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ABUSE OF CIRCUMSTANCES AS A CAUSE OF THE AVOIDATION OF CONTACT IN THE CIVIL COURT AND ISLAMIC LAW

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Abstraction

This research is library research. Regarding the termination of an engagement in the KUHper, Article 1381 explicitly mentions ten ways to terminate an engagement. These methods are: Payment, offer of cash payment followed by deposit or safekeeping (consignment), debt renewal (novation), debt settlement or compensation, debt mixing (confucio), debt relief, obliteration of outstanding goods, cancellation/cancellation, entry into force a condition is void, and the lapse of time (expiration).

Indeed, freedom of contract stems from the position of both parties being equally strong, having the same bargaining position, so that each party is domiciled as a contract partner. . The reality is not so, in making a contract each party, especially the party who is in a strong economic position, tries to seize dominance over the other party and face each other as opponents of the contract. The party whose position is stronger can impose his will on the other party for his own benefit, resulting in the content and terms of the contract being one-sided or unfair.

Keyword: Abuse of Circumstances, Avoidation of Contract , Civil Court , Islamic Law

Introduction

As a form of relationship between individuals and legal entities, the law of engagement also regulates how the engagement ends. Engagement as a model of a relationship involving one or more legal subjects, does not rule out the possibility of deviations and efforts made by the parties involved in the engagement to end the engagement.

Generally, the engagement ends because of the efforts made by the parties who are partners in an engagement. This effort arises because the parties have interests so that a consideration arises to end an engagement. Or it could be that the engagement ended by itself without the parties wanting to end the engagement.

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Both the engagement that ends due to the efforts of the parties involved in an engagement or without any effort so that the engagement automatically ends, all of which are regulated in the applicable laws and regulations. This is necessary in order to create a legal certainty between the parties involved in the engagement, what kind of legal actions can lead to the termination of the engagement.

In this paper, we will present the abolition of engagement, both in the perspective of western civil law and the perspective of Islam. However, both western and Islamic civil law are laws that are not present in a vacuum. Both are present in a civilized legal society. It becomes a natural thing if the legal substance contained in both has shortcomings.

Definition of Contract

Literally, the word contract as a translation of the term "Verbintenis", which is a takeover of the word "Obligation" in the French Civil Code..[1] Thus, it means that the contract is an obligation on one of the parties in the legal relationship of the contract.

Contract in book III of the Civil Code are "Legal relations in the field of property law, where on the one hand there are rights and on the other hand there are obligations.".[2] The rights born from such a relationship are called legal rights or commonly called rights, while the obligations are called legal obligations.

The term understanding of the law of engagement is used to describe the abstract form of the occurrence of the contract of the parties entering into the transaction, which does not only arise from the existence of an agreement between the parties, but also from the provisions that apply outside the

[1] Kartini Mulyadi dan Gunawan Widjaja, Perikatan Pada Umumnya, (Jakarta: PT. Raja Grafindo Persada: 2004), 16
[2] J.Satrio, Hukum Perikatan (perikatan yanmg lahir dari undang-undang), (Bandung, P.T Citra Aditya Bakti: 1993), 1

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agreement that cause the parties to be bound to carry out certain legal actions..[3]

Circumstances Abuse of Contract

The agreement reached in the contract has a position and therefore has the same binding force as a law. Furthermore, every contract execution must be carried out in good faith. This provision is seen in Article 1338 of the Civil Code, which states that all agreements made legally apply as law for those who make them.

Thus, the agreement or contract cannot be withdrawn, other than by agreement of both parties or for reasons which are stated to be sufficient by law. Contracts must be executed in good faith. It should be stated first, that although some scholars place the contract in a narrower sense, because it is intended only for written agreements, on this occasion the words contract and agreement are placed in the same sense. The binding power of the contract as a law determines that the parties must comply with and comply with the terms of the contract they made as subject to and comply with the law.

Provisions of Article 1338 of the civil Code shows that contract law adheres to an open system, which gives the community the widest possible freedom to enter into agreements containing anything, as long as it does not violate public order and morality. This open system contains a principle that frees the parties to make any type and content of the agreement, which is known as the principle of freedom of contract.

