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The Principle of Justice in Listening To the Evidence in Consumer Dispute through Arbitration in Indonesia

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Abstract: The realization of the principle of justice in proving the settlement of consumer disputes through arbitration in Indonesia is important, with three reasons, namely first, there is a weakness of the consumer protection law because the formulation of substantial norms and formal law is contrary to other laws so that the formulation is not in the framework national legal system and difficult to be harmonized. Second, the legal norms for consumer dispute settlement with an inverse proof burden system have created injustice for consumers and producers and open up opportunities for other parties to manipulate adverse evidence. Third, no matter how well the consumer dispute resolution process, does not guarantee that justice is achieved unless the judge (arbitrator) is right and correctly divides the burden of proof and provides an assessment of the strength of the evidence submitted by the disputing party. Discussion of the problem of proof, using the normative legal research method that refers to norms and legal principles in the legislation or court decisions. This discussion is explorative on thought, concrete legal norms in the Indonesian consumer protection law and is prescriptive to offer the concept of problem solving of the problems presented. The conclusion of the discussion is that the consumer arbitration verification system in Indonesia is a model that comes from the presumption of liability principle with a reverse proof burden. The realization of justice in this system cannot be harmonized so that it needs to be adjusted to the principle of justice that is universally adhered to and the principle of justice characterized by the legal personality of the Indonesian nation, namely Pancasila justice.

Keywords: Principles of Justice, Verification System, Consumer Disputes, Arbitration.

INTRODUCTION

Economic development of a nation must be able to support the business world so that it can produce various goods or services that improve the welfare of citizens. Consumer protection is all efforts to guarantee legal certainty maintain or defend consumer rights in determining the choice of goods or services offered by producers (business actors).

The relationship between consumers and producers can lead to disputes due to damage, pollution or loss of consumption of goods or use of services. One alternative solution to settling this dispute is through arbitration. In short, the arbitration is an arbitral process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an oppurtunity to be heard[1]. Juridically formal the arbitration law in Indonesia formulates the notion of arbitration is a procedure for the settlement of a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute[2]. In other words, arbitration is a method of resolving disputes in civil matters that are approved by both parties, which are binding and can be implemented or enforced.

Furthermore, the balance of interests between consumers and producers in the arbitration trial is by realizing the principle of justice in the event of verification. The realization of justice is very important, for three reasons, namely first, that there is a weakness in the Indonesian consumer protection law Number 8 of 1999, especially in the settlement of consumer disputes arbitrarily. The formulation of substantial norms (material law) and formal law (procedural law) in the law still exists that are contrary to other laws, where a common norm is governed by two or more different laws, which will be difficult to determine where is the general provision (lex generalis) or special provisions (lex specialis).

[1] Henry Campbell Black, *Black's Law Dictionary* (St.Paul Minn: West Publishing Co, 1991), p. 70.

[2] Article 1 number (1) of Law Number 30 Year 1999 concerning Arbitration & Alternative Dispute Settlement.

This situation has become more complicated if the legislation under consumer protection laws (such as government regulations, trade and industry ministerial decrees and / or other regulations) continues with conflicting norms. This reinforces the indication that the formulation of a number of norms in the law on consumer protection in Indonesia is not within the framework of the national legal system and is difficult to harmonize.

Second, the arrangement and norms of procedural law in the settlement of consumer disputes with an inverse proof burden system have caused injustice or imbalance for consumers or business actors. Judges open opportunities for third parties to manipulate data or events that harm consumers and businesses. Third, that no matter how well the process of consumer dispute resolution in the Court or outside the Court, from the summons of the parties, the preparation of minutes of proceedings and decisions made by Judges or arbitrators, does not guarantee that justice is achieved, unless the Judge or arbitrator is right and right in dividing the burden proof and provide an assessment of the strength of each of these evidences.

In proceedings in court proceedings or arbitration, the litigant party presents events which are used as a basis for affirming his civil rights or for refuting the civil rights of other parties. These events were not only presented in writing or verbally. However, it must be accompanied by legal evidence so that the truth can be ascertained.

