

## **BORROWING COMMON LAW ESTOPPEL FOR THE SETTLEMENT OF UNWRITTEN AGREEMENT IN INDONESIA**

**Sunarsih<sup>1</sup>, Gunardi<sup>2</sup> & Amad Sudiro<sup>3</sup>**

<sup>1</sup>Faculty of Law, Tarumanagara University Jakarta  
*Email: sunarsihlarangka@gmail.com*

<sup>2</sup>Faculty of Law, Tarumanagara University Jakarta  
*Email: gunardi@fh.untar.ac.id*

<sup>3</sup>Faculty of Law, Tarumanagara University Jakarta  
*Email: ahmads@fh.untar.ac.id*

---

*Enter : 20-09-2023, revision: 02-10-2023, accepted for publication : 01-02-2024*

---

### **ABSTRACT**

*The recognition of the binding force of unwritten agreements is still uncertain in Indonesia, depending on the judgment of the examining judge. Unlike in the common law countries, the parties entering into unwritten agreements as long as they fulfill the validity of the agreement are protected by the prevailing estoppel. This research aims to investigate the existence of estoppel or its values in the Indonesian Civil Code, which can be used as the basis for the settlement of disputes arising from unwritten agreements in the Indonesian courts. The research will draw comparisons between the application of estoppel in countries adhering to the Common Law legal tradition and dispute settlement of unwritten agreements in Indonesia as a country adhering the Civil Law legal tradition. Estoppel is defined as the prohibition of denying or revoking promises having created reliance to other parties; and by the enforcement of estoppel principle, unwritten agreements as long as complying the terms and conditions for legally binding agreement, shall be declared to be legally binding. This legal research, primarily normative and explanatory, utilizes secondary data for micro-comparative analysis, exploring the borrowing of estoppel from Common Law into the Indonesian Civil Code. The conclusion of this research is expected to contribute an input for the prevailing regulation concerning the recognition or binding force of unwritten agreements by virtue of Article 1320 of the Indonesian Civil Code.*

**Keywords:** *Legal Borrowing, Unwritten Agreement, Estoppel, Binding Force, The Indonesian Civil Code*

### **1. PREFACE**

In Indonesia, unwritten agreements, even though they meet the legal requirements of an agreement, have not been fully recognized to have legally binding force; therefore, in several cases it is found the examining panel of judges decided that unwritten agreements did not have the binding force as compared to written agreements. Whereas, in the Indonesian Civil Code there is no stipulation clearly stating that agreement must be made in writing, in other words that agreement can be either written or unwritten. The Indonesian Civil Code stipulates expressly that agreement becomes binding subject to its full compliance to the legal requirements of an agreement by virtue of Article 1320 of the Indonesian Civil Code.

Meanwhile, in the courts of Common Law countries, the implementation of estoppel enables unwritten agreement being acknowledged legally binding, provided that such unwritten agreement complies with 3 principles of estoppel, namely: the existence of promise, reliance of the promised, and the prohibition of denial to such promise. Estoppel is derived from a principle in equity, which means that when a person, by speech or action, has caused another person to rely to his promise for something, he is prohibited from denial, if such denial may cause injustice (Coke, 2003). Anenson (2007) explains estoppel by quoting Lord Kenyon, that a person is prohibited from being contradictory in the same transaction, or on different occasions stating a claim to another party for his personal benefit. This definition emphasizes the prohibition of

conflicting actions or statements in the same transaction, in the sense that the statement contains denial thereof, and the conflicting statement is aimed for gaining self advantage.

Historically, both Common Law and Civil Law were likely to be complement one to the other. Facts prove that the Indonesian Civil Code is taken from the Dutch, while the Dutch Law was influenced by French and French by the Ancient Roman (Haryanto, 2009). On the other hand, the Common Law legal tradition developed and implemented in the Great Britain, which was once also influenced by the law of the Ancient Roman because of colonization until AD 410, before the Norman era. During such colonization, the law also underwent adjustments due to the demands of the Roman. By quoting Dr. Winfield, Edward convinces that during its rule in three and a half centuries, Rome must have made the people become familiar with some of the legal principles (Re, 1961). Based on this fact, it is very possible that both Dutch law, which is based on the Civil Law legal tradition, and the English law, which is based on the Common Law legal tradition, have been influenced by the Roman law, and therefore it is also very likely that there has been a transplantation or borrowing of legal provisions or institutions from one to the other.

