



History, Development of Commercial Law in Indonesia and Their Correlation with the Book of Civil Law

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Abstract

This article discusses the history and development of commercial law in Indonesia and its correlation with the civil code law. This article uses literature research. Commercial law is the law that regulates the behavior of humans who participate in trading for profit or the law that regulates legal relations between humans and legal entities with each other in the trading field. Generally, the development of commercial law is divided into three stages, namely the *lex mercatoria* period in the Middle Ages, the incorporation of the *lex mercatoria* into the national legal system, and the new *lex mercotaria* period. In essence, *lex mercotaria* is a concept in Latin that is used to communicate a set of principles or principles that apply to traders in Europe in general. When viewed from the perspective of its function, *lex mercotaria* is actually an international trade law which, among other things, emphasizes the separation of assets and contractual freedom, applies to traders from various parts of the world who establish trade relations with the citizens of the kingdom along the route that crosses the boundaries of territorial sovereignty. . based on the principle of concordance, the KUHD Netherland 1838 became an example for the making of the Indonesian KUHD in 1848. Initially, commercial law was based on civil law. However, over time the commercial law codified the legal rules so that the Commercial Law Code was created which is now independent or can be said to be separate from the Civil Law Code. The Commercial Law Code has a relationship with the Civil Law Code as explained above that as a result of the codification, commercial law is part or a branch of civil law, but in a more specific form. Thus, the Civil Code becomes a special source of civil law. The relationship between the two laws is the genus (general) and species (special).

Keywords: History; Development; Commercial Law; Civil Law

Introduction

Trade is defined as the exchange of goods and services or money that is mutually beneficial or provides benefits and is based on the voluntary will of each party.

Trade occurs because of differences in human resources, natural resources, such as geographic location and climate as well as differences in economic conditions and available within a region or within a country. The differences that occur in each of these regions and countries that cause differences in the goods produced, their quality and quantity as well as the costs required.

Trade comes from ancient times, it can be seen from some of the remains of Sumerian-made goods in Egypt or Babylon which were found in the Mediterranean sea. Most likely at that time people began to exchange goods and services with each other without using the value of money. The trading area in ancient times was still very limited, because the transportation was still limited, whether it was sea transportation or land transportation, and the costs were very expensive and full of risks. Because what drives trade between countries is the development of technology and the means of transportation itself.

Then in the next era, namely since the collapse of the roman empire, trade in Europe has developed, especially in the 12th and 13th centuries. They even established an association to protect long-distance trade, while the goods traded were in the form of raw materials such as wool, leather, wood, spices and many others which will then be processed through the production process.

Periodization of the history of law does not begin with the pre-historic period as well as the periodization of history in general, but begins with the existence of law in the era of primitive society. It can be stated that history does not have records relating to the prehistoric period, namely the period when the letters or characters which are the main requirements are not yet known, so they cannot be recorded. In prehistoric times, communication was carried out by means of sign language, both voice and by gestures and other signs among a very limited community, most advanced they conveyed through simple drawings whose remains can be seen on the walls of several caves that were once inhabited by humans in ancient times.

If we look at it based on the perspective of the modern economic cycle, which basically consists of production, distribution, and consumption, the most dominant activity carried out at that time was consumption in a very limited sense in the aspect of using it for the needs of daily life. So the economic cycle in prehistoric times was not complete. The point is that in pre-historic times trade was not known, everything was available in abundance, so there was no cultivation, no picking, picking and no market as the main means of doing trade. The chain of economic cycles that gave birth to trade were basically production and distribution which in prehistoric times were still unknown. Given the absence of even a simple form of trade, then automatically trade law is not yet known. This can be explained that one of the functions of law is to regulate, regulatory elements consist of rules, subjects and objects of regulation and regulators. If the subject and object do not exist, it is impossible to formulate rules and enable regulators.

Research Methods and Idea

The research method is a scientific way to obtain data with a specific purpose and use. Research methods can also be interpreted as methods used to collect and analyze data developed to gain knowledge using reliable and reliable procedures. In this study used library research, namely making library materials as the main source. The data involved in this study were collected through library research or literature review, because the study is based on the history and development of commercial law. Collecting data in

this study used the method of reviewing several book sources on the history and development of commercial law.

Based on the explanation above, it can be concluded that library research is an activity to collect information relevant to the topic or problem that will be the object of research. This information can be obtained from books, journals and other sources. By using library research, researchers can take advantage of all the information and thoughts that are relevant to their research.

