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Abuse of Circumstances (*Misbruik Van Omstandigheden*) in Developing Contract Law in Indonesia

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The contract is the legal basis for the parties in executing the contract, so the contract must be made concerning the provisions in the law. A contract can be requested for cancellation if there are reasons that, according to the law, can be requested. However, the law of the contract has developed with the doctrine used by the judges in their decisions. That doctrine is the doctrine of abuse of circumstances. This doctrine is used as one of the reasons for cancelling the agreement, although this doctrine is not yet contained in the Civil Code or Indonesian legislation. Therefore, researchers will discuss the doctrine of abuse of circumstances in the development of contract law in Indonesia, as a reason for cancellation of the contract. The method used in this research is legal research, namely normative research, using the method of legal and conceptual approaches. Abuse of circumstances has appeared in Indonesia for a long time; it can be seen from the presence of judges who use the doctrine of abuse of possibilities as a reason to cancel a contract, even a contract made by a notary. And forms of mistreatment of circumstances can also be seen from several characteristics, namely one party in the contract has an economic advantage to use the situation to follow his wishes in the contract; one party has a psychic/psychiatric advantage, which can therefore make him follow what his will is in the contract. And there are circumstances where there are circumstances beyond the control of one party, either from the opponent of the contract or from the other party.

Keywords: misconduct, abuse of circumstances, contract law

Introduction

The term contract is often referred to as an agreement, as a translation of the *Agreement* is English, or *Overeenkomst* in Dutch. The term contract is the most modern, widespread, and commonly used, especially in the business world (Fuadi, 2005, p. 9). The contract is a document that contains the rights and obligations of the parties, which is the basis of the legal relationship between the two parties in carrying out the rights and responsibilities. The term contract itself is well known in business civil relations and is commonly used in various circles of society (Ker, Smits, Iglesias, & Dusollier, 2014, p. 56). The contract comes from Latin, i.e., *contracts*, which means a binding agreement. Consistent with that meaning, the Big Indonesian Dictionary also defines a contract as (1) *n* agreement (in writing) between two parties in a trade, lease, etc., (2) *n* legally sanctioned agreement between two or more parties to perform or not doing activities.[1]

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[1] https://kamushukum.web.id/?s=perjanjian, accessed on 5 Januari 2022.

The basis of contract law in Indonesian law, in general, is contained in the Civil Code (*Burgerlijk Wetbook*), which corresponds to the said alliance as held in Book III. The contract is made by the parties willingly, and the parties can pour the purpose in the contract; although the Civil Code does not mention that the contract must be made in writing, the development of worldly life demands to be done in writing. It aims to make it easier to exercise its rights and obligations in the contract and make it easier to prove.

A contract in legal terms is defined as an ongoing personal relationship, essentially governed by a set of norms. The implementation of certain behaviours often depends on certain behaviours or conditions (Agri Chairunisa, 2015, pp. 137-138). Contracts that seem easy often reap conflicts or disputes between the parties, in addition to the conditions of the parties that are sometimes unbalanced to add some problems in the contract. In a contract, the agreement is the main key. Still, when the agreement occurs in a situation where one party feels helpless, it will undoubtedly impact the difficulty of fulfilling the rights and obligations contained in the contract.

Several disputes in the implementation of contract law emerged a new doctrine, the doctrine of "Abuse of Circumstances", which in Dutch is called *Misbruik Van Omstandigheden.* This doctrine arises from the development of community life in making and executing contracts. Abuse of circumstance (*Misbruik Van Omstandigheden*) has long been known in the Netherlands. Still, in Indonesia, the doctrine of abuse of circumstance (*Misbruik Van Omstandigheden*) is relatively new and has not been included as positive law. As a country that adheres to the civil law system, Indonesia cannot easily apply the doctrine to positive law. For that, the researcher will conduct a more in-depth study related to abuse of circumstances (*Misbruik Van Omstandigheden*) in the development of contract law in Indonesia, given the diverse story of civil law today. This study will discuss some of the following issues: first, implementation of abuse of circumstances (*Misbruik van Omstandigheden*) in contract law; second, forms of abuse of circumstances (*Misbruik van Omstandigheden*) as a reason for cancellation of a contract.

Methodology

Research methods work scientifically in conducting research activities, following the nature and character of scientific objects (Qamar et al., 2017, p. 2). This research is legal research, which uses normative legal research methods. The study of normative law will review the law as a system of values, conceptual and positive law. So the following steps will be taken, identifying legal facts and eliminating irrelevant matters to determine the legal issues to be resolved (Marzuki, 2005, p. 213).

