# Deviation Article 1320 against BW to provide legal protection in the agreement for Online Transportation[1]

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## INTISARI

Pasal 1320 Boergerlijk Wetboek (BW) adalah aturan yang memberikan rambu-rambu keabsahan suatu perjanjian yang salah satu poinnya mempersayaratkan kecakapan bertindak sebagai syarat sah perjanjian. Dalam teori pelanggaran terhadap syarat ini berakibat perjanjian dapat dibatalkan sehingga prestasi masih dapat dilaksanakan selama tidak ada keberatan dari pihak yang belum cakap bertindak. Permasalahan penelitian bukan pada boleh tidaknya substansi pasal 1320 tersebut disimpangi tetapi permasalahannya adalah substansi pasal tersebut menjadi teks tanpa arti karena syarat kecakapan bertindak sudah banyak disimpangi dalam perjanjian jasa transportasi online, karena mempertahankan kecakapan bertindak sebagai syarat sah perjanjian justru menjauhkan anak dari perlindungan hukum terutama dalam perjanjian transportasi online. Penelitian ini adalah penelitian doctrinal. Berdasarkan hasil penelitian dimana dalam penelitian tersebut ditemukan anak yang masih usia sekolah hampir seluruhnya menggunakan jasa transportasi online melalui handphone yang mereka miliki.

**Kata kunci**: Penyimpangan, Boergerlijk wetboek, Kecakapan bertindak, Perjanjian transportasi online

## ABSTRACT

Article 1320 Boergerlijk Wetboek (BW) is the rule that gives signs an agreement validity that one of them stated that legal capacity as term of agreement In the theory, violation of the terms of this agreement may be canceled so achievements can still be implemented as long as there is no objection from the parties that incapacity to act in law. Problems of research not on whether or not the substance of the article May 1320 has been broken but the problem is the substance of the article into the text without meaning because the terms have been violated in the service agreement transport online, because maintaining legal capacity as agreement terms thus distancing the child from legal protection, especially in the transport agreement online. The research is the research of doctrinal. Based on the results of research on school-age children almost entirely using transportation services online by cellphone them.

**Keywords**: Deviation, Boergerlijk wetboek, legal capacity, agreement of online transportation.

[1] This article is a conceptual idea

## A. Introduction.

Children as part of the young generation are the successor to the ideals of the struggle of peoples and human resources in the future. To realize the quality of the human resources and unscrupulous Indonesia, needed guidance and protection continuously for the sake of maintaining the survival, growth, and development of the physical, mental, social and the protection of all the possibility that will endanger them (children) and in the future

Legal protection of the child is the right of every child, therefore it has become a liability for the parents, the community and the Government to provide protection on children, bearing in mind the child still had limitations in the keep and protect him. The child as a subject of law is in a transition period that is filled by the turmoil of physical, psychic and social at a specific age group will be wading through life very easily influenced. In addition children now have a distinctive lifestyle and have its own characteristics, namely has the appetite to want to know as an embodiment of self-identity.

Currently, online transportation has become the ideal choice transportation of community for having the certainty of pricing in the use of the services. This transport is not only used by adults but children participated because it's easy and cheap. This fact makes the Community break rules which have been determined by article 1320 BW where in this article states that the terms of the legal agreement are both sides should have the legal capacity that was given to adults only. Deviation towards this provision is character urgently because this provision has been not given legal protection toward children do a transaction of online transportation.

## B. Research Methods

This research is the legal research of primary legal materials with doctrinal i.e. Boergerlijk wetboek. Secondary legal materials include books, journals, and research relevant to the research problems. This research uses the approach of law and conceptual approach.

## C. Discussion

When people discussed the implementation of the law, then it is generally people will look at the existing regulations as a foothold to do or not do. People who need to do the act but in the norms or regulations is prohibited would be hampered the implementation of his/her interests. Those who obstructed this importance can only be let go and accept the contents of the regulation. An example implementation of the interests that the law hamper his/her interest are online transportation agreement at children because it is still overshadowed by the fear of cancellation of the agreement.

Each person should not make regulations as a sacred footing in terms of legislation as the initial and final guidelines in every act. The authors agree to the existence of legislation as guidelines in doing or not doing, but keep in mind not all regulations are able to organize any human activities, therefore regulations are just the initial concept that opens on appraisals outside himself.

When an act that its organized was not reflective of the purpose of its creation, then it is natural legislation opens himself to receive science outside of himself in analyzing any problem that is present in the middle of the community. The openness of legislation science other outside herself because the legislation is not perfect and there may be perfectly set up all activities of human life completely. The substance of the legislation is the legal language which is the linguistic symbols. These symbols are only able to be understood by the scientific called theory.

The theory is the creation of human thinking which is sourced in the brain that is still growing from generation by generation so that what we understand as truth in the last century could have undergone a change in the present or the future. Maturity-based on age is defined in regulations on a century ago is the truth because at that time the factors of development of maturity a person in the form of facilities and infrastructure are not yet appearing as at this time.