Discussion

History of Commercial Law and Its Development

Commercial law is the law that regulates the behavior of humans who participate in trading for profit or the law that regulates legal relations between humans and legal entities with each other in the trading field. Trade law arises because of the existence of traders, and trade in a general sense is the work of buying goods from a place or at a time and reselling these goods at a certain place and time with the intention of making a profit.¹

Trade law is actually not something that appears or is simply drowned out, trade law has a very long history and is directly proportional to the development of trade itself. The world of commerce and law has a very close correlation, and is mutually influencing. This indeed looks cliché but is still very relevant to trace its history amidst the tendency to forget that is getting worse.

Interaction with commercial law basically only started to be known when humans recognized a form of behavior called bartering, because as simple as anything is done, barter is a system that introduces and bases its performance on agreed terms and all of this is a representation of the rules.²

Generally, the development of commercial law is divided into three stages, namely the lex mercatoria period in the Middle Ages, the incorporation of the lex mercatoria into the national legal system, and the new lex mercotaria period. Trade law in the lex mercotaria era was characterized by several characteristics, namely:

1. Transnational in nature
2. The main source of merchant habits
3. Enforcement is not by judges but by the merchants themselves
4. The procedure is fast and informal
5. Cases are often decided on the principles of decency and appropriateness.

The second stage of the development of international trade law was marked by the inclusion of this lex mercotaria into the national legal system in the 18th and 19th centuries when the concept of state sovereignty was getting stronger. For example, France made a codification of commercial law in the Code De Commerce in 1807, Germany in 1861 issued a Uniform Commercial Code, and England as a country that adheres to the Uniform Commercial Code system. Common law incorporated the lex mercotaria into its national legal system in the mid-18th century.

The third stage of the development of international trade law was driven by the birth of trade globalization and the resurgence of the international trading community in the 20th century. At this stage the lex mercotarial returns to its universal or international character. However, in contrast to the medieval

¹ Suwardi, "Hukum Dagang Suatu Pengantar", (Yogyakarta: Deepublish, 2012), hlm. 1..

² Putu Sudarma Sumadi, "Hukum Dagang Intern-Nasional", (Sidoarjo: Zifatama Jawara, 2019), Hlm. 6-7.

period, *lex mercotaria* in this third stage is not part of international law or law that will be separate (autonomous) from national law, but is part of national law that is applied in an international context.

Although currently a number of international trade laws are regulated in international treaties, it does not mean that international trade law is part of international law because its application to national law only occurs when the state ratifies it. In this third stage, there are efforts from the international trading community to restore the characteristics of international trade law as a uniform law.³

In essence, *lex mercotaria* is a concept in Latin that is used to communicate a set of principles or principles that apply to traders in Europe in general. The principle of *lex mercotaria* was absorbed, adopted and applied from the customs in the practice of trade in the Middle Ages which lasted between the V-XV centuries. From the aspect of material intake, it can be stated that *lex mercotaria* is a rule of trade law that originates from the habits of traders. This seems understandable because the legal subjects who most needed the rules of commercial law at that time were traders, besides that, because the law-making apparatus and other legal sources were not yet available.

When viewed from the perspective of its function, *lex mercotaria* is actually an international trade law which, among other things, emphasizes the separation of assets and contractual freedom, applies to traders from various parts of the world who establish trade relations with the citizens of the kingdom along the route that crosses the boundaries of territorial sovereignty. . The meaning that can be raised is that *lex mercotaria* is an international trade law which is very thick if you don't want to say it is international trade law. This is actually the background for including the national term in the words of commercial law, the term commercial law was developed from *lex mercotaria* which is actually an international law.

Traces of the history of *lex mercotaria* can be seen and found in the principles and rules of law that governed commercial transactions in the Middle Ages. The development of this legal field runs parallel to the development of international economic relations in Europe at the beginning of the 11th century.⁴

The history of commercial law must present a sequence of how the process goes from an exchange of goods rules, then experiencing a period of independence until it can become an almost abandoned field, in Indonesia itself, once the Law on Limited Liability Companies was enacted, the initiators responded by building a new domain, namely company law. Some of the material contained in the new legal field is still sourced from the Commercial Code (KUHD) which is taught while remembering that this law book is an outdated Dutch colonial heritage.