In this study, researchers will use the Statute Approach and Conceptual Approach to obtain the desired results. Using both approaches is considered sufficient to answer the problem formulation in this study. The legal materials used in this study are secondary and primary legal materials and do not use tertiary legal materials.

Result and Discussion

Implementation of Abuse of Circumstances (*Misbruik Van Omstandigheden*) in the Development of Contract Law

The development of civil law here is more and more diverse. It can be seen from the many contracts circulating in the community. People have used contracts as the legal basis of the legal relationship they want. This is not wrong because, by Article 1338 of the Civil Code Paragraph (1), "The agreement made applies as a

law to those who make it". The contract made by the parties is a legal basis/reference in exercising the rights and obligations as stated in the clauses of the contract. Ease in making a contract is not directly comparable to ease in executing the contract. In making a contract, the parties are often not in the position they should be.

The parties must fully understand that the contract made must be following the provisions of the legislation, where the parties must submit and comply with things that are prohibited and allowed in law so that the contract made will not be void by law or can be cancelled. For the contract not to result in annulment for the sake of the law, the parties must fulfill the elements contained in Article 1320, Paragraphs 3 and 4, namely:

The elements of the lawful clause and lawful cause in a contract are essential so as not to cause void by law as referred to in Article 1335, that an agreement without cause, or made based on a false or prohibited cause, shall have no force.

Having no conviction means that the law never considers the deeds agreed in the contract to exist so that the court cannot examine and adjudicate disputes from the contract in question. In contrast to annulment by law, the resulting agreement can be annulled. Several articles in the Civil Code have actually regulated the cancellation of the deal and even explained the procedure for the cancellation of the agreement/contract. Further in the Civil Code, Article 1321 also explains that a competent person agrees in the law and the agreement of both parties.

However, suppose the contract is made not under Article 1320 of the Civil Code Paragraphs 1 and 2. In that case, the contract will result in cancellation, the consequences of this contract; one of the parties must request cancellation to the District Court first by listing the reasons according to the criteria Conditions 1 and 2 of Code of Civil Law Article 1320.

Disputes from contracts that occur due to non-fulfillment of elements in Article 1320 of the Civil Code, Elements 1 and 2, namely agreement and competence in agreeing, are not enough. Although the Civil Code has explained in detail the elements that can be used as a reason for the cancellation of the contract, including Article 1321 of the Civil Code that consent also has force if given due to error or obtained by force or fraud, the mistake is an element that can be cancelled in the agreement that has been agreed, but the mistake in question is an error that occurs only about the goods that are the subject of the agreement/contract.

Further related to the cancellation of the agreement/contract, coercion is also an element of the cancellation of the agreement. Contract, as contained in Article 1323 to Article 1327 of the Civil Code: The coercion in question is not only coercion against the person also concerned when the coercion is done by another person/third party who has no interest in the agreement/contract. Coercion can also occur so that it gives an impression and can create fear of being threatened. However, the judge in using the article must pay attention to the person's age, gender, and position.

The third element that causes the cancellation of an agreement as in Article 1321 is a fraud, which is regulated in Article 1328 of the Civil Code, that fraud is a reason to cancel an agreement if the fraud used by one party is such that it is clear that the other party will not agree, without any intrigue. Fraud cannot only be calculated but must be proven.

Apart from the three elements contained in Article 1321 of the Civil Code, which resulted in the annulment of the agreement, some acts could not be forced into implementation of Elements 1 and 2 of Article 1320 of the Civil Code and Article 1321 of the Civil Code. Further on, the cancellation of the agreement can be seen in Article 1266 of the Civil Code, which explains that the condition of cancellation is always considered to be

included in the reciprocal agreement if one of the parties does not fulfill its obligations. In that case, the consent is not void by law, but the judge must request the cancellation.

Obviously, Article 1266 of the Civil Code mentions the cancellation of the contract, so one of the parties must first file a lawsuit to the District Court, which has the authority to examine the civil case to request the cancellation of the agreement/contract. Further cancellation of the agreement can be made if the delivery cannot be carried out due to one of the parties.[2] Or, if in the sale and purchase transaction, the buyer does not pay the purchase price, then the seller can demand the cancellation of the sale and purchase, as in Article 1517 of the Civil Code.

However, there is an act that is considered to be a reason to cancel the agreement, outside the category of the Civil Code, an act that is used as a reason to be logical and rational. These reasons fall into the category of the doctrine of abuse of circumstances (*Misbruik Van Omstandigheden*), where this doctrine is more appropriate to be used as a reason for the cancellation of the agreement rather than being forced to enter into the elements of an act against the law or default as in the Civil Code.