Indeed, freedom of contract stems from the position of both parties being equally strong, having the same bargaining position, so that each party is domiciled as a contract partner. The reality is not so, in making a contract each party, especially the party who is in a strong economic position, tries to seize dominance over the other party and face each other as opponents of the contract. The party whose position is stronger can impose his will on the

[3] Gemala Dewi, DKK, Hukum Perikatan Islam di Indonesia, (Jakarta, Kencana: 2006),. 2

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other party for his own benefit, resulting in the content and terms of the contract being one-sided or unfair.

In fact, fairness in contracting is more manifest if the exchange of interests of the parties is distributed according to their rights and obligations proportionally. Therefore, it must always be remembered that the preparation of a contract always starts from an attitude based on the will, that the contract will be mutually beneficial as far as possible. That's why, the starting point of every contract is actually good faith[4]

Pay attention to the provisions contained in the Criminal Code. Civil law, it turns out that the principle of freedom of contract does not mean absolute freedom, because there are restrictions given by several articles. The application of the principle of consensuality contained in Article 1320 of the civil Code means that without an agreement from one of the parties in making a contract, it results in an invalid contract. Provisions of Article 1321 of the Criminal Code. The Civil Code emphasizes that there is no freedom in the meeting of wills or consensus that is given due to mistake, coercion or fraud. If the agreement is obtained by mistake, coercion or fraud, the contract is invalid. Likewise with the application of the principle of good faith as stated in Article 1338 of the Criminal Code. Civil law is a limitation on the application of the principle of freedom of contract.[5]

Misuse of circumstances is an imbalance to the giving of the agreement of the affected party. Misuse of circumstances as a factor limiting freedom of contract, related to the occurrence of a contract, not because of an unallowable cause. Misuse of circumstances is not only related to the contents of the agreement, but also relates to what happened at the birth of the agreement because they are not free to determine their will in the contract. Misuse of circumstances concerns the conditions that play a role in the occurrence of the contract, namely enjoying the circumstances of others does

[4] Agus Yudha Hernoko, Hukum Perjanjian, Asas Proporsionalitas dalam Kontrak Komersial, (Yogyakarta : LaksBang Mediatama, 2008,) 39.
[5] Herlien Budiono, Kumpulan Tulisan Hukum Perdata di bidang Kenotariatan, (Bandung: Citra Aditya Bakti, 2007), 108.

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not cause the content or intent of the contract to be impermissible, but causes the abused will to be not free. The real disease does not lie in the causes that are not allowed, but lies in the defects of the will.[6]

Someone who has a bargaining position advantage will be able to dominate and influence the will of the other party in a contract, so that the other party is forced to enter into the contract. More or less there must be a forced position on the part of the needy party, in which case there is no real alternative to making a contract with another person, and thus there is also no possibility of entering into a real contract.[7]

An unbalanced advantage will be able to give birth to an unequal agreement, thus giving birth to a contract based on a pseudo agreement, which was made out of compulsion. The weaker party to meet their needs. At first glance, these events are protected by the principle of freedom of contract, and therefore have binding power, but because the agreement given is not based on free will, but because of forced circumstances, the contract can be canceled on the basis of abuse of circumstances. It can be said that irresponsible freedom of contract will tend to lead to abuse of circumstances. By recognizing the abuse of circumstances as one of the reasons for the cancellation of the contract, it also serves as a limiting factor to the practice of freedom in contract making.

In the misuse of circumstances, the problem is regarding the superiority of one party over the other. The advantages are not only economic, but also psychological advantages or both, both economic advantages and psychological advantages. When an advantage is abused, there is an abuse of circumstances. Misuse of circumstances occurs because there is a weakness in choosing that cannot be avoided by the weaker party

[6] Hardijan Rusli, Hukum Perjanjian Indonesia dan Common Law, (Jakarta:Sinar Harapan,2006,), 89.
[7] Hardijan Rusli, Hukum Perjanjian Indonesia dan Common Law, 92.