Anton Susanto Freddy looked at the law in view of semantics stated that the norms have been encoded has specific functions but in understanding the norms have linguistic weaknesses (Freddy, 2005). These weaknesses in the form of the difference in the definition of each interpretation. In view of the semiotics of law, the law is seen as the giver of the message and the community as the message recipient will understand the message based on its needs. Maturity as a benchmark legal capacity will be understood by the community regardless of age but also uses other considerations.

Violet of law is sometimes necessary in order to give legal protection to every subject of law both children as well as those in adults. Joeni Arianto Kurniawan state that:

> “the legal gap potential is increasingly difficult to avoid when a law has been positively formatted... But the legal positivity in a form that is rigid (written) such as this Law is actually the main principle in the culture of Civil law systems that have problems in it. because it triggers problems in the Indonesian legal space ... The law has advantages in fulfilling legal certainty, but it also has weaknesses because it will be inflexible, rigid, and static. Writing is the limitation and limitation of a law logically will bring the consequences of the lagging substance" (Kurniawan, 2007)

Understanding the above in line with Forsberg Maman Suherman stating that in Civil law systems, there is a culture of basing itself on legal positivism philosophy (Suherman, 2004). The understanding of culture embedded in the legal system of civil law brings legal situation favors the one purpose only, namely legal certainty of law. So Aaron Hadiwijoyo suggests that:

> "In Civil law systems, there is the concept that the primary purpose of which is targeted by the law is not justice but a certainty, because the philosophy of positivism prioritizes the things nature is clear and definite (positive), above all with the reason that the only thing that is certainly can be used as a measure of truth."

Other thinkers, Lili Rasjidi and Ira Thania stated that culture of law civil systems always identified with the law so that the only source of law is the law caused just the act alone to shape laws that can fulfill positivistic criteria (Rasjidi, 2004).

Based on the description of the authors above, the application of the law by using positivistic philosophy always collides on the situation or situation that is not expected by the law itself, namely the gap between law and reality. The gap is interpreted as an unsynchronized legal substance with implementation in the field. The gap between legal substance and reality in the opinion of the author can create legal deviations, or it can also create a barrier for someone to carry out his interests.

Someone who is hindered by his individual interests because the consequences of applying the law in the field of civil law are mostly only passive in the sense that he is only resigned to taking it for granted while waiting for a certain time so that his interests are permitted by law to carry it out. In a state of resignation accepting this provision, there is a hidden legal problem because only the negative effects are felt by the person concerned without being able to do more.

Legal thinkers who criticize the culture found in the civil law system have provided a general description of the negative effects of law when applied rigidly (according to the text). The flow of legal positivism always carries out legal construction through the understanding that law is a separate object of study so that the legal construction of its application is also closed. The clear understanding of the law as an object of its own study does not mean that the law is integral to the use of methods in various other study disciplines but instead, the use of legal uses can use a variety of study disciplines outside the law, this is called a multi-disciplinary approach. Humans who use the law must

view the law as one of the social phenomena, each individual must place the rule of law in a variety of diverse situations and conditions. This argument cannot be separated from the reality which shows that the rule of law is not born of a vacuum, meaning that a rule of law is only born from a social event which may be motivated by interests. This fact is in line with the role and nature of the law itself as a rule in community life. In short, it can be said that law in the context of a modern country is born not to limit individual freedom but to facilitate the freedom of each individual including the freedom to save independently for children in the bank to achieve the protection of children's rights.

Legal experts themselves contradict each other in the application of the law. The positivism which is widely criticized is different from that of utilitarianism, ethical flow, and many other schools. This conflict raises the question of what is law? This question is the most basic question and has produced a variety of answers that in groups often even drop each other. This question is very important in the study of legal education so that it can be concluded that almost all legal philosophy literature provides its discussion. The urgency of this question cannot be separated from the mainstream discourse which demands that a legal order (law) be seen as having no legitimacy when the law does not have the requirements demanded by law. For example in Germany during Nazi or South Africa during Apartheid. Even under certain circumstances, this question can provide guidance on questions related to the law that applies to various practical problems.

John Austin put forward the law as a set of orders either directly or indirectly, by a governing body or individual, to a member or members of a political community where the authority is primary. The definition given by Austin is named as command 'command theory' which originated from Thomas Hobbes. This theory initially began to be seriously developed by his teacher Austin, Jeremy Bentham, who in his youth was dissatisfied with the views of Sir William Blackstone who still adhered to natural law which he considered too speculative (Iskandar, 2011).

The difference between the two schools cannot be separated from the belief that the law originated from provisions previously contained in the tradition of natural law itself. Humans are not the creators of the law but only limited to legal inventors who previously existed in nature.