The legal experts agreed, that the Proof [3] was needed in adjudicating a dispute before the court (Juridicto Contentiosa) and in the case of the petition which resulted in a determination (Juridicto Voluntair). Proof is the presentation of legal evidence to the Judge or arbitrator who examines a case to provide certainty about the truth of the event presented, while the law of proof [4] in the civil procedure law occupies a very important place.

Return to discussion in the scope of consumer protection. Article 28 of the Indonesian consumer protection law states that proof of the element of 'error' in a claim for compensation is the responsibility of the producer. This system comes from the Presumption of Liability Principle, which states that the defendant is always considered responsible until the defendant can prove his innocence, the burden of proof is on the defendant[5].

Unlike the general guideline for evidence in Article 1865 BW (*Burgerlijk Wetboek*) or Article 163 HIR (*Herziene Indonesische Reglement*) or Article 283 Rbg (*Rechtsreglement voor de Buitengewesten*), which states: is obliged to prove the events; otherwise the person who submits the events to disprove the rights of others, is obliged to also prove those events"

The burden of proof guideline is based on the principle of civil procedural law, namely the principle of *audi et alteram partem*, or parties who litigate in a civil process in court, must be treated equally by the judge. The parties have the same opportunity to win and equal opportunities to lose. Processually, the position of the parties who have the same litigation before the judge. Therefore, the principle of *audi et alteram partem*. Is also translated as 'the principle of the same processual position from parties with civil litigation'[6].

The same processual position of the parties who litigate before the judge is a proof of burden sharing theory. The judge must share the burden of proof based on the similarity of the parties' position so

[3] Subekti, *Hukum Acara Perdata, Badan Pembinaan Hukum Nasional Departemen Kehakiman* (Bandung: Bina Cipta, 1989), p. 78 declared "proving to be convincing the judge of the truth of the arguments or arguments put forward in a dispute". M. Yahya Harahap, *Hukum Acara Perdata Peradilan Indonesia*, (Jakarta: PT. Zaher Trading, 1997), p. 206 stated "that the notion of proof is the provisions which are basically said to be tools that will bring the litigant parties towards their authority or not". Abdul Kadir Muhammad, *Hukum Acara Perdata Indonesia*, (Bandung: PT. Citra Aditya Bakti, 2000), p. 115 declared "proving is to provide sufficient facts according to the law to provide assurance to the Panel of Judges regarding the occurrence of events or relations".

[4] The law of proof regulates how to prove, the burden of proof, the types of evidence and the strength of the evidence, and so on. In Indonesia the law of proof is contained in the HIR that applies in the regions of Java and Madura, Article 162 to Article 177; RBg that applies outside of Java and Madura, Article 282 to Article 314, Stb. 1867 No. 29 about the strength of proof of deed under hand; and BW (Burgerlijk Wetboek) or Civil Code Book IV Article 1865 to Article 1945.

[5] Shidarta, *Hukum Perlindungan Konsumen Indonesia* (Jakarta: Grasindo, 2000), p. 62.

[6] Achmad Ali, *Sekelumit Tinjauan Tentang Hubungan Antara Asas Audi Et Alterem Partem Dengan Asas-Asas Lainnya Dalam Hukum Acara Perdata,* (Jakarta: Jurnal Hukum dan Pembangunan, UI, Vol.13 No.6, 1983), p. 524. the term Audi Et Alterem Partem comes from Latin which means 'hear also the other party'. This principle is often referred to as 'Audiatur at alters pars', which is the same meaning as 'Einers mannes Rese ist keines Mannes Rede' or 'man soll sie horen alle beide'.*Ibid*, p. 523.

that the possibility of winning between the parties is the same. The judge must share the burden of proof to the parties who have litigation appropriately, which is sometimes only the defendant, and sometimes both of them[7].