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and the stronger party abuses it by imposing the contents of the contract that gives him an unequal advantage..[8]

Abolition of contracts in Civil Law

In Article 1381 of the Civil Code, it is stated successively the events that resulted in the termination of the engagement as follows: [9]:

1. Payment.

   payment is the implementation or fulfillment of each agreement voluntarily, meaning not by coercion or execution. So the word payment by law is not only aimed at the delivery of debt, but the delivery of each item according to the agreement is called payment

   In principle, only people with an interest can make payments legally, such as someone who is in debt or a guarantor. Thus chapter 1382 B.W. This article further explains that an unauthorized third party can pay legally, provided that the third party acts on behalf of the debtor, or if he acts on his own behalf, provided that he does not replace the debtor's rights. Because, if the person paying the debt replaces the rights of the debtor, it cannot be said that the debt obligation has been canceled, because in fact he is still alive, only the collection has changed.

   In conclusion, it can be determined that Article 1382 allows anyone to pay and the debtor is required to accept it, although this payment does not necessarily free the debtor. Only for agreements where one of the parties is required to perform an act, of course, this principle

[8] Hardijan Rusli, Hukum Perjanjian Indonesia dan Common Law, 105.
[9] J. Satrio, Hukum Perikatan (Tentang Hapusnya Perikatan), (Bandung, PT. Citra Aditya Bakti: 1996), 4

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will not apply. For example, in a work agreement, a worker cannot simply be replaced by a friend who may not be commensurate with his skills.[10]

2. Offer Cash Payment Followed by Deposit or Custody

This is a payment method to help the debtor in the event that the debtor does not like to receive payments. In article 1404 of the Criminal Code, "If the creditor refuses to pay, the debtor can make an offer for cash payment for what he has to pay, and if the creditor also refuses, then the debtor can deposit the money or goods with the Court. Such an offer, which is followed by safekeeping , releases the debtor and applies to him as payment, provided the offer is made according to the law, while what is deposited in such a manner is at the expense of the creditor." Furthermore, this point is discussed further in article 1404 to article 1412 of the civil Code.

3. Renewal of debt (novasi).

Novation is regulated in Article 1413 of the Civil Code to Article 1424 of the Civil Code. Novation is an agreement, where an engagement has been canceled and at the same time another engagement must be revived, which is placed in the original place. According to Salim, novation is an agreement between a debtor and a creditor, in which the old agreement and its existing subject matter are abolished and an object and subject of a new agreement arise..[11]

4. Compensation

Compensation is one way to terminate the engagement, which is caused by circumstances, where two people are each debtor to each other. If a person who is in debt has a debt to the debtor, so that the two persons

[10] Subekti, Pokok-Pokok Hukum Perdata, 153
[11] Salim, Hukum Kontrak., 169

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are equally entitled to collect the debt from one another, then the debt owed between the two persons can be calculated for an equal amount.

Compensation occurs when two people owe one another to each other with which the debts between the two people are written off, by law it is determined that between the two of them has occurred, a calculation eliminates the engagement (article 1425 of the Civil Code).Percampuran utang (konfusio).

The article relating to the mix of debts is Article 1436 of the Criminal Code, that "When the positions of creditor and debtor are gathered together in one person, then by law there is a mixture of debts and therefore the receivables are written off." This happens if for example the debtor marries in a mixture of assets with the debtor or if the debtor replaces the debtor's rights because he becomes his heir or vice versa.

5. Elimination of debt.

Debt relief is a legal act whereby the creditor relinquishes his right to collect his receivables from the debtor. Debt relief does not have a specific form. It can be done orally. For debt relief to occur, it is absolute that the creditor's statement regarding the exemption is addressed to the debtor. Debt relief can occur with consent or free of charge.

Article 1439 explains that if the debtor voluntarily gives a debt agreement to the debtor, it can be considered as a proof of the existence of a debt relief.Musnahnya barang terutang.

According to article 1444, if a certain item as intended in the agreement is abolished or because of a prohibition issued by the government, it cannot be traded or lost until the situation is not clear, then the engagement is terminated, provided that it is deleted or the item is

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completely outside the fault of the debtor and previously he had neglected to hand it over.Batal/ pembatalan.

Article 1446 "All engagements made by minors or persons placed under guardianship are null and void by law, and the prosecution brought by or on their part must be declared null and void, solely on the basis of - maturity or forgiveness". Article 1449 "Agreements made by coercion, error or fraud, issue a demand to cancel it".