Hence, the primary objective of this research is to investigate the existence of estoppel in the Indonesian Civil Code. By examining this aspect, the study aims to ascertain that estoppel can be invoked as the basis for resolving disputes arising from unwritten agreements in Indonesia, as it is implemented in the Common Law countries.

## **2. RESEARCH METHOD**

This research is a legal research, which is essentially a scientific exploration based on certain methods, systematics and reasoning; setting the goal to explore and analyze one or more legal phenomena, accompanied by in-depth examination to find a solution therefor (Sunggono, 2016). This legal research is normative because it uses secondary data sources; it applies micro-comparative legal research as it explores to justify the borrowing of estoppel originating from and developed in the Common Law legal tradition, but conveyed in the law of agreement according to the Indonesian Civil Code adopted from the Dutch Law, which is of the Civil Law legal tradition.

This research takes on an explanatory method as its primary objective is to elucidate and reinforce an existing situation. In terms of its structure, it assumes a prescriptive nature, dedicating to conduct an analysis to obtain a comprehensive understanding of the borrowing of estoppel within the current regulations. Regarding its practical application, the research is categorized as fact-finding, focusing on the analysis of data to disclose facts pertaining to the existing borrowing of estoppel. This specifically involves examining how the Common Law legal tradition's estoppel is borrowed in the Indonesian Civil Code, which adheres to the Civil Law tradition. The research employs a comparative approach, applying "micro-comparison" method to explore specific legal institutions. In this instance, it involves identifying the borrowing of estoppel from the Common Law legal tradition in the provisions of the Law of Agreement according to the Indonesian Civil Code of the Civil Law legal tradition.

As a normative juridical research, the most fitting methodology is a literature study, relying on secondary data as the analytical foundation (Waluyo, 1996). The research incorporates three distinct classifications of legal materials: primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data, constituting the focal point of the study, undergoes processing through a qualitative analysis method, to generate descriptive data (Mamudji et al., 2005).

### **3. RESULT AND DISCUSSION**

#### **The Settlement of Unwritten Agreement in Civil Law and Common Law**

In Indonesia, the legal binding force of an unwritten agreement, even when it adheres to the stipulated terms and conditions, remains uncertainly recognized. Some examples of court cases have occurred, where judges, during examinations, considered unwritten agreements to have no binding power. This judicial perspective is influenced by the principle of formal proof designated in the Law of Civil Procedure, following the principle of formal evidence, meaning that written documents are given the most evidence power. One example of such a case is in the Supreme Court Decree No. 6444 K/Pdt.Sus/2012, in which the Claimant (a shop worker) was employed by the defendant (a shop owner) without a written employment agreement. The panel of judges decided to reject the claim with the consideration that between the claimant and the defendant employment relation did not exist as the claimant could not prove it with any written employment agreement, and therefore there was no obligation for the defendant to pay the claimant any termination allowance. This is an example that unwritten agreement is not awarded legally binding power. In contrary to the fact that some cases of unwritten agreements are considered binding, it is concluded that the awarding of unwritten agreement is clearly uncertain.

In comparison to the law enforcement in a Common Law country like Australia, unwritten agreement is considered binding as indicated in the case of *Walton's Stores (Interstate) Ltd v Maher* in 1988 (Anenson &, 2007). Maher was the owner of a piece of land and building in Nowra, Australia. Maher was in the process of negotiating with Waltons Stores ("Waltons"), a department store under the management of Bond Corporation, which expressed intention to lease Maher's land. Waltons was willing to lease the land, requesting Maher to demolish the existing building, and then to construct a new one. Based on his reliance to the promise of Waltons, even before any written statement was executed, Maher demolished his building and initiated the new construction. However, it turned out that the signing of the agreement never took place as Waltons Store seemed reluctant to sign it just because Maher happened to express hostile statements. Waltons asked its attorneys to slow down the negotiation process, at the same time Waltons also tried to review the business plan, but still gave Maher the impression that the deal would still be continued. Maher then sued Waltons, claiming that Waltons had been fully aware that there was an agreement between them even though it had not been fully signed, and that Waltons had to be prevented from denying such agreement, because Maher had kept his reliance to Walton's promise and because of such promise Maher had demolished his own building. The court determined that in order to avoid damages due to the Waltons' improper actions, the Waltons were prohibited from denying the promise to Maher. The Waltons' unwillingness to sign the agreement was improper. In this case, it is clear that Maher's reliance to Waltons is protected by the implementation of estoppel, in other words, estoppel has enabled unwritten agreement is given binding power and become undeniable by the party expressing the promise.