On January 1, 1809 the Code de Commerce (Commercial Law) entered into force in the Netherlands. At that time the Netherland government wanted its own commercial law, in the proposal of the Dutch Commercial Code from 1819 it was planned a Commercial Code consisting of three books but in it no longer recognized special courts that resolved cases involving arise in the field of trade, but trade cases are settled in ordinary courts. It was this proposal of the Dutch Commercial Code which was later attempted to become the Dutch Commercial Code of 1838.

In the end, based on the principle of concordance, the Dutch Commercial Code of 1838 became an example for the making of the Indonesian Commercial Code of 1848. At first, commercial law was based on civil law. However, over time the commercial law codified the legal rules so that the

³ Subianta Manadala, "Harmonisasi Hukum Perdagangan Internasional: Sejarah, Latar Belakang dan Model Pendekatannya", *Jurnal Bina Mulia Hukum*, Vol. 1, Nomor 1, September 2016, hlm. 55-56.

⁴ Putu Sudarma Sumadi, "*Hukum Dagang Intern-Nasional*", (Sidoarjo: Zifatama Jawara, 2019), Hlm.21-22.

Commercial Law Code was created which is now independent or can be said to be separate from the Civil Law Code. Late 19th century Prof. Molengraaff is planning a Bankruptcy Act that will replace Book III of the Netherland Commercial Code. Prof.'s design. This Molengraaff was later successfully made into the Bankruptcy Act in 1893 and took effect in 1906, and based on the principle of concordance, this amendment was also made in Indonesia in 1906.

The history of commercial law in Indonesia is based on the principle of concordance which enforces law according to class, namely:

1. For groups of Europeans and those who are equal, civil law and western commercial law are applied which are harmonized with civil law and commercial law in the Netherlands.
2. For the indigenous group (Indonesian natives) and the equivalent, customary law applies.
3. For foreign eastern groups (residents of Chinese, Indian, and Arab descent) their respective laws are applied, provided that all of them are subject to western law.

The enforcement of Burgerlijk van Wetboek (Book of Civil Law) and Wetboek van Koophandel (Book of Commercial Law) is based on Article II of the Transitional Rules of the 1945 Constitution as amended by Article 1 of the Transitional Rules of the 4th Amendment of the 1945 Constitution of each statutory regulation on The colonial era still applies as long as it does not conflict with the spirit and ideals of the Indonesian nation.⁵

Commercial Law Resources

At the beginning of its development, the main sources of Indonesian commercial law were regulated in the Civil Code, which was referred to as the genus, and the Commercial Code, which was referred to as the species. Lately, with the rapid development of the business world, it has also been developed in such a way as to keep up with the modernization of the times. Furthermore, the regulations that contain the rules of trade law are stated in various laws and regulations that regulate special sections of business law.

1. Legal arrangements in the Codification

a. Code of Civil law

The Civil Code or Burgelijk Wetboek which is actually the source of commercial law is Book III on Engagement. This is understandable, because as HMN Purwosutjpto said that commercial law is the law of engagement that arises within the scope of the company. In addition to Book III, several Parts of Book II of the Civil Code relating to objects are also sources of commercial law, for example Title XXI concerning Mortgages.

However, currently the provisions relating to mortgages on land are no longer valid, because these provisions have been revoked and replaced by Law no. 4 of 1996 concerning Mortgage on Land and related objects on land. The provisions of Book II of the Civil Code concerning Objects are related to the problem of ship mortgages as regulated in the First Title of Book II of the Commercial Code and Law no. 21 of 1992 or aircraft mortgages as regulated in Law No. 15 of 1992.

⁵ Suwardi, "Hukum Dagang Suatu Pengantar", (Yogyakarta: Deepublish, 2012), hlm. 4-5.

2. Settings outside of Codification

The sources of commercial law that are outside the codification include the following:

- a. Law No. 1 of 1995 concerning Limited Liability Companies
- b. Law No. 8 of 1995 concerning the Capital Market.
- c. Law No. 19 of 2003 concerning State-Owned Enterprises
- d. Law No. 8 of 1997 concerning Company Documents
- e. Law No. 14 of 2002 concerning Patents
- f. Law No. 15 of 1992 concerning Brands
- g. Law No. 19 of 2002 concerning Copyright
- h. Law No. 30 of 2000 concerning Trade Secrets
- i. Law No. 31 of 2000 concerning Industrial Design
- j. Law No. 32 of 2000 concerning Layout Design of Integrated Circuits
- k. Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition
- l. Law No. 30 of 1999 concerning Arbitration and Dispute Resolution
- m. Air Transport Ordinance (Stb No. 100 of 1993) jo. Law No. 15 of 1992 concerning Aviation
- n. Law No. 21 of 1992 concerning Shipping
- o. Law No. 37 of 2004 concerning Bankruptcy and Postponement of Payments
- p. Law No. 7 of 1992 concerning Banking with all its implementing regulations.