This Doctrine of Abuse of Circumstances (*Misbruik Van Omstandigheden*) Is a Doctrine That Comes From Outside Indonesia, or Precisely There Is No Legal Provision on Principle in Indonesia

First, this doctrine appeared in England in the 15th and 16th centuries. Britain is a country that adheres to the *common law system* so that law can be created following the existence of the law. In the UK, the doctrine of circumstances abuse is known as *undue influence* (Budhiawan, Kamello, Sirait, & Purba, 2020). The doctrine of undue influence extends the *power of equity* (Khairandy, 2000, p. 106)[3] for the court to intervene in an agreement in which there is an abuse of an unbalanced position between the parties (Khairandy, 2000, p. 107), so that the principles of justice can still maintain the freedom to enter into a contract by the judge.

The Netherlands, which also adheres to the civil law system, incorporates the doctrine of abuse of circumstances into the law by reforming its law, namely BW to NBW[4], which adds provisions beyond BW.

With a civil law system, Indonesia is not easy to apply the doctrine. Applying the doctrine of abuse of circumstances (*Misbruik Van Omstandigheden*) in a civil law system such as Indonesia is still controversial (Khairandy, 2003, pp. 21-22). It is not easy to incorporate new elements into the law to become a positive law. However, there are different characteristics in civil law, so judges in examining cases can use new reasons that are considered logical and rational as an implementation of the application of legal justice for seekers of justice until the judge in deciding the matter includes the doctrine of abuse of circumstances (*Misbruik Van OMstandigheden*) in his reasoning granting the annulment of the agreement, which is then made jurisprudence by the judges afterwards.

The teaching about the abuse of circumstances emerged because the BW had not yet regulated it. Its existence arises since many jurisprudence judges find a particular circumstance and are considered contrary to custom. The judge decides the case based on abuse of circumstance and annuls the agreement for part or all

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[2] Article 1480 of the Civil Code.

[3] Equity is a doctrine that allows judges to make decisions based on the principles of propriety, equality, moral rights, and natural law (quoted from Khairandi, 2000, p. 106).

[4] The NBW is not intended to change the existing law. Rather, it has codified the law under the BW as it has developed over the last 150 years (Van Zeben, 1991, p. 2).

(Panggabean, 2001, p. 41). Furthermore, in the Supreme Court Decision which can also be referred to as a legal breakthrough made by a judge at the cassation level, if one of the parties cannot express their will freely, it can be seen that there has been an imbalance in the agreement (Asnawi, 2013, p. 143).

The doctrine of abuse of circumstances (*Misbruik Van Omstandigheden*) is a doctrine used by the Netherlands, and has been included in the NBW (Niuew Burgerlijk Wetboek) since Bovag Arrest III, HR February 26, 1960. The doctrine of abuse of circumstances (*Misbruik Van Omstandigheden*), contained in Article 3:44 Paragraph 1 of the NBW, mentioned four conditions for the existence of abuse of circumstances, namely (Siwi, 2020):

1. Special circumstances (*bijzondere onstandigheden*) include emergencies, dependencies, fuss, insane, and inexperienced souls.

2. A real thing (*kenbaarheid*) implied that one of the parties knew or should have known that the other party in a particular situation was moved (his heart) to sign a deed of agreement.

3. Misuse (*misbruik*), one of the parties has executed the agreement, although he knows he should not.

4. In the causal relationship (causal *verband*), it is important that the agreement is not closed without the abuse of the situation.

If seen from the sound of Article 44 Paragraph 1 of the NBW, it is not a new thing, but the thing or act is currently more and more cock also used as reasons for cancellation of the agreement. Economic needs and economic compulsion in making contracts can lead to disproportionate contracts and tend to disregard the provisions of the legislation. These acts are used to violate the articles in the Civil Code. Harmful can be defined as a forced agreement (*opgedrongen*). So loss (*nadeligheid*) is equal to forced (*onvrijwiligheid*). According to the Dutch Parliament, losses are only referred to as losses in any form and losses do not have to be in legal action in the sense of inequality between achievements or biased clauses (*econeratie* or *onereuze clauseles*), but can also be subjective and ideal, differences in Parliament The Netherlands yielded that the element of loss was not listed in Article 3:44 NBW (Budiono, 2008, p. 20).

Nowadays, the doctrine of abuse of circumstances is often used by judges in examining and resolving matters. In his decision, the judge gave some arguments about the doctrine of abuse of affairs as a reason or basis for cancelling the agreement.

