the elaboration of TAP MPRS No. XX / MPRS / 1966 (Jan Remmelink, 2006). Thus,

Pancasila overcomes all laws in Indonesia which include written law and unwritten law (customary law), must be formed and based its validation from Pancasila, known as the Pancasila System (Ridwan AR).

Propriety *(billijkheid*) from a lawmaker's point of view will play an important role, but lawmakers support the dominant view in society in everyday life. The government in carrying out its activities must pay attention to the values that apply in society, be it related to gama, morals, customs, or other values (Ridwan AR).

The teaching of functional propriety in this case comes from laws and regulations derived from the values that exist in society, both values contained in customary habits and customs carried out in accordance with religious teachings, especially the Islamic religion. Based on the foregoing, the application of the principle of propriety in the implementation of social and environmental responsibility can be carried out in accordance with functional propriety derived from laws and regulations and customary customs and customs in accordance with religious teachings in society. Thus, Pancasila overcomes all laws in Indonesia which include written law and unwritten law (customary law), must be formed and based its validation from Pancasila, known as the Pancasila System.

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4 Conclusion

The teachings that influence the principle of propriety in the perspective of Indonesian civil law are the teachings of objective propriety, the teachings of subjective propriety and functional propriety. The doctrine of objective propriety is a doctrine derived from the conduct of the parties in the performance of the covenant in accordance with common presumptions. The teaching of subjective propriety is a teaching that comes from the assessment of an act done by a person. The teaching of functional propriety is ajaran derived from the values that exist in society, both the values contained in customary habits and customs carried out in accordance with religious teachings.

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