The above belief gives the consequence that man-made law must be in accordance with natural law as the highest law for humans. Natural law always includes morals in its studies. This is reasonable because generally people who feel cheated by others always demand justice in the law. Therefore it is not

surprising that the community always juxtaposes the law with morality. The hope of the people who expect moral inclusion in the law is rarely realized because the principle of legality always expects the presence of legal certainty in the life of the state. Then the legality principle equates immoral and illegal actions (Tebbit, 2005). The difference between law and morality cannot be separated from the fact that both are different elements. Law is basically a series of rules that are monopolized by prohibitions. For some issues, violations of the law can be accompanied by violations of morality. It is very important when the law is seen to function as a minimum morality based on the need for mere restraint.

The explanation above explained that the law is different from morality but morality is not possible to function as a guide or aspiration to form a law. Even Dworkin argues that the separation of law and morality is impossible because when we accept a principle and rule as law, we are unable to maintain the difference between the law in reality and what should be. Law from the first time it was known was seen as a representative of rules that were more eternal and sacred. Aristotle in his work the constitution of the Lacedaemonians could be considered as the first work on the political management of a country that had been carried out by humans. In short, Aristotle did not make the law a separate discipline. His laws and views are only part of other major themes such as ethics, politics, and rhetoric. This view is in line with the trend that dominated the thinking of the period which was then followed by the Romans. The rule of law at that time was not the starting point for argumentation. What is the main concern for their argument is the essence of justice?

New legal construction can be done through legal reform. Indonesia is more inclined to carry out criminal law reform but forgets civil law reform. This was stated by Dikdik M Arief Mansur & Elistris Gultom:

"various parties from legal practitioners, academics, and government, through the Criminal Code, one of the triggers for changes in criminal law is the advancement of information technology that requires all human activities to take place quickly, transparently and without borders..''(Arief Mansur, 2005). Today, renewal of criminal law is part of criminal law policy [2] has been cultivated and is still being processed. The new construction of law through legal reform has experienced inequality because only criminal law is carried out by the government. Whereas legal reform does not only cover criminal law,

[2] Barda Nawawi Arief, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan*, Bandung: PT. Citra Aditya Bakti. 2005, hlm 3

but civil law requires renewal because the origin of the colonial inheritance and the authorization were centuries ago.

Legal capacity in the context of civil law is very urgent to do renewal or re-construction so that its implementation is able to provide protection of interests on all legal subjects through justice felt by the community. Legal reform has two meanings, the first meaning is interpreted as legal reform and law reform.[3] When the law is conceptualized as a system, the law becomes a process for law enforcement itself. legal reform is legal reform through a conscious political process. Legal reform is a progressive and reformative political process. It is at this level that law functions as a tool of social engineering that can be effective through judicial processes or through legislative processes as stated by Mochtar Kusumaatmadja for Indonesian legal development practices[4]

The legal reformative function as a tool of social engineering makes the reformation of Indonesian law still a concept as a legal reform (renewal of the legal system). Legal reforms like this are only limited to legislative activities which generally only involve the thinking of political people who have lobby access. Legal reform as a legal reform has never been successful or has never been proven. With other legal reforms such as this, they have a preference to limit themselves to the renewal of the Law or articles and paragraphs only and seem not to concern the ideological paradigm. Legal reform in this way still limits itself through mere positivistic perspectives. Even though legal understanding of positivistic and rule-based law is not able to capture the truth because it does not want to see and admit it.[5]

Legal review as a legal reform in semiotics [6] law can be said to be unable to follow the participation of many people who are unfamiliar with the law. Communities in the environment that are hinted at by cultural experience and very different language experiences will make it difficult for them to enter discourses dominated by linguistic dominating systems of elite politicians and professional elites who hold the dominance of legal games. Legal reform is

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[3] Soetandyo Wignjosoebroto, *Hukum*:*Paradigma, Metode dan Dinamika Masalahnya*. Jakarta: Elsam-Huma, 2002, hlm 355.

[4] Mochtar Kusumaatmadja, *Fungsi dan perkekmbangan Hukum dalam Pembangunan Nasional*, Bandung: Bina Cipta, 1987, hlm 51

[5] Soetandyo Wignjosoebroto, *Hukum*:*Paradigma…..*, *Op. Cit*

[6] Semotika menurut Soetandyo adalah suatu cabang ilmu mengenai tanda-tanda kebahasaan yang masing-masing tanda itu, entah yang berupa kata-kata yang diucapkan atau dituliskan, entah yang berupa isyarat-isyarat simbolis lainnya seperti warna atau gerakan anggota tubuh, yang semuanya itu adalah hasil konseptualisasi oleh subjek-subjek yang tengah berwacana mengenai realitas yang ditemui dan dialami. Dengan kata lain semiotika adalah suatu prosedur yang terpakai untuk menganalisis suatu dialog guna mengungkapkan pesan-pesan yang tengah dibalikkan oleh para pembincang yang terlibat dalam dialog itu. Soetandyo Wignjosoebroto, *Ibid*

easier to respond to the interests of the ruling elite than to respond to the interests of marginalized people and have a very vulnerable life. Legal reform indeed fights for freedom, equality, and equality in obtaining an opportunity, but all that is only limited to abstract norms and mere rhetoric. In fact, not all legal users have the same opportunity

Legal reform failure triggered the birth of the flow of legal realism in America as a criticism of legal reform. The purpose of the presence of this school is to signify the legal doctrine of the positivists with their legal reform.

