

Understanding of Breach and Tort Law on Academic Discourse and Judicial Practice

Suhendro

Universitas Lancang Kuning, Pekanbaru, 28265, Indonesia
Email: suhendro59@icloud.com

Abstract: In the system of Civil Law, including Indonesia's system of law, contract and tort law are regulated in one generic agreement. Regulation in one generic agreement lead to an overlapped the understanding between breach and tort law. Overlapping understanding of breach and tort law occurred both on academic discourse and judicial practice. Focus issues: First, differences between breach and tort law. Second, benchmarks should have been established by courts to determine the boundary between breaches and acts against of law in contract. The type of research is normative law research. By using this type of research, conclusions could be drawn are: First, as conceptual juridical "house" of breach is not performing the contractual obligations, while "house" of tort law is not performing the non-contractual obligations. Second, on the searching of the cases, found the facts that court through its decisions did not have deeper and comprehensive understanding on the meaning of breach and tort law. Courts could not determine the benchmarks to determine the boundary of breach and tort law. Recommendation, First, should be an affirmation of the boundaries between breach and tort law, by returning each of breach and tort law institutions to their "house". Second, the needs of guidance for judges to determine the boundary between breach and tort law through leaflets and Supreme Courts Training.

Keywords : Breach, Tort law, Contract

1. Introduction

One of the problem in contract laws, more broadly in the law of engagement are related to the overlapping the understanding between breach and tort law. The problem occurs not only on academic discourse, but also in the practice of law enforcement, especially juridical practice.

These problems not only occur in the Civil Law System but also in the Common law System. Although there are the differences in the regulatory system of breach and tort law on Civil Law system and Common Law system, yet often encounter issues of overlapping on understanding of tort law and breach.

Civil Law system places contracts and tort law in one category or generic which is an agreement. In other words, there is unification of regulatory between contract and tort law in agreement. Historically Indonesia's law system was influenced by civil law system, also known the unification between tort law and contract in one generic or category, which is agreement. This unification of regulatory created an overlapping understanding between breach and tort law. On academic discourse, there are differences opinions about the boundary of breach and tort law. A. Lakshminath and M. Sridhar's view that tort law and breach are different. Catherine Elliot and Frances Quinn also share the same view. As well as Agus Sarjono that declared between them there were a very clear difference

The view that stated there was no different between breach and tort law, delivered by Arthur S. Hartkamp and Marianne M.M. Tillema which declared there were no fundamental difference between tort law and breach. The same opinion also declared by Asser-Rutten. Academically there are

difference between breach. Some declared that breach is not fulfilling the obligation on the agreement that include both contract that made out of an agreement or legislations. However, some stated that breach's boundary is not fulfilling the obligations that made out of an agreement. In addition there were some content similarities that contained in the concept of breach and tort law.

The differences on understanding in concepts of these two legal institutions, had impact on the judicial practice. The boundaries of breach between breach and tort law are still confusing and not clear on the appliance on civil suit in court. On the judicial practice the overlapping understanding on the court's decisions especially in cases of breach and tort law related to contract. Facing the problem of an overlapping understanding of breach and tort law, needs for benchmarks established by the court on determining the boundary between breach and tort law. The problem that became an object of this research is the different between breach and tort law. Then its proceed with search of a benchmarks that should be used by court to determines boundaries between breach and tort law.

2. Research Methodology

Type of this research is normative law research, with statue approach, conceptual approach, case approach. Using primer, secondary, tertiary law materials. Technique of collecting data is using literature study and documents then using juridicial qualitative as technique analysis.

3. Differences between Breach and Tort Law

Agus Sarjono stated on the academic discourse, the discussion about tort law often intersected about the concept of breach. This happens because these two concepts allows penalty in form of "compensations". The extent of the concept of tort law that often removes its boundaries with breach, like if breach is also tort law. Eventhough between these two there are a very clear differences. The breach is closely related to the problem of performance. The meaning of performance in the context of civil law system is comprehensive, not only related to contactual obligations, but more of that, performance related to the obligations that arises from an agreemenr. According to article 1233 of the Indonesian civil code, the source of an agreement are agreements and laws. Performance not only related to the contactual obligation but also includes the obligations which arise from the legislation. Issue of this performance that made one of the factors of overlapping the understanding of breach and tort law.

On the narrow meaning performance is fulfilling the obligations which arise from an agreement relation. These obligations are contractual obligations. Then these contractual obligations may come from legislations, contracts, or an agreement that made by parties, propriety, or custom.

Breach occurs, in circumstances between performance and contra performance will be exchange, but under certain conditions the exchange of performance did not happened as wanted, so it calls breach appears. The term of breach comes from the Dutch *wanprestatie* which means poor performance. Someone equated breach with a violation of contract.

In general breach means, debtor did not accomplish the obligation that arise from an agreement. In particular, breach leads to violation of contractual obligations. Not reffering to the subjective's rights of obligation which determine by law in general. This violation is the tort of law. Especially breach is the violation of contractual rights. In other words, breach means that debtor did not accomplish his obligations which arised from contract. Breach in context of legal agreement have meaning that debtor did not accomplish his performance nor accomplish as wanted that made creditor did not get what have been promised from the debtor.

The general understanding about breach is implementation of the performance that were not on time or not done properly. In other words breach is the violation of contractual obligations. Contractual obligation is the obligation that were born from contractual relation between debtor and creditor. That contractual obligations may come from legislations, contracts (agreements), propriety, and customs. So breach is not accomplish its contractual obligations. Tort law is source of agreement that were born by legislations. Terms of tort law came from Dutch that called *onrechtmatige daad*. Normatively in Indonesia always refers to article 1365 Civil Code. Formulation of norms on article 1365 Civil Code is more structure norms than the substance of the provision of law that already complete. Therefore the substantiation of provision on article 1365 Civil Code always requires materializations outside the Civil Code. Therefore, tort law develops through courts decisions and legislations.

From the provision of article 1365 Civil Code, could be drawn the elements of tort law. J. Satrio stated that the elements of tort law that concluded from article 1365 Civil Code are, 1. There are the actions; 2. The actions should against the law; 3. The doer have guilt element; and 4. The action causes disadvantage. The elements of tort law are same with the elements of breach which delivered by Ridwan Khairandy which are, 1. Should have debtor actions; 2. The actions are against the law; 3. The actions occur because of guilt; 4. The guilt caused disadvantages. Eventhough the elements are same, but between breach and tort law in the principal is different. Against law in breach is not accomplish its contractual obligations while against law in tort law is not accomplish its non-contractual obligations which is the agreement that were born from legislations.

3.1. The Absence of Benchmarks in Juridicial Practice

From the searched of court decisions documents, found the decisions that are controvercial and inconsistent in other words, courts has not yet be able to determines a benchmarks to determining the boundaries between breach and tort law. The absence of benchmarks could be seen in judges decisions on suit cases which are: the accumulation of breach and tort law, the decisions are some accepting and some did not accepting the lawsuit. Disqualified case as tort law that should been breach.

4. Conclusions and Recommendation

As juridicial conceptual “house” of breach is not accomplish the contractual obligations, while “house” of tort law is not accomplish the non-contractual obligations. The searching of cases has been found the facts that court through its decisions did not have the deeper and comprehensive understanding about the meaning of breach and tort law. Court also could not determined a benchmarks to determining the boundaries of breach and tort law yet.

There should be explanations about the boundaries of breach and tort law, by returning each legal institutions of breach and tort law to its “house” The necessity of guidance to judges to determines the boundaries between breach and tort law trough leaflets and Supreme Courts training.

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