#### **Identification of the Key Meanings of Estoppel**

Estoppel is a mechanism to enforce consistency, meaning that when someone says or does something that becomes the basis to build trust and therefore do something accordingly, someone who states or promise is obliged to remain or be consistent with his statement/promise, although such statement/promise is not contained in a binding contract (Coke, 2003). McKendrick (2000)

explains the concept by using the statement of Lord Birkenhead during the examination of the *Maclaine v. Gatty* case [1921] AC 376, 386, that if an individual, through statements or actions, induces another person to believe something, and the latter, relying on that promise, takes action without suffering any detriment, then the party making the initial statement is precluded from asserting things that contradict the reliance formed by the relying party. From this explanation, it can be concluded that the essential value of estoppel is conveyed in the enforcement of the prohibition of denying the statements and/or actions that have led the other party to rely and act based on such reliance in a specific event.

According to Henry M Herman (1871), estoppel is an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial. In other words, a person is always prohibited from proving something contrary to what was previously admitted. To clarify this point, it is further stated that a party will be prohibited or prevented from doing an act that according to the provisions of the law is not allowed to be denied, and the act that cannot be denied is an act or statement of someone who has previously stated to the other party. Based on the limitation of the meaning of estoppel, the key meanings of estoppel consist of: promise, reliance, and prohibition of denying promise; provided that the existence of promises and reliance must be proved (factual) and not in the form of assumption or just a one-sided opinion.

#### **The conformity of the Value of Estoppel in General Provisions of The Law of Agreement According to the Indonesian Civil Code**

In Article 1233-1234 of the Indonesian Civil Code: *“All contracts arise from an agreement, or by law. Their purpose is to provide something, to do or not to do something”*. The two aforementioned articles encompass general provisions delving into the analysis, is crucial as these provisions suggest that the Civil Code does not impose restrictions on the form of agreement, whether written or unwritten. The term "agreement" in these provisions conveys the notion of a commitment fostering reliance by the other party, which is the basis of agreement. Based on this understanding, a more specific inference can be drawn, asserting that an agreement, without any written prove, is deemed binding provided that it complies the prerequisites. To summarize it briefly, the fact that there is no stipulation requiring that an agreement must be in writing, therefore, denying obligations merely due to the absence of a written proof has no legal ground.

David V. Snyder (1998) argues strongly that historically, estoppel was not created by countries adhering to the Common Law legal tradition, but the Romans which adhering to the Civil Law legal tradition, which first built the concept. Thus, it reasonably indicates the conformity of Common Law estoppel in the laws of Civil Law countries. The identification of the existence of estoppel in the Indonesian Civil Code can be undertaken by identifying the existence of the key values of estoppel, consisting of: (1) promise, (2) reliance, and (3) prohibition of breach of promise, in each article of the general provisions of the Indonesian Civil Code (Article 1233-1458) . The identification of estoppel key values is focused on the general provisions being the rules for the rest and entire law of agreement in the Indonesian Civil Code.

The research finds that the formulation of estoppel values or principles in such general provisions is not in the forms of straightforward statements or arrangements, but is implied and contained in various provisions, as explained in the following

- a. the promise and reliance are deemed implied in the entire provisions because each articles is stipulation the agreement context;

- b. the prohibition of promise breach is implied in various formulations in the provisions, to aimed at protecting and ensuring the fulfillment of obligations by the promising party to the relying party;
- c. formulations of the prohibition of promise breach among others in the forms of: stipulation on the execution of obligations, stipulations concerning defaults and negligence, the debtor's obligations to pay costs, losses and interest due to its default or negligence in fulfilling the determined obligations.

One of the examples of the conformity of the Common Law estoppel in the Indonesian Civil Code is in Chapter 1 Section 5 Indonesian Civil Code concerning the conditional obligations, where a prohibition against a promise breach is clearly expressed in the form of prohibition of negligence unless a specific condition agreed by both parties be fulfilled. In the event the debtor fails to comply, he shall be responsible for the payment or compensation for incurred costs, losses, and interest to be paid to the creditors. Articles 1259-1261 of the Indonesian Civil Code about conditional obligations read as follows:

**Article 1259.**

*“If an obligation is conditioned upon the terms that an event will not take place within certain time, then such term is fulfilled where such time elapses and the event has not taken place. Similarly, if such term is met, if before such time elapses it is certain that the event will not happen, but the time is not fixed, then such term is not met before there is certainty that such event will not happen”* (Prohibition of breach of promise: If the condition is the non-occurrence of an event, with the passage of time the parties are obliged to assume that the condition is fulfilled and therefore the obligation is binding.)

**Article 1260.**

*“Such terms are deemed fulfilled if the debtor prevents the fulfillment of such terms”* (Prohibition of breach of promise: not only a refusal to perform or fulfill a promise, but also includes the act of obstructing the party who wants to fulfill the performance).

**Article 1261.**

*“If the conditions are met, then such terms apply retroactively to such time the obligation arises. If the creditor passes before the term is fulfilled, then the rights pass to his successors”* (Prohibition of breach of promise: evidenced by the provision that in the event of death, the obligation remains undenied, but the creditor's rights are inherited).

The identification of the values of Common Law estoppel in the law of agreement according to the Civil Law, proves that law borrowing has clearly occurred. As according to estoppel, unwritten agreement is acknowledged legally binding, therefore, unwritten agreements in Indonesia must also be considered accordingly, provided that the the validity requirements are also conformed, as stipulated in Article 1320 of the Indonesian Civil Code, consisting of 4 (four) conditions: agreement, capability, specific object and lawful cause.

Based on the above, it is clear that the Common Law estoppel is implied in the general provisions of the law of agreement in the Indonesian Civil Code, not expressly stated and is existing dispersedly. The enforcement of estoppel values of promise, reliance, and the prohibition of promise breach is conveyed in the form of obligation to compensate for incurred costs, losses, and interest due to debtor's defaults.

#### 4. CONCLUSIONS AND RECOMMENDATIONS

The Indonesian Civil Code implicitly stipulates that agreements may be either written or unwritten. The fundamental concept of estoppel, as implied in the general provisions of the Law of Agreement in the Indonesian Civil Code, consists of 3 (three) elements, namely: promise and reliance which inherent with the context of an agreement based on mutual consent, and the prohibition of promise breach. The prohibition of promise breach is conveyed in the form of obligation fulfillment and sanctions for negligence therefore, including the obligation to compensate the incurred costs, losses and interest.

In reference to the above discussion, it concludes that unwritten agreement as long as it complies with the prerequisites for the validity of an agreement according to the Civil Code, constitutes binding force for both parties. Such binding force is also expected to become the ground for the settlement of disputes thereof, whether before the court and outside the court.

#### Acknowledgement

This paper can not be completed without the assistance of colleagues, their contribution of data and inputs; the author would like to express sincere gratitude to them all; also to reviewers for their insightful revisions and advice.

#### REFERENCES

- Anenson, L., & ., H. V. (2007, September 10). The Triumph of Equity: Equitable Estoppel in Modern Litigation. *Review of Litigation*, 27, 8. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1013106](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013106)
- Coke, E. (2003). *The Modern Law of Estoppel*. Oxford University Press.
- Haryanto, E. (2009). Burgerlijk Wetboek (Menelusuri Sejarah Hukum Pemberlakuannya di Indonesia), *Al-Ikham*, 4(1), 144. <https://ejournal.iainmadura.ac.id/index.php/alihkam/article/view/268>
- Herman, H. M. (1871). *The Law of Estoppel*. Albany W.C. Little & Co.
- Mamudji, S., Rahardjo, H., Supriyanto, A., Erni, D., & Simatupang, D. P. (2005). *Metode Penelitian Hukum dan Penulisan Hukum*. Badan Penerbit Fakultas Hukum Universitas Indonesia.
- Mangunson, R. (2008). *Indonesian Civil Code: Burgerlijk Wetboek voor Indonesia (Kitab Undang-Undang Hukum Perdata)*. PT Gramedia Printing Jakarta.
- McKendrick, E. (2000). *Contract Law* (Fourth Edition ed.). Palgrave Law Master.
- Re, E. D. (1961). The Roman Contribution to the Common Law. *Fordham Law Review*, 29(3), 457. <https://ir.lawnet.fordham.edu/flr/vol29/iss3/2/>.
- Snyder, D. V. (1998). Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction”, *Arizona Journal of International and Comparative Law. Journal of International and Comparative Law*, 695, 31. <https://www.repository.law.indiana.edu/facpub/2297/>
- Sunggono, B. (2016). *Metodologi Penelitian Hukum*. Rajawali Press.
- Waluyo, B. (1996). *Penelitian Hukum dalam Praktek*. Sinar Grafika.