Oliver Wendel Holmes state that law *''law has not been logic*: *it is an experience.*[7] According to Holmes, the law is not a closed normative text system. Maintaining the purity of the law by closing the impulse from outside legal influence is a futile and unrealistic effort. Still according to Holmes in a decision is not the logic of a judge who is used to logic deductively mathematically from the base of a premise called formal legal precedent. The ability of a judge to grasp the meaning he interpreted as truth is influenced by the values he believes in, education, experience and so on.

A judge in deciding a case must prioritize values that he believes are the truth, his educational background (continued when his experience and so on. Judges need to know in social, historical and economic aspects in every legal issue. Such a decision directs the law to expediency the law itself. The formation of law cannot be separated from knowledge. Plato considers true knowledge to be a single, unchanging knowledge that is the knowledge that captures ideas. Knowledge of manas is a priori and is inherent in the human ratio itself, which is called an idea or idea. Therefore humans must constantly cleanse their knowledge from changing elements in order to penetrate the nature of reality or ideas. This path of rationality was followed by modern philosophy which, among others, was followed by Rene Descartes, Malebranche, Spinoaze, Leibniz, and Wolf.

They claim that true knowledge can be obtained in its own ratio and is a priori which produces logical, analytical and mathematical statements. Another understanding differs as Aristotle argues that true knowledge is empirical observation. Knowledge is a priori, so the task of human beings observes these elements so that they change and make abstractions of these elements so that they are universally obtained from the particulars. To do this abstraction, humans must cleanse themselves of the changing elements. This path of empiricism gained support from Hobbes, Locke, Berkeley, and Hume. They

[7] Oliver Wondel Holmes, *Law as Prophecy of What the Courts Will Do*. Dalam Surya Prakash Sinha, *Jurisprudence*:*Legal Philosophy in a Nutsheel*, West Publishing. St. Paul Minn,

argue that true knowledge can be obtained through evidence of celestial observation.

A legal renewal, whatever the form must have an element of continuity and change. This means that legal reform cannot be separated from the attachment of history or previous times, both legal material and procedures for implementing the law. (Wahid, 2001) Legal reform requires legal development strategies in which legal development strategies are always related to three legal traditions, namely the traditions of civil law, traditional law traditions, and social-legal traditions (Hakim G, 1988). The state always strives to modernize the law from time to time so that the modernization of law is a strategic choice to support the modern legal mission as a capital instrument (Samekto, 2005).

The establishment of a law, including the law regarding acting skills is colored by three legal sources (Setyowati, 2007) namely: Islamic law, customary law, and western civil law. The third source of law is a place that is used as a reference in making law but unfortunately, these three sources are only glimpsed when the law will be made but it is not meaningful when the application of the law.

The formation of laws both forming new and reforming the law requires a way of thinking as Holmes says, "the life of the law has not been logic, it has been experienced". Thinking that aims to provide creativity to discover new things in the law. Bobbi de porter provides the following creative thinking methods:

1. Thinking doesn't be easy to feel satisfied / don't accept what you are. We may see what others see, but we also have to think about what others don't think.
2. Do not stick to one way, do not be stiff in thinking, take another way to take a goal. Don't always take the same path to the same place.
3. Sharpen curiosity. Make the question why, as a guide to curiosity. Ask why this is something like this (Pasiak, 2014).

Sociological thinking is expected to have an effect on changes in perspective in order to enrich the treasury of legal sociological knowledge so that it also changes the way normative legal thinking and law can play a role according to its function of regulating community life. Written law or law in a sociological view is seen as a human work, the discussion must begin with the community itself. Based on the social reality of a law making, we can distinguish it based on several community models that influence a regulation.

Chambels and Seidman, divide the community into two models as follows:

1. Communities based on the basis of agreement on values held in service will know little about conflicts or tensions within society as a result of the agreement on values that are the basis of their lives In this community model, everyone relies on agreements between citizens. Elements that become life support can be summarized into one integrated unit that is good. In this model lawmakers only set the values that apply in society. Legal action in this society is the realization of values in society. This model only exists in simple societies.
2. Second, the community with the conflict model. In this society with changes and social conflicts. In this model, the community is seen as a relationship, some of its citizens are under pressure by other citizens. These changes and conflicts are common events. Making written law in this society is in a condition of conflict with one another.

The construction of sociologically written law can not only be seen as a sterile and autonomous activity but this work has social origins, social goals, social intervention and has social effects. Written lawmaking is an art to find ways to implement the good value of society.

Satjipto rahardjo stated, the standard and format used in the sociology of lawmaking are not just rationality, logic and procedures but also include sociological entries.
example:

1. The origin of social law
2. Revealing the motives behind lawmaking
3. Seeing lawmaking as a deposit of conflict of power and interests in society The composition of the lawmaking body and its sociological implications. Discuss the relationship between the quality and number of laws made with the social environment in a given period
4. The target behavior that you want to set or change.

Another opinion in rhythm was put forward by Muhammad As ari. AM that treaty law has undergone significant changes that are influenced by developments in information and communication technology. Before the development of information and communication technology affected the law, people were still making agreements with conventional methods, but now the method has turned into super modern (As Ari, 2018).

Actually, the significant change equal natural law theories which priority to justice. Gustav Radbruch state, natural law theories defend justice as law's crown (Tanya, 2010). in the fair Indonesian dictionary is to hold on to the truth (KBBI Online, 2019). Justice is morally an ideal truth condition about

something (Marina in Rinaldi, 2015). Justice can also be derived from the soul of the nation or volkgeist. The soul of the nation or Indonesian volkgeist is Pancasila (Prasetyo, 2016). It has been determined in the Pancasila, namely in the second precept and approved. The justice that Indonesia adheres to gives the meaning that justice must be based on prosperity and support for the whole community. Justice contains universal moral values and is based on world-recognized human rights (Fadhillah, 2007). In principle, everyone wants the principles of justice to be upheld. These principles are built through a plurality of values that apply to certain situations. The plurality of values has a point of equality to achieve a harmonious, prosperous and harmonious society. Aristoteles judged justice through the assessment of desire and reason. Intellect plays an important role because, without reason, one will not have any capacity (Zulkarnain, 2018).

Justice is a part of ethics that can provide the ideal ethical principles that apply in every aspect of society. Thus a person can act fairly to other people in accordance with the provisions in force in the community. Justice is the main character because justice has ethical values.

Currently, a modern era which is influenced by globalization makes the use of technology to be support for rapid business growth because various information can be presented through long-distance relationships using computers or mobile phones based on Android (Hanim, 2011). Deviations from the provisions of written rules do not necessarily constitute violations of the law because the law has a spirit that is justice, without the justice of the written law to only be meaningless writing.

According to Hart, Law system is social rules system. As an example, regulation is commonly considered as an excuse or justification for an action, and violations are generally open. Therefore, the rule of law is normative while custom is otherwise. Hence, in other words, regulation can assert rights and authority while custom does not have the power to adjust one’s behavior. The validity of positive law which is dominant opposes customs in the subordinate area (Summers in Dimyati, 2017)

Legal and moral relations are depicted in the progressive legal theory proposed by Professor Satjipto Rahardjo. In the view of progressive law, law stems from the assumption that ‘'is a law for humans, not humans for law'. Starting from this basic assumption, the presence of law is not for the law itself but something wider and bigger (Wahyudi, 2009).

Progressive law does not prioritize text in written law but prioritizes legal principles that are useful for humans. Progressive law not only applies to the realm of criminal or public law but also applies to the realm of civil law. In the realm of civil law, progressive law can be applied to the legal agreement terms stated in article 1320 of code civil. Article 1320 BW requires four elements that must be in the agreement if the agreement is to be declared

lawful. These elements consist of the parties agreeing to enter into an agreement, the parties are capable of acting in the law (capable of law), the agreement must have a certain object, the agreement has a lawful cause. From these four conditions, there is one very interesting condition to be studied, namely the condition "the parties are capable of acting in law". If people follow written legal texts, not everyone may enter into an agreement but people who are still children (have not legal capacity) are not free to do an agreement.

According to Muhammad As Ari. AM (2018) curently is a technological age because, in every line of activity in human life, technology cannot be separated. Starting from waking up to sleep again humans will come into contact with technology. Before the technology experienced rapid progress, humans still carried out civil law transactions including conventional transportation agreements, which were still facing each other when bidding. But nowadays conventional methods have been abandoned and changed to the way applications are planted on mobile phones. The author gives the name of the agreement, namely the super modern agreement.

The super modern agreement is an agreement that appears in the advancement of information and communication technology whose agreement is made in the virtual/virtual world through technology intermediaries in the form of software and hardware but the implementation is done in the real world. Modern super agreements have characteristics as follows:

1. Appears together with technological advancements. Increasingly developing technology has also varied the number and form of the agreement
2. An agreement occurs without a real meeting of the parties
3. The location of the agreement is unlimited and cannot be limited even though it is an official state because it occurs in the virtual world
4. Because it is through technology intermediaries so that agreements will occur more quickly because the draft agreement feedback is more quickly accepted by both parties
5. Because the intermediary is technology, it does not incur additional costs in the form of commissions for intermediaries
6. Because the agreement happened in cyberspace so the possibility of giving birth to fraud victims for several agreements. For example, online buying and selling agreement.
7. This agreement does not appear in plain view but the impact is felt in the real world.
8. This agreement does not question the legal status of the parties such as the status is competent in the law and has not been competent in the law so that the legal terms of the agreement contained in the civil law stating that both parties must be competent are always violated.

The characteristics of the super modern agreement above provide a sharp difference with conventional agreements. These differences are described as follows:

1. In a conventional agreement was born before information and communication technology experienced rapid progress so that the number and form were permanent while the super modern agreement was born even at the same time with the rapid development of information and communication technology so that the number and shape were dynamic
2. In a conventional agreement, an agreement is born when both parties meet and meet face to face while the super-modern agreement, the agreement is born without face-to-face meetings from both parties.
3. In the conventional agreement the location/place of the agreement is limited by the territorial area of a country while the super modern agreement is the opposite
4. In a conventional agreement, if you need an intermediary, this agreement is the intermediary, while the super modern agreement is technology
5. In conventional agreements, the risk of being deceived is easily minimized while the super-modern agreement is more likely to be deceived because the parties do not meet each other but this only happens in a sale-purchase agreement or an agreement that does not coincide and is not under the company's control.

The presence of this super modern agreement is one form of legal change that occurred due to the influence of advances in information and communication technology. The presence of the super modern agreement is hampered if the procedure for making this agreement uses legal texts contained in article 1320 BW but the agreement becomes a novelty agreement if implemented according to progressive law and/or law that is in line with progressive law.

The presence of a legal action in the field of civil law that is not in accordance with the legal conditions of the agreement, namely the ability to act is always accepted by progressive law because progressive law is not only based on mere rules but also relies on community behavior. Both of these supports (rules & behavior) make progressive law a humane law because it is able to place humans in an essential position so that when there is a change in society the legal users are not imprisoned in the forest legal texts.

Legal texts are legal wilderness that requires serious maintenance. The text of the law as a legal wilderness sometimes requires cleaning so that every person who lives it does not get lost in it. Society is a group of humans that develops from time to time. This development resulted in the community experiencing changes while the text of the legal text is a collection of words

that will not change so that the legal text becomes irrelevant to the development of society at any given time. At this time the legal texts that have long lived in the jungle of law must be discarded in order to create a refresher.

According to (Muhammad As Ari. AM, 2015) states that the ability to act in law follows a barometer of maturity as long as there are no other factors that suggest sideways losing his skills. Every legal subject who wishes to enter into an agreement must obey the written rules as adopted by legal positivistic thinkers. Rigidly compliant will eliminate legal relevance to the dynamics of society because it is not necessarily the contents of written rules in accordance with real life.

Written civil law whose parent rules are from BW give instructions about what can be done and what is forbidden to do. One such acquisition and prohibition is regulated in Article 1320 which states that the agreement is valid if it fulfills four conditions, one of which is the parties have legal skills. In the history of the formation of the Civil Code, it is known that the Civil Code was born and legalized in the Netherlands on October 1, 1838, which was previously planned to take effect on July 6, 1830, but postponed its application because the Belgian rebelled at that time. From the historical flow, the writer illustrates that at that time social changes due to technological developments did not yet exist so that they did not contribute to changes in people's behavior in applying the law. Legal competence which is one of the legal requirements of the agreement at that time is certainly still relevant to the behavior of the community so that the community voluntarily still follows these rules.

The description above illustrates that public compliance with written law is determined by the suitability of legal texts with the needs of the community derived from opinions formed in society. Everyone adheres to the sound of legal texts in the realm of civil law not caused by the threat of cancellation of the agreement but because the text brings justice and/or expediency (*doelmatig heid*)

Actually, the application of legal skills as a legitimate condition of the agreement has often hampered developments that are of good value to the community. One example I took in the agreement to save for children in the bank. the application of rigid legal skills to the promotion of saving children in a bank does not provide a good contribution because the child always does not have the right to be independent to carry out his.

This was stated by (Muhammad As Ari. AM, 2017) as follows:

"Children are legal subjects whose interests must be protected by law. this means that the interests of children as legal subjects must be carried out without obstacles. The other side will be profitable for banks by increasing the absorption of funds/capital from public banks which will strengthen the nation's economic progress as well. The very concrete definition of legal skills only has a limited scope of application because it can only apply to adults. "

Humans since the time of Adam until now always have the desire to get along with people in groups. This association gives birth to actions that are packaged in trading activity. Humans want their trade to run regularly so they need tools to regulate their trade. This device is named law. Law not only functions to regulate but also functions to protect all aspects of activities in the lives of all humans. In Latin, the term "ubi societesibi ius" was born. The term published as an expression that the importance of legal presence in the community, but of course the law in question is present for the welfare of society not to make people get lost in the legal jungle.

Another function of law is to provide protection to every individual in the association of living with humans. Humans obtain legal protection without law between one human being and another human being, capable of acting or incompetent to act is not a legal benchmark for carrying out its protective functions. Humans have developed and experienced extraordinary mindset changes through the advancement of information and communication technology and globalization so that the law must follow these changes through deviations from the legal text if these deviations are able to provide legal protection for individual interests.

Actually, the Law was made to deviate from the customs that took place in the community. This is in line with the opinion (Abreu & Greenstein, 2015) which states that the legislation is retaining practical deviations while assuaging rule-of-law concerns. The making of laws is intended to unite the law in a rule commonly known as legal unification, but this goal actually reduces the power of customary / customs which has long been practiced in the form of human behavior. There are principle differences in the purpose of making laws between States that adhere to the Continental European legal system and the State which adheres to the common law system. In a country that adheres to the Continental European legal system the making of the Law aims to eradicate the total customary law while in the State which adheres to the common law system the making of the law aims to deviate customs / customary because the customs law has a large in the community.

Actually, the purpose of establishing a law is not an important issue as long as all legal users (government or non-government) always re-analyze the existing laws - at least to ask the conscience whether the law has realized justice? Does it reflect welfare? Has it been in the interests of the people? And there are still many other questions that can be asked in the heart so that everyone does not make the law tyrannical for others.

The questions above can only be answered in progressive law and other schools that agree with him. Progressive law positions humans above the law, in other words, the law only becomes a means to guarantee and safeguard all human needs. In this explanation, the law is no longer an absolute and

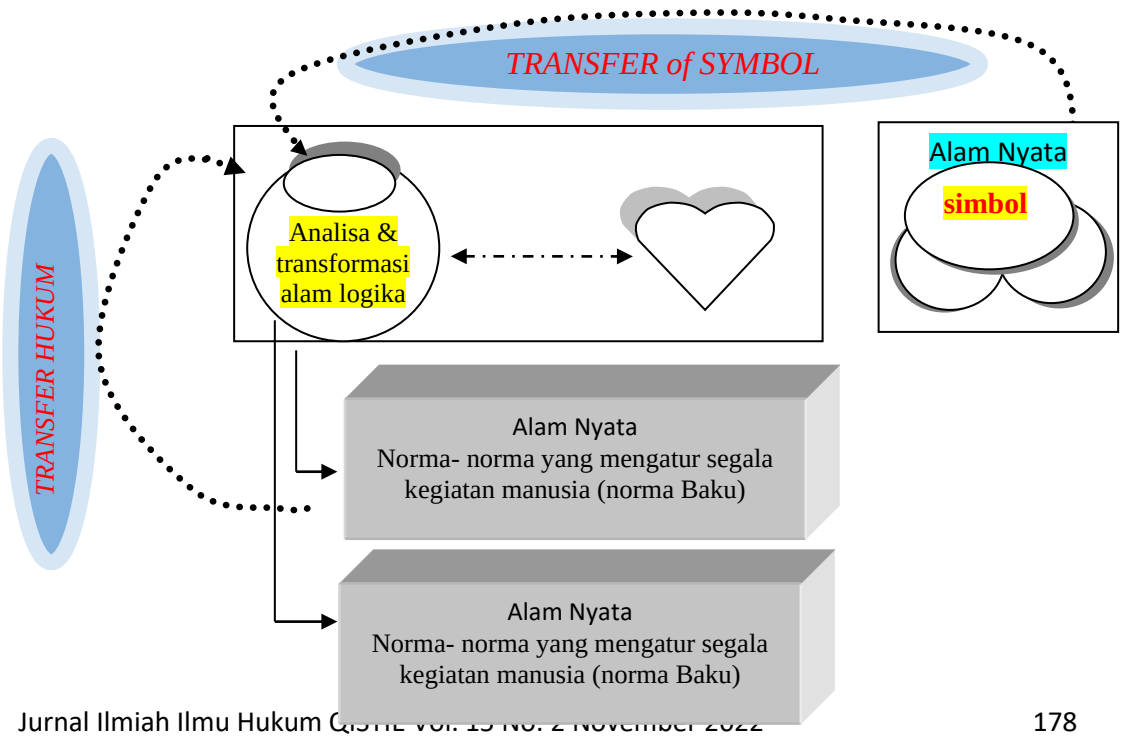
autonomous document so that everyone who applies the law does not get lost in the legal jungle.

Law is not an autonomous and closed institution from outside legal institutions but on the contrary, the law requires assistance from various aspects thus the law must look at the social context which is moving dynamically in determining each case settlement. Keep in mind that when the law is still ius constituendum, the law has two main sources, namely material and formal sources. Material sources are where the law gets the contents or legal contents which are then processed into legal texts. Whereas formal sources are where the law gets legitimacy and binding power so the law gives birth to a legal product known as the Constitution, Laws, government regulations, presidential regulations, ministerial regulations to the lowest regulations.