Correlation of Commercial Law with the Civil Law

The Commercial Law Code has a relationship with the Civil Law Code as explained above that as a result of the codification, commercial law is part or a branch of civil law, but in a more specific form. Thus, the Civil Code becomes a special source of civil law. The relationship between the two laws is the genus (general) and species (special). In such a relationship applies the principle of *lex specialis derogat legi generali* (special law can defeat general law), such a provision can be found in Article 1 of the Commercial Code which states, "The Civil Code. As long as it is not regulated otherwise, it also applies to things that are also regulated in this book."⁶

In Switzerland, there are two regulations for civil law, namely *Zivilgesetzbuch* and *Obligationenrecht*. The meaning of *Zivilgesetzbuch* is the same as the Indonesian Civil Code, especially regarding the law of persons. The meaning of *Obligationenrecht* specifically regulates the law and commercial law or the same as the Commercial Code. While the relationship between the two rules is coordinating and complementary to each other in regulating trade issues, and there is no conflict between the two.⁷

Today, in the Netherlands, there has been the unification of the *Burgelijk Wetboek* (BW) and the *Wetboek* which is commonly known as the New Dutch BW (*Nieuw Nederland Burgelijk Wetboek*). With the unification of these two things, the division between civil law and commercial law no longer exists. Because the systematics of the *Nieuw Nederland Burgelijk Wetboek* or the new Dutch BW consists of:

1. Book I on Person and Family Law (*Personen en Familierecht*)
2. Book II About Legal Entities (*Rechtspersonen*)

⁶ R. Small, J. L. (2000). Randomized Controlled Trial of Midwife Led Debriefing to Reduce Maternal Depression after Operative Childbirth. *British Medical Journal* , 321.

⁷ Clark, N. W. (2008). *Courting Conflict ? Justice, peace and the ICC in Africa*. London : Royal Africa Society.

3. Book III on Property Law in general (Vergomensrecht in het Algemeen)
4. Book IV About Inheritance Law (Efrecht)
5. Book V About the Law of Matter (Zekelijk Rechten)
6. Book VI on Bonding Law in general (Algemeen Gedeelte van het Verbimssenrecht)
7. Book VII on Special Agreements (Bijzondere Overeenkomsten), and
8. Book VIII On Traffic and Transportation Advice (Vankeeramiddelen en Vervoer).

In contrast to Indonesia and countries with civil law systems, in countries that adhere to the common law system, such as the United States, England and Australia, the regulation of business law or commercial law is not codified in the Code. However, it is only rooted in the habits that apply in the community without having to have written provisions as a reference for legal rules.⁸

Conclusion

The history and development of commercial law in Indonesia is inseparable from the history of the development of legal science in other European countries, in the sense that the development of commercial law in Indonesia is strongly influenced by legal developments in other countries, especially those that have direct relationships. Indonesia as a country that was once colonized by the Netherlands, then the policies in commercial law and civil law cannot be separated from the policies that occur and are implemented in the Netherlands.

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Generally, the development of commercial law is divided into three stages, namely the *lex mercatoria* period in the Middle Ages, the *lex mercatoria* period of incorporation into the national legal system, and the new *lex mercotaria* period.¹⁰

The Dutch Commercial Code of 1838 became an example for the creation of the Indonesian Commercial Code of 1848. At first, commercial law was based on civil law. However, over time the commercial law codified the legal rules so that the Commercial Law Code was created which is now independent or can be said to be separate from the Civil Law Code.

⁸ Robinson, P. H. (2011). Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background." 55.

⁹ Melanie Glow, K. V. (n.d.). Children Affected by Armed Conflict and Displacement the Right to Peace: Children and Armed Conflict. Retrieved September 9, 2020, from <http://www.crin.org/BCN/details.asp?id=11689&themeID=1004&topicID=1026>

¹⁰ Harry L. Roque, J. (2005). The Criminal Nature of Recruitment of Child Soldiers Under International Humanitarian Law. 1 ASIA PAC. Y.B. INT'L HUMAN. L., 37.

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