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COERCION ACCORDING TO LAW SYSTEM (INDONESIAN CIVIL CODE) AND COMMON LAW SYSTEM (BRITISH JURISPRUDENCE) IN AGREEMENT

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Abstract
Nowadays, many agreements contain defects including the laws that contain coercion that may bring legal effect to the agreement itself. Article 1321 of the Indonesian Civil Code reads: No agreement shall have power if given in error, or obtained by force or fraud, while article 1323 of the Indonesian Civil Code reads: Forces imposed on the person making an agreement result in the revocation of the agreement in question if the coercion is made by the third party who is disinterested in the agreement made. Thus, researchers are interested in bringing the case up into a study of coercion (Dwang/Duress) according to the Civil Law System (Indonesian Civil Code) and the Common Law System (British Jurisprudence) in the Agreement. According to the Common Law, coercion or threat that may disgrace (to disgrace) the family is a close relative whereas according to Civil Law (Indonesia) the threat to the family is restricted to the husband/wife or relatives in a line up or down. In addition, coercion or threat of coercion with losses, according to Civil Law, there must be a causal relation. Agreements that contain duress or coercion or threat of coercion either according to the Common Law or Civil Law can be requested for cancellation on condition that there is evidence of coercion and the coercion is against the law.
Keywords: Agreement, Coercion, Cancellation of Agreement

I. INTRODUCTION

HR Sartjonno [1] stated that: “It is a fact that every country which is a political entity has its legal system. Even a state in the form of a federation has more than one legal system as in the case of the United States of America, the Republic of the German Federation, the Republic of Syria, or a country such as the Republic of Indonesia, where there is also legal liberalism in the field of civil law as a result of the application of Dutch legal politics and today it is still maintained based on the transitional regulations of Article II of the 1945 Constitution along with the previous transitional regulations with certain adjustments to current demands.”

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In connection to that mater, in this globalization era, comparative law is immensely necessary to be developed since it brings many benefits for the solution of legal problems and the development of the law itself. On this occasion, researchers are interested in examining coercive legal institutions (Dwang/Duress) according to the Civil Law System and the Common Law System in Agreement.

The Civil Code (Indonesian Civil Code) opens Book III, title 2, section 3 article 1338 which says "all treaties made legally apply as a law for those who make them."

The word "legally" means that there is a possibility that an existing agreement contains deficiencies which, if demanded by the opposing party, can be canceled. The agreement exists and is considered valid as long as it is not cancelled / has not been canceled. In article 1338 of the Civil Code, the words "legally" mean "fulfill all the conditions for the validity of an agreement" as determined by law. Thus, it can be concluded that according to Article 1338 an agreement made legally, which means fulfills the requirements of article 1320 of the Civil Code applies as a law for those who create it. It cannot be withdrawn without the agreement of both parties or valid reasons according to the Laws and it must be carried out with good intention.

However, in reality, there are now many agreements that contain flaws including those that contain coercion which certainly has legal consequences for the agreement itself. Article 1321 of the Indonesian Civil Code reads: There is no agreement that has power if it is given due to oversight, or is obtained by prosecution or fraud, while article 1323 of the Indonesian Civil Code reads: Coercion carried out against people who enter into an agreement results in the cancellation of the agreