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Contract as implementation of human rights and the principle of freedom of contract in realizing human welfare

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Abstract
Freedom of contract is a universal legal principle of agreement. The legal principle is also embraced in the Indonesian treaty law. That principle stems from the individualist understanding that gave birth to free-market economic politics to pursue individual well-being. The application of the principle of freedom of contract becomes a problem for the state of Indonesia as a welfare state, whether its application is driven to achieve social welfare or individual welfare. This article is an analytical normative juridical study. The results of the study concluded that freedom of contract is actually related to the existence of human beings who have human rights which are fundamental rights that include freedom, the right to life, and property. It all concerns the dignity and dignity of human beings related to quality of life. What this latter mentions is essentially about well-being. Thus, contracts are legal means used to pursue welfare, be it personal welfare or welfare of co-living or social welfare.

Keywords: contract, human rights, human welfare

Introduction
Man is the most perfect creature in the world. Human perfection can be understood because he has reason and will. Man with his mind can do the investigation, explanation and choice. Therefore, human beings, naturally, have fundamental rights, namely freedom, the right to life, and personal security. That fundamental right is in principle human-centered. That right is part of the positive law that is the main topic of its regulation in the law and it is a principle of protection of rights law often formulated widely, which is part of the national constitution or international human rights treaties. (H. Patrick Glenn, 2000)
In the reality of human life, that fundamental right interacts with one human being to another; one of them is in the form of a contract. Contracts containing fundamental human rights can be seen from two criteria. First, it is seen from the formal side. Second, in terms of substance. Formally a fundamental right is a right specified in the provisions of the constitution, while in substance the right is a norm that aims to guarantee human dignity or a fundamental right to the protection of personal autonomy. (Chantal Mak, 2007).
The building of contract law in general, including Indonesian contract law, is refuted by the principle of freedom of contracting which is supported by the principle of consensualism and the principle of binding power of the agreement. In Indonesian contract law it can be found in Article 1338 of the Civil Code which says: "all agreements made legally apply as law to those who make them. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. The agreement must be executed in good faith".

Research Methods
This research is included in the normative analytical juridical research, which is a study based on critical thinking on legal norms related to freedom of contract, in Human Rights to realize human welfare. This research tries to reveal about the meaning of contracts as the implementation of human rights and the principle of freedom of contract to realize human welfare. In relation to normative juridical research, the object is in the form of legal principles, legal methods, systematic law, legal theories and laws and regulations related to freedom of contract and human rights. This study uses secondary data obtained through literature studies. Secondary data used include primary legal materials, namely the Indonesian Constitution 1945 [27], the Civil Code, the Universal Declaration of Human Rights 1948 [26], Law No. 39 of 1999 [29] on Human Rights.

Discussion
Contract as human rights is a classic opinion as stated by Grotius that the right to enter into a contract is one of human rights. On the other hand, Thomas Hobbes explains contracts are methods by which the fundamental rights of humans can be transferred. As with the laws of nature that emphasize the need for freedom for man, it applies to contracts. (Sutan Remy Sjahdeini, 1993) [16]
Contracts as a means of implementing fundamental rights are seen from three things. First, contracts are built on the basis of freedoms possessed by humans. Freedom has been accepted as a principle in every social life, as well as in primitive living associations. (Asser-Rutten II, 1987) Freedom itself as a form of ability to desire, choose, decide or as no outside interference. Emeil Durkheim explains that the only bonds that deserve a contractual designation are the bonds that individuals have desired, and which have no other origin than the manifested of free will. On the contrary, any necessity that does not get the consent of both parties in no way contains a contractual nature. (A.A.G. Peters and Koesriani Siswosoebroto, 1988) [2] Freedom becomes the main principle of contract law; and this applies to all the legal systems that exist in the world. That principle is called freedom of contract. (Moch, Insaeni, 2013) [10]
Second, contracts are built as a form of wealth exchange. Contracts as a form of mutually beneficial exchange have been accepted since the very simple human civilization until

the modern century today. (P.S. Atiyah, Promis, 1981) [12] J.H. Niewenhuis as quoted by Agus Yudha Hernoko mentioned that the ratio of contracts goes from the purpose of exchanging fair wealth. (Moch, Insaeni, 2013) [10] Contract as a form of exchange is the idea of cooperation between mankind. (Karen Leback, 2012) [8] Emeil Durkheim said the contract was a juridical form of exchange. (A.A.G. Peters and Koesriani Siswosoebroto, 1990) [1]

Third, contracts are born to build human quality of life. It is closely related to ownership. Catarine Krause mentions the right of ownership with regard to a decent standard of living and a dignified life for everyone. (Ifdal Kasim and Johannes de Masenus Arus, 2012) [6] Therefore, as Hugh Collin mentions, contracts are not only recognized as a way of distributing wealth, and building the strength of relationships, but most importantly provide an opportunity to realize the meaning of life of the parties as human beings who are entitled to live. (Luanda Howthome, 2017)

From what is explained above, exactly what is expressed as quoted by Agus Yudha Hernoko who explains the contract has three purposes. First, the contract must be implemented (forced) and provide protection against a reasonable expectation. Second, the contract seeks to prevent an unfair increase in wealth. Third, the contract aims to prevent certain losses in the contractual relationship. (Moch, Insaeni, 2013) [10]

The three things related to the contract above actually describe human civil rights that in Indonesian contract law can be understood through Article 1, Article 2, and Article 3 of the Civil Code. The three provisions of the article as the main axis of civil rights, one of which is described in Book III civil code on the alliance. Save the author, when examined carefully and critically the three main axis of civil rights in the Civil Code similiar with the norms of international human rights law as contained in Article 3 The Universal Declaration of Human Rights 1948 [26] (UDHR): "everyone has the right to life, liberty and security of person". The author believes that the provisions contained in the Civil Code include contractual laws stipulated therein, basically a form of implementation of individual civil rights or human rights through the law. The goal is nothing but for civil rights as human rights to be guaranteed adequate protection, respect, and fulfillment in the association of individuals in the midst of society directed at improving and developing the quality of human life.

Collin learned from the development of a number of European jurisdictions explaining three things that significantly affect the impact of human rights on contract law in Europe. First, it relates to the conception of freedom of contract supported by constitutional rights. Second, the right is considered fundamental enough to direct power to the evolution of contract law. Third, it relates to the mining of balancing mechanisms to conform to private law. This is due to the impact of human rights provisions, especially contractual laws made by individual civil parties vary according to the understanding of opinions between the court and legal practitioners (lawyers). (Hugh Collins, 2011) [20].

Freedom to make contracts is directly related to freedoms relating to freedom of human integrity as can be interpreted from the phrase "no one can be imprisoned" from Article 11 of the International Covenant on Civil and Political Rights as an instrument of International Human Rights which in its complete saying "no man can be imprisoned solely on the basis of his inability to fulfill an obligation arising out of an agreement. (Munir Fuady, 2013) [11] From this article it can be said, that freedom makes contracting as human rights. In other languages Badrulzaman explains the principle of freedom of contact applies universally because it comes from the laws of nature and the realization of free will as a human rights emanation. (Mariam Darus Badrulzaman, 2016) [9] A lengthy discussion of the right to freedom of contract as a grant of natural rights in America was found in Spencer's Justice. (Roscoe Pound, 2017) The term freedom of contract itself in America was first invented in Lieber's Civil Liberty and Self-Governmen in I853. (Roscoe Pound, 2017)

The strong argument for the universal nature of freedom of contract can be seen in The Unidriot Principles of International Commercial Contracts (UNIDROIT) compiled by The International Institute for the Unification of Privat Law in May 1994 in Rome. (Sri Rahayu Otoberia and Niken Savitri, 2008) [15] This principle as the basic principle of international trade. That freedom is the "cornerstone" of an open, market-oriented and competitive international economic system. (Taryana Soenandar, 2016) [18] The rationale of the regulation of the principle of freedom of contract in The UNIDROIT is that if the freedom of contracting is not regulated, then there can be distortions, but on the contrary if the arrangement is too strict, it will lose the meaning of the freedom of contract itself. UNDROIT strives to accommodate various interests that are expected to provide solutions to the problems of differences in the legal system and other economic interests. (Taryana Soenandar, 2016) [18]

The principle of freedom of contracting was originally set against the background of individualism embryonally born in Greek times, continued by the Epicuristens and flourished in the renaissance through the teachings of Hugo de Groot (Grotius), Thomas Hobbes, John Locke, and Rousseau whose peak development was achieved in the period after the French revolution. At the end of the XIX century due to the insistence of ethical and socialist understanding of individualism began to fade, especially since the end of the second world war. This understanding is judged not to reflect justice. The public wants the weak to get more protection. Therefore, free will is no longer given absolute meaning, but given a relative meaning, attributed always to the public interest. (Mariam Darus Badrulzaman, 2016) [9] In the XX century there was a trend of changes from free contracts made by the parties to contracts governed by the government. (Munir Fuady, 2013) [11] In further developments, control over the operationalization of the principle of freedom of contract is carried out by the legislature through many laws in several countries including Indonesia; and last but not least control is also exercised by the judiciary.

The principle of freedom is important to understand because it relates to three things. First, freedom of contract can advance general well-being, economic efficiency, or some other purpose. An instrumental approach to assessing freedom of contract is characteristic of economic law analysis. Second, the freedom of the contract may be valuable in its own right; regardless of its instrumental value, freedom of choice may be important. Perhaps people are happier when they can choose for themselves, or perhaps having more choices is a good thing, regardless of

their influence on efficiency or well-being. Third, freedom of choice as a doctrine in contract law. The doctrine assumes that the contracting parties as autonomous parties are free and equal in the sense that they have the ability to enter into contracts. (Hamish Stewart, 1995) [19]

Freedom of contract as the basic principle of contract stems from human freedom, whose operationalization implies as the norm of law; through that freedom man is free to make contracts that have the effect of issuing legal norms whose practice power is binding and coercive for the environment itself. In various legal literature contracts have become a general understanding of the law states the contract as a law like a law. So, normatively the contract is analogous to the law. However, it is necessary to understand by speculative critical thinking, between contracts and laws there are differences when viewed from several aspects namely (a) the subject (b) authority authority, and (c) the scope of its validity.

Aspects of norm-forming subjects. The legal norm born of a contract is based on the actions of a private individual prevailing in the social life of society conducted on the basis of the individual having freedom as a fundamental right of the individual. The act was intended to make rules for the internal circles of those who made it. (Abdul Munif, 2016) [3] The act of making a contract is a humane act (*actus humanus*) an act that contains the value of humanity, not human actions (*actus hominis*) as an act in general as a movement of nature that is free of value. The individual's freedom to perform the act of making the contract is obtained naturally or naturally because man has reason and will. Man must have the freedom to take action. So, the concept of freedom as the basis of the development of rights. Freedom is a concept that plays an important role in the fight for human rights. (John Stuart Mill, 1998) [7]

Rutten describes the freedom to make contracts based on the individual as the source of all the well-being and will of the individual as the basis of all power. Consequently people are free to bind themselves to others when and how they want to. (Purwad Patrik, 1986) [14] On the other hand, Scholten describes contractual relationships as private human relationships known as civil or private relationships. (Paul Scholten, 1992) [13] In contrast to the legal norms in the form of laws the subject of its maker is the state as a certain entity in the form of a common identity of human life. The legal norms of laws made by the state are based on the freedoms that the state has, where the freedom of the country is obtained from social contracts (social agreements).

Aspects of norm-making authority authority. In the sphere of civil rights that do not contain political power. Legal norms established and established under contracts are enforced on the pure initiative of their makers. A new state can be present if the parties wish. The position of the state here as a tool for the parties if the legal norms do not work as they should. Individuals can make their own rules that they think are good, but subsidy, legislators show what will happen if the rules of self-formation do not exist. (Paul Scholten, 1992) [13] On the other hand, Kelsen explains the creation of legal norms by individuals in contracts relating to legitimate self-determination, i.e. autonomy, exists only in a very limited sense; for no man can create a right for himself, for one's right requires the obligation of another. (Hans Kelsen, 2007) [5] Legal norms with the character of the law are established by the state as political entities whose authority comes from the political rights of individuals through social contracts. Legal norms in character are enforced on pure initiative by the state for the sake of public interest, order and tranquility.

Aspects of norm practice. Legal norms born out of its contractual power in the internal environment are binding and coercive for its own makers. The form of legal norms is concrete individually, while the practice of legal norms is generally applicable, binding and coercive for everyone including its makers. The form of legal norms is abstract and general.

J. Cartwright mentions there are two visions of freedom of contract. First, a vision of a market where freedom of contract as a legal and commercial institution to support free and open markets and, more specifically, the legal role of contracts primarily (or at least generally) to support and facilitate market transactions. Second, the voluntary vision of free contracting, this can be seen as a moral principle. This principle as the basis of justification makes the choice of the individual to enter into a contract. This vision of freedom of contract is often expressed in Continental European law with the phrase "contractual autonomy" derived from the philosophies of Rousseau and Kant. (Tedoradze Irakli, 2017) [25]

Mariana Semini explains the autonomy of free will in contracts contains three important aspects. First, the philosophical aspect is based on Russeou's view, that humans are naturally free, therefore should be free to build any legal relationship. Proponents of this view accept the so-called social contract. According to frugal authors the essence of the theory of will makes the contract its root is freedom and it becomes the center of the main study of philosophy, (T.S.N. Sasrty, 2011) [17] it is because it is the foundation of human values.

Second, the moral aspect in which each contract must meet justice. Where there is a contract, there is justice. The contract must be in the interests of both parties, therefore both parties must build some kind of relationship with each other in order to achieve something that will benefit them. The parties who build the contract must be honest with each other, balanced and impartial based on common sense.

Third, the economic aspect. Freedom of will must be in accordance with the achievement of economic interests, because this material or not material from the contracting party. In other words, these interests must be accompanied by increased quantity of production, price increases, cost reductions, creating competition and others. (Irena Lavdari, 2017) [21].

Conclusion

From what is explained above, freedom of contract is actually related to the existence of human beings who have fundamental rights, namely freedom, right to life, and property. It all concerns the dignity and dignity of human beings related to quality of life. What this latter mentions is essentially about well-being. Thus, contracts are legal means used to pursue welfare, be it personal welfare or welfare of co-living or social welfare.

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