Formulation of The Problem

In this study, the problem is limited about the realization of the principle of justice in the event of proof in the settlement of consumer disputes through arbitration in Indonesia. On this basis, the main problems in this study are as follows:

- What is the proof of the event on the level of positive law relating to the settlement of consumer disputes through arbitration in Indonesia?
- What is the realization of the principle of justice in the event of proof in the settlement of consumer disputes through arbitration in Indonesia?
- How does the burden of proof system in the settlement of consumer disputes through arbitration in Indonesia provide more justice for the parties?

RESEARCH METHODS

The type of legal research used is normative legal research[8]. Normative legal research refers to legal norms contained in the legislation and court decisions. Normative legal research is legal research that puts the law as a norm system building. The norm system in question is about principles, norms, rules of law, court decisions, agreements and doctrines (teachings)[9]. Normative research only stops at the scope of legal conception, the principle of law and the rules of regulation alone, not to the human behavior that applies the regulation[10]. Normative legal research is also called doctrinal legal research. In this type of legal research, the law is often conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a norm or norm which is a standard of human behavior that is deemed appropriate[11].

Then the legal research used in this study is explorative in nature that explores thought, concrete legal norms in the consumer protection law and is prescriptive that offers concepts for problem solving that are not merely descriptive (just to describe something as it is) [12]. Prescriptive nature also means that this study intends to provide arguments on the results of research that has been conducted. The arguments put forward are to provide prescriptions or judgments about right or wrong or what should be according to the law to facts or legal events from the results of the research[13].

In addition, this study also carried out several approaches, namely the legislative approach (opproach statute), conceptual approach and historical approach, all of which will be closely related to enriching the legal considerations that are appropriate for face legal problems to produce a more comprehensive and accurate legal analysis[14].

The statutory approach, is meant that the researcher uses the legislation as the initial basis for carrying out the analysis. This must be done because the legislation is a focal point and because of the nature of the law which has comprehensive, all-inclusive and systematic characteristics[15]. Conceptual approach (conceptual opproach), concepts in legal science can be used as a starting point or approach for analysis of legal research, because many concepts will emerge for a legal fact. This concept approach originated from the views and doctrines that developed in law. By studying these views and doctrines, ideas will be found that give birth to legal notions, legal concepts and legal principles that are relevant to the problem under study and with the conceptual approach, legal arguments are made in response to problems proposed law[16].

Historical approach, namely the approach taken by examining the background and development of the material under study. This review is needed if indeed you want to reveal the material that has been researched in the past has relevance to the present,

[7] Achmad Ali dan Wiwie Heryani, *Asas-Asas Hukum Pembuktian* (Jakarta: Kencana, 2012), p. 121.

[8] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: RajaGrafindo Persada, 1995), p. 15, said, "Normative legal research is legal research conducted by examining library material (secondary data) which covers the principles of law, legal systematics, the level of vertical and horizontal synchronization, the comparison of law and legal history".

[9] Mukti Fajar ND dan Yulianto Achmad, *Dualisme Penelitian Hukum, Normatif dan Empiris* (Yogyakarta: Pustaka Pelajar, 2010), p. 34.

[10] *Ibid*, hal. 37.

[11] Soerjono Soekanto dan Sri Mamudji, *Op.Cit*, p. 13.

[12] M. Solly Lubis, *Filsafat Ilmu dan Penelitian* (Jakarta: Sofmedia, 2002), p. 8.

[13] Mukti Fajar N.D. dan Yulianto Achmad, *Op.Cit*, p. 184.

[14] Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif* (Malang: Boymedia, 2011), p. 305.

[15] *Ibid*, p. 303, It is said that these legal characteristics are interpreted as follows: 1) comprehensive, meaning that the legal norms contained in it are logically related to one another. 2) all-inclusive, meaning that the collection of legal norms is sufficient to accommodate existing legal problems, so there will be no legal vacuum. 3) systematic, that is, besides linking one another, the legal norms are arranged hierarchically.

[16] Mukti Fajar N.D. dan Yulianto Achmad, *Op.Cit*, p. 187.

moreover has relevance in order to reveal or answer the problems raised[17].

To get scientific objective results and can be verified and the results can be justified, the data in this study were obtained through data collection using library research conducted to collect secondary data in the form of legal materials both primary, secondary and tertiary relating to research material and field studies to obtain information from informants, namely the arbitrator from the relevant consumer dispute settlement institution in this study to help provide guidance in the framework of solving research problems.

While the data collection tool used in this study is through document study that is to study and understand library materials related to the object of research. The study of this document is carried out on documents available both in the library and in the field, namely documents, regulations and arbitration procedures and other sources as well as information relating to the issues discussed.

DISCUSSION

Consumer Dispute Resolution through Arbitration

The emergence of a dispute opens the opportunity for consumers and producers to choose arbitration based on an agreement. In accordance with the principle of independence of each arbitration rules and procedures and the principle of freedom of contract, if the parties choose and agree on one of the rules, it will apply fully with the provisions of the arbitration implementation, which are still guided by the legal principles of consumer protection laws or arbitration laws.

Indonesia's consumer protection law has determined the burden of proof, in resolving disputes[18]. The proof of burden will determine directly how the end of a legal process in court or arbitration. If the party placed the burden of proof cannot prove the fact in question then the party will be deemed defeated even though the opponent (the consumer) also cannot prove the fact he argued.

Because of the importance of determining the burden of proof, the judge needs to be careful and fair in its implementation. According to Achmad Ali, the implementation of the burden of proof is regulated by certain principles which are restrictief in nature, restricting the freedom of the judge so that it can be avoided from abuse of office or authority (de tournament de pouvoir)[19]. In the Indonesian legal system, between the burden of submitting evidence and the burden of convincing, the stages of separation were not held, and at the same time took place when the parties were charged with proof. Three possibilities for whom the burden of proof is placed in a case, namely only to the plaintiff, only to the defendant or to both. In the event that proof is always charged to one party or always to both parties, such determination will lead to rigidity and injustice[20].

Justice as a Legal Principle in Arbitration Events

The formulation of legal principles in the Indonesian consumer protection law refers to the national development philosophy, namely the complete human development that is based on the Indonesian state philosophy of Pancasila [21]. According to Hans Kelsen, law as a norm system, is made according to higher and highest norms [22], namely grundnorm or basic norms. The principle of benefits, justice, balance, security, consumer safety and legal certainty are the three main principles, namely the benefits, justice and legal certainty which constitute 'three basic legal ideas' or 'three basic legal values' as the main reference in consumer protection in Indonesia.

The principle of justice is safeguarding the balance, harmony and harmony of all areas of the nation's life. Need legal means to encourage the balance of interests between consumers and producers then balance the interests of the government representing the public interest through various policies or regulations to maintain legal certainty in the application or law enforcement of the field of consumer protection.

The purpose of choosing an arbitration forum will ultimately lead to the settlement of disputes, namely getting substantial justice that is more useful and not just obtaining meaningless formal justice[23].

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[17] *Ibid.*, p. 189. Satjipto Rahardjo stated: "Normative legal research that uses a historical approach allows a researcher to understand the law more deeply about a system or institution, or a particular legal arrangement, so as to minimize errors, both in understanding and determining an institution or certain legal provisions".

[18] *Ibid.*, p. 21, stated: "Proof is an effort made by the parties to resolve their dispute or to provide certainty about the correct occurrence of a particular legal event, using evidence determined by law, so that a decision or decision can be produced by the court".

[19] *Ibid.*, p. 110.

[20] *Ibid.*, p. 124.

[21] Burhanuddin Salam, *Filsafat Pancasilaisme,* (Jakarta: Reneka Cipta, 1996), p. 25, stated "the Pancasila Philosophy is the result of thinking or thinking deeply of the Indonesian nation which is considered by the Indonesian people as the most true, fairest, wisest, most trusted, most trusted good and most suitable for the Indonesian people ".

[22] Soedikno Mertokusumo, *Penemuan Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 1996), p. 12.

[23] Eman Suparman, *Pilihan Forum Arbitrase Dalam Sengketa Komersial Untuk Penegakan Keadilan*, (Jakarta: Tatanusa, 2004), p. 79.