One of the decisions that use the reason for the abuse of circumstances (*Misbruik Van Omstandigheden*) is the decision of PN MATARAM Number 234/Pdt.G/2020/PN Mtr dated February 25, 2021, that in the decision, the judge stated that Defendant I and Defendant II according to law are an abuse of circumstances not an act against the law, so that the panel of judges based on *ex quo et Bono* declared the actions of Defendant I and Defendant II as acts of abuse of circumstances (*Misbruik Van Omstandigheden*). The reason for the judge to use the doctrine is seen in the decision because there is an act of coercion committed by Defendants I and II to sign the statement of sale return by including a substantial interest. The coercion implied in the event is due to a situation where the plaintiff feels that he has no other alternative to follow the wishes of Defendant I and Defendant II arbitrarily.

Following the decision of the Banjarmasin High Court, Number 13/PDT/2019/PT BMJ, it also used the reason for the abuse of circumstances (*Misbruik Van Omstandigheden*), namely Terbanding (PT Bank Mandiri)

to set the interest rate and set the fine and did not restructure the credit, in the credit agreement.

In addition to the District Court Judge, the Supreme Court decision also contains the act of abuse of circumstances (*Misbruik Van Omstandigheden*), in Decision Number 3406 K/Pdt/2019, dated December 16, 2019; in the Cassation case, the judge decided to cancel the land sale and purchase deed on the grounds abuse of circumstances (*Misbruik Van Omstandigheden*).

Forms of Abuse of Circumstances (*Misbruik van Omstandigheden*) as Grounds for Cancellation of the Contract

Contracts that both parties ideal have made should be implemented as the clauses in the contract. The contract can only be requested for cancellation if it does not meet the rules of Article 1320 Code of Civil Law, those who make the contract and agree to make the contract. Visually, we can know these two conditions by looking at the identity of each party in the contract, whether the parties have been categorized as legal or not, by looking at the date of birth or age of the parties. However, age is not the only way to know if the parties are legal; it can be used under normal circumstances. The second element is an agreement, where we can see from whether the contract has been signed by both parties or not, or if they do not put a challenge, then it can be seen whether they put their fingerprints or thumbprints on the contract. Both elements can be used to determine whether the contract meets the element to request cancellation or not (Cahyono, 2020).

In addition to the two elements in Article 1320 of the Civil Code, currently, the judge has adopted and used several reasons included in the doctrine of abuse of circumstances as one of the elements that can lead to the cancellation of the agreement. Although the doctrine of abuse of circumstances has not been enshrined in the Criminal Code or other laws, some Indonesian judges use this doctrine as an excuse in passing their verdict on cases that require the cancellation of the agreement by both the defendant and the plaintiff.

Abuse of circumstances (*Misbruik Van Omstandigheden*) is such an act committed by one party against the other party bound by the agreement by taking advantage of the unbalanced position of one party with the aim of taking advantage of the other party. Abuse of circumstances can occur when a person in a contract is influenced by something that prevents him from making his own judgment so that he is not independent whether the opponent influences it in the contract or other parties that can affect the independence in thinking and deciding the outcome so that the person cannot make decisions independently. And his decision to approve the contract impacts both material and immaterial losses or even the inability to fulfill the contract.

Parties who feel harmed due to an act of abuse of circumstances may request the judge to cancel the agreement by filing a lawsuit to the competent District Court as having the absolute and relative competence of the court. As for the forms of abuse, the situation includes:

1. One of the parties to the agreement has a higher economic capability, thus causing the compulsion to agree to the contract.
2. One of the parties to the agreement has greater power, leading to compulsion in agreeing to the contract.
3. The existence of certain circumstances that cause compulsion in agreeing to a contract.

The compulsion meant to fulfill the abuse of circumstances is an act that may not be understood in more detail. One of the parties does not get more understanding so as not to understand the result of the agreement of the contract.

Conclusion

The doctrine of abuse of circumstances is currently widely used and discussed by judges, legal observers, and legal advisers among academics. Although the doctrine of abuse of circumstances has not been enshrined in the legislation of the Civil Code, the judges have used the doctrine and poured the reasons as the reasons used in their decisions. Currently, judges in Indonesia make jurisprudence the principle of abuse of circumstances. Misuse (*Misbruik Van Omstandigheden*) is a situation where one party commits an act or action against the other party bound by the agreement by taking advantage of the unbalanced position of one party to take advantage of the other party. As for the forms of abuse of the situation, among them are:

1. The existence of parties who have higher economic capabilities thus causes the compulsion to agree on a contract.
2. The existence of a party with greater power can lead to compulsion in agreeing to a contract.
3. The existence of certain circumstances that cause compulsion in agreeing to a contract.

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