6. cancellation conditions

The terms of void referred to here are the terms of the content of the engagement which are agreed upon by both parties, if these conditions are fulfilled, the engagement will be null and void, so that the engagement will be terminated. In principle, the terms of cancellation always apply retroactively, that is, since the engagement was made. Canceled engagements are restored to their original state as if the engagement never happened.[12] Article 1265 of the Civil Code, the void condition is a condition which, if fulfilled, will annul the agreement and bring everything to its original state, as if there was no contract.

7. Expired

According to the provisions of Article 1946 of the Civil Code, expiry is a tool to obtain something or to be released from an engagement with the passage of a certain time and conditions determined by law.

[12] Salim, Hukum Kontrak., 175

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Article 1967 of the Civil Code stipulates that all claims, both material and individual in nature, are dismissed due to expiration, with the lapse of 30 years. Meanwhile, the person who shows the existence of an expiration date does not need to show his rights and cannot be filed against him a rebuttal based on bad faith.

Movable objects that are not interest or receivables that are not indicated (niet aan toonder), whoever controls them is considered the owner. However, if an object is lost or stolen, within a period of 3 years from the day the object is lost or suspected, he or she can claim back the lost or stolen object as his property from the hands of whoever has control over it. The holder of the last property can sue the last person who handed over or sold him a compensation (article 1977 of the Civil Code).

C. Abolition of contracts in Islamic Law

1. Abolition of contracts with Fasakh

Fasakh is a legal effort made by the party who made an agreement to cancel the transaction. Cancellation can be done unilaterally if the transfer of goods or payment has not occurred. Without having to wait for a decision from the court or the agreement of the other party. This is revealed in the Hanafiyah and Shafiiyah schools. However, if in the transaction there has been a transfer of goods or payment, the cancellation cannot be done unilaterally. Must be based on other parties or court decisions. [13]

In the first case, before payment or delivery of goods is made, the cancellation can be done unilaterally because there has not been a transfer of rights between the transacting persons. So that no one is harmed materially. In contrast to the second one, if in the transaction there has been a transfer of goods or payment, this will at least cause material loss to

[13] Wahbah Zuhaili, Alfiqhu al-isla>m wa adillatuhu>, (Damaskus: dar al-fikr, 1997), 3120.

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the party receiving the cancellation. It could be that there is a change in the goods or the money paid has been used for other things.

It should also be noted that although in the provisions of Islamic law it is permitted to unilaterally cancel if the transaction has not occurred payment or delivery of goods, the parties to the transaction should be aware of themselves not to arbitrarily cancel. At least the party receiving the cancellation of the loss in terms of time. Civil transactions are built on the basis of the good faith of both parties. So as not to injure the I'tikad, the litigants should not be arbitrary in their transactions.

There are several transaction models in which the engagement is terminated due to legal action for cancellation:

a. Cancellation due to damage to the contract. This kind of transaction model can be canceled by both parties and by the court. For example, the object of the contract is not found.
b. Cancellation due to khiyar, both khiyar conditions, 'aibi and ra'yi.
c. Due to the agreement of both parties voluntarily to stop the transaction.
d. No transaction. It is permissible to do Faskh if the other party does not fulfill its obligations or it is not possible for the transaction to be carried out due to a natural disaster.
e. Because the time has expired, as in a certain term lease contract.[14]

2. Abolition of contracts with Dead
   a. Leasing

      In the Hanafiyah view, the death of one of the parties involved in the lease transaction causes the engagement to be terminated. This is because the lessee enjoys the benefits of the item little by little, or in other words gradually over time. The sale and purchase transaction is not a transfer of goods. Ownership of goods does not change. Different from other than hanafiyah. They do not take death as a factor in

[14] Wahbah Zuhaili, Alfiqhu al-isla>m wa adillatuhu>,, 3132-3133

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breaking the bond. For those who are considered from the goods being leased is the existence of the benefits of the goods at the time the contract takes place. So that the benefits of rented items can be inherited.