The author has explained two sources of legal formation. From this explanation there are sources that determine the content and causes of the formation of legal texts, I call this source material. These material sources can come from religion (orders and prohibitions), community culture, public opinion, community behavior and so on. The law before it applies as law owes a debt to the material source so that the law must not reduce the strength of the place where he gets his identity. The law is not forgotten beans on the skin.

Law is not miraculously formed but the formation of law through a process known as a process of transfer symbols and legal transformation. For more details, the formation of law can be seen in the chart below: (Muhammad As Ari. AM, 2017)

Bagan Konstruksi Hukum



The chart above can be explained as follows: The law before birth is a variety of complex symbols. These symbols can be in the form of human behavior or other social symptoms. Initially, these symbols in the form of behaviors went well but over time behaviors emerged simultaneously with different interests so that there was a gap between fellow humans. When this gap occurs, it also causes conflict between humans. Then humans think how to resolve this conflict, but if humans resolve this conflict legally then humans first give a legal label to the symbols that are in conflict through several processes. First: the conflicting symbol is transferred from the real world to the realm of logic. Second: when it comes to logic then the symbol is processed in such a way by using reason and heart. Hearts must participate in processing this symbol so that when it becomes a legal text it does not lose its human element. Third: after processing successfully, the symbol is converted into legal text in this process called legal transformation. Fourth: after becoming a legal text, this legal text is transferred to the real thing to be used as a means to make people happy, prosperous and others. If this legal text is unable to fulfill its purpose or function, the legal text must be replaced by repeating the legal formation process from the initial process to finding legal texts that are in accordance with the needs of the community.

Agreement law has developed very rapidly in business practices so that its implementation is sometimes groundless again to the rules contained in book III of the Civil Code concerning engagement (Pramono, 2010). Book III of the Civil Code has an open nature, this open nature means that its provisions function as complementary means only (aanvulen recht) so that the provisions can be deviated by the parties making the agreement (Rahman, 2011).

The presence of the principle of freedom of contract is one of the causes of the emergence of super-modern agreements because through this principle a person is not limited to creating agreements both in their nature, form, contents, place, person and so on. But this principle of freedom of contract is not a free principle without limits. Article 1337 of the Civil Code states, "a cause is prohibited if prohibited by law, or if it is contrary to good morality or public order."

The provisions of article 1337 above give orders to legal users to comply with article 1320 of the Civil Code. Based on (Sarmadi, 2012) the legalistic-positivistic way of thinking in legal studies has given birth to a paradigm of legal thinking that is merely legal analytical on the prevailing regulations. Legalistic-positivistic legal parties only recognize legal truth through the text of regulations. They forget that the original law is not limited to text. Consciously, legalistic-positivistic parties try to eliminate the legal power of human behavior in mutual association but they do not realize that it is precisely human behavior that reduces the power of written law through the

deviation of the rules they do such as deviations from the provisions of Article 1320 of the Civil Code.

## D. Conclusion

The deviation of article 1320 BW specifically in the part of legal capacity creates new law in community life. This deviation has resulted in a substantially legal way through community behavior in life. Community behavior that deviates from the provisions of article 1320 BW occurs because the provisions of the article are no longer in line with the development of the current technological currently. The provisions in Article 1320 BW, whose substance is legal capacity, actually prevent children from carrying out their interests in making agreements on online transportation services. The application of legal capacity in a textual manner does not provide justice to children who want to make an agreement on online transportation services. Sociologically, this deviation provides benefits for children because it facilitates, benefits in the financial aspects and provides security to children because the agreement of online transportation services can be traced to pick-up and drop-off transactions of passengers through online transportation service companies.

Deviations from the provisions in article 1320 on legal skill points have given rise to a new type of agreement called the super modern agreement. This super modern agreement arises from changes in people's behavior in making agreements with each other where this change in behavior is influenced by the development of information and communication technology.

This deviation strengthens the understanding that the changing factor of law is technology and behavior that is a common need of society. In other words, people prefer the road to a law substantially rather than legal or artificial law.

## E. Suggestion

The provisions of article 1320 BW need to be reconstructed by adding the article clause with the sound "acting skills are excluded from the agreement because technology development provides benefits to the agreement maker. Clausula about legal capacity must prioritize the principle of the best interest for the child." The government needs to recreate the legal texts related to maturity and the ability to act to be in accordance with human development by not prioritizing age alone in determining adult status in the view of law.

The author offers a legal clause in the provisions of article 1320 of the Civil Code as follows: "for the implementation of the agreement in this modern era, parties may not use age as a measure of ability to act as long as the agreement fulfills the principle of benefits and justice in the surrounding environment where the agreement takes place." only one way done by the

author as an effort to provide solutions to legal irregularities in the field of civil law.

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