Although it is said that the enforcement of justice is a goal in resolving consumer disputes through arbitration, it is realized that it is not easy to understand it, because there are a variety of meanings that can be seen from various perspectives and theories [24].

Justice in the formal sense requires law to be generally applicable in accordance with procedural rules stipulated in law, while in a material sense it is required that the law be as possible with the ideals of justice in society. The law cannot be separated from the ultimate goal of state life and society which cannot be separated from the values and philosophy of life of the community itself, namely justice [24].

Efforts to put and realize justice through this law are fundamental to every country. Justice is closely related to law enforcement in resolving disputes, so that a just law is realized. In this context, the law is used as a means to reconcile disputes that occur in society through litigation and arbitration. Settlement of disputes through arbitration must include legal justice that puts all people in the same and equal position. Legal justice does not distinguish one's social status, because in the eyes of the law everything is the same.

In relation to the consumer arbitration verification system, the burden of proof is placed on the shoulders of the producer as the party being sued to prove that there is no mistake in the claim for compensation. Consequently, if the producer fails to prove, it will be sufficient as a legitimate reason according to the law, the compensation claim demanded by the consumer will be granted. This inverse proof burden positions the consumer as a weak party while the producer has a higher financial strength and degree so that the law is given the responsibility to prove the element of error.

In contrast to the principle of fairness in a system of proof that is generally applicable both in civil procedural law, arbitration law or procedure rules for arbitration institutions in Indonesia, those applying a balanced verification system, namely the party submitting events on the basis of a right, is required to prove these events and vice versa for those who disagree, are also required to prove it. Judges must listen to both parties and provide as much opportunity as possible to carry out the evidence according to the principles of *audi ET alteram partem*.

The rationale of the proof of load reversal system is that the producer is considered guilty, until the person concerned can prove otherwise. This system is contrary to the principle of the presumption of innocence which is commonly known in law. In the event that the producer assures the judge or arbitrator about the unrighteousness of the consumers' arguments or is obliged to present sufficient facts according to the law to provide certainty to the Judge regarding the absence of errors in the event or causal relationship of the incident.

Such a situation shows that consumer protection laws have made the expectation of a balance of position between consumers and producers as the goal of the law, to be unbalanced or unfair because consumers remain in a weak position and tend not to attempt to prove the event argued. Consumers only depend on proving errors from the manufacturer. In practice, the proof system is ineffective and is not implemented absolutely because producers will always try to hide their mistakes and refuse to provide compensation so that consumers are sometimes charged with proof.

Realization of the Principle of Justice in the Event of Consumer Arbitration Verification

Regarding the burden of proof system in the settlement of consumer disputes, the Indonesian consumer protection law must still adhere to the values of justice contained in Pancasila as the basic foundation (basic norms) formed by a law that is humane, just, civilized and socially just for all people in Indonesia. Although justice in Pancasila is in the form of abstract values, the values contained in the second principle and the fifth principle of Pancasila reflect the protection of citizens' rights and obligations that are interrelated with other values in all Pancasila principles as a whole.

Fair and civilized humanitarian precepts as a basis for the protection of human rights that place humans in a civilized manner without reducing their rights at all. In the principle of social justice, the concept of social justice and legal justice is distinguished. Justice in law literally has a narrow meaning that what is in accordance with the law is considered fair while those who violate the law are considered unfair, and to restore it is held a court. Social justice in Pancasila is a source of value that must be translated into legal justice. The nature of social justice is to create and realize justice in human relations with themselves, human relations with others, human relations with their countries, and human relations with their gods.

Pancasila as the root of ideas and thoughts about the law or the perception of the meaning of the Indonesian legal law. In essence, it consists of three elements, namely justice, usefulness and legal certainty[24]. Pancasila as a source of law becomes the basic norm of the Indonesian people in shaping the legislation. The value of justice contained in Pancasila is the basic foundation for the establishment of a

[24] Ferry Irawan Febriansyah, *"Keadilan Berdasarkan Pancasila, Dasar Filosofis dan Ideologis Bangsa"*, (Yogyakarta: Deepublish, 2016), p. 151.

humanitarian, just, civilized and socially just law for all Indonesians.