b. pawns. If the debtor dies, then the pledged goods are sold with the aim of paying off the debt.
c. Cooperative contract. If one or both parties involved in the cooperation contract dies, the contract will automatically terminate.
d. Musaqoh contract. For the hanabilah, if one of the parties, both the land owner and the land cultivator, dies, the contract will automatically end. Both after and before cultivating the land[15]

3. Because there is no permission from the authorities.[16]

Misuse of circumstances in the perspective of justice Gustav Radbruch

In both Islamic civil law and western civil law, abuse of circumstances is not explicitly stated, that abuse of circumstances can be used as an excuse to take legal action to cancel transactions. In the Indonesian Civil Code, for example, in Article 1449, it is explicitly explained that an agreement made by force can be legalized for cancellation. It is the same in Islamic engagements, that the agreement made through the element of coercion on the parties can be filed for termination (fasakh)..[17]

In both the Criminal Code and Islam, indications of coercion lead to coercion that is visible to the naked eye. Nothing reaches the point where there is no real coercion to the naked eye. Thus, no legal action to cancel the engagement can be filed. Especially for the Indonesian context, it must comply with the laws and regulations, although it also does not deny the role of judges as decision makers to be wiser, not just mouthpieces of the law. Even in fiqh concerning engagement, the abuse of circumstances is not

[15] Wahbah Zuhaili, Alfiqhu al-isla>m wa adillatuhu>, 3134-3135.
[16] Wahbah Zuhaili, Alfiqhu al-isla>m wa adillatuhu>, 3136.
[17] Wahbah Zuhaili, Alfiqhu al-isla>m wa adillatuhu>, 3066.

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included in the category of coercion because it does not explicitly appear to be an element of coercion.

Gustav Radbruch's thoughts gave birth to an interrelated relationship between the value of justice and the rule of law. The value of justice is a material that must be the content of the rule of law. While the rule of law is a form that must protect the value of justice. further explained that the aspect of justice that must be contained in the rule of law shows the existence of equal rights before the law. [18]

When examined more deeply, cases of abuse of rights are seen as a symptom of injustice due to the imbalance between people who are superior in the economy and people who are weak in the economy in the eyes of the law. People who are weak in the economy do not have a choice, in the case of debts, for example, except to borrow money from those who are economically strong even though the interest is quite high. The lender's weak position is sometimes exploited by the lender to reap as much profit as possible. Meanwhile, the borrower cannot take legal action for cancellation because there is no clause in the legislation that regulates it.

Here then arises injustice, people who are indirectly forced to enter into an engagement, where the engagement is detrimental to themselves, cannot take legal remedies for cancellation. In contrast to actions that clearly contain an element of coercion to carry out an engagement that is detrimental to themselves, the law allows for legal action to cancel.

Therefore, justice must also be given to the parties who are victims of abuse of circumstances by giving them the right to take legal action to cancel the engagement if the engagement is deemed detrimental to them. The value of justice like this must also be protected by the laws and regulations in order to have legitimacy at the level of practice.

In Islamic engagements, the idea of faskh of the engagement must also be initiated, in which there is an element of abuse of rights. Whether we realize it or not, in the Indonesian context, fiqh is still the main reference for

[18] Bernard L. Tanya, Teori Hukum, 151.

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Muslims. This is even more so if the fiqh rules are then converted into positive law so that they have clear legal consequences and procedures and can be accepted by all.

Conclusion

These methods are: Payment, offer of cash payment followed by deposit or deposit (consignment), renewal of debt (novation), debt settlement or compensation, debt mixing (confucio), debt relief, obliteration of outstanding goods, cancellation/cancellation, entry into force a condition is void, and the lapse of time (expiration). Meanwhile, in Islamic engagement, a contract (engagement) is considered to end if there is a cessation (cancellation), due to death and not getting permission from the authorities.

In both the engagements regulated in the KUHPer and Islamic law, there is no legal remedy that can be taken to cancel the engagement which contains elements of abuse of circumstances. This creates an injustice when viewed from Gustav Radbruch's theory of justice. Should, in order to create a sense of justice, engagements that contain elements of abuse of circumstances, legal remedies for the cancellation of transactions made as well as engagements that arise due to coercion should be taken to create a sense of justice.

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