According to Aristotle, there are important differences between numerical similarity and proportional similarity. Numerical similarity equates every human being as a unit with the same rights and obligations. This equation means that equal rights are the same for all people in obtaining human rights justice, while proportional similarity gives each person what is his right in accordance with his abilities and achievements.

The characteristics of Pancasila justice require an understanding of the similarity of vision, mission, goals and perceptions in creating a just law. The characteristics of Pancasila justice if analyzed by John Rawls' theory of justice have in common with Aristotle's opinion. This commonality of opinion is that justice must be understood as equality. Humans as social beings must obtain equality in the law or similarity in obtaining justice. Rawls's view positions the same and equal situation between each individual in society; there is no difference in status, position or having a higher position with each other, so that one party can do a balanced agreement.

In theory, Raws intends to develop a procedure that results in principles of justice that can be determined by a kind of agreement process among members of the community with regard to, among others, human cooperation, minimal morality, a sense of justice, rational choice, and what is called primary goods (the main things that everyone wants to get) [25]. Based on such a procedure, Rawls summed up two principles of justice, the first concerning the distribution of the same basic freedoms for everyone in the sense of equality. The main basic freedom is human rights that must be given equally to everyone. This first principle of justice is in accordance with the second principle of the just and civilized Pancasila of humanity. The second principle of justice is related to position, social position, income and wealth. In this case, Rawls adheres to the principle of difference, in the sense that social position cannot be generalized but the distribution of justice is in accordance with the service or position of the individual. This is in accordance with Aristotle's distributive justice principle. Both of Rawls's principles of justice are then used as legal institutions in creating fair certainty and distributing benefits.

Pancasila justice is a moral value and a value of justice that functions as legal principles. These legal principles are used as guidelines in the preparation of the law and are applied to society as a rule of law. The values of justice contained in Pancasila as a principle or basis for forming a law that is essentially a law aimed at finding justice. The value of justice is a value that upholds the norm based on impartiality, balance and equality of a thing that is a balance between rights and obligations.

Likewise, the formulation of the principles of consumer protection in the Indonesian consumer protection law refers to the philosophy of national development, namely the development of Indonesian people as a whole based on Pancasila. The principles of consumer protection are divided into three basic principles, namely the principle of benefit, justice and legal certainty. As a principle of law, it automatically becomes the main reference in the formation of legislation and in various activities related to consumer protection.

The principle of balance that means justice in principle is the maintenance of balance, harmony and harmony in all areas of the nation's life. Legal infrastructure and facilities encourage a growing balance of interests between consumers and producers. The tendency that consumers are always in a weak position when dealing with producers has given rise to efforts to protect consumers by not ignoring the protection of producers and the interests of the people represented by the government. The value of such justice is contained in the Pancasila which is the basic foundation for the formation of a humanitarian, just, civilized and socially just law for all the people of Indonesia.

CONCLUSION

Proof is one of the trials that play an important role. This is because proof is a process that determines a person's win or lose, is accepted or rejected by the claim filed. The proof system in one country with another is certainly different. This is adjusted to the culture or understanding adopted by the country. In general, the verification system is distinguished based on civil law and common law understandings which are influenced by various proof system theories such as the presumption of liability principle adopted in the Indonesian consumer protection law.

The principle of justice in the consumer arbitration system is different from the arbitration verification system that is universally applicable in Indonesia so that the realization of justice cannot be harmonized with other laws which then lead to injustice for producers and consumers. The principle of justice is one of the main principles in the judicial or arbitration system. The ultimate goal of choosing consumer arbitration is to get substantial justice that is more dignified and not just obtaining formal justice.

The development of a proof system in consumer arbitration in Indonesia is in line with the direction of globalization. Non litigation dispute resolution has

[25] *Ibid*, p.154.

become the choice of business people because it is fast, efficient, complete, win-win solution and final and binding. The realization of the principle of justice which has a legal characteristic of the nation's personality in the consumer arbitration verification system will provide justice not only for producers and consumers but also provide justice for all people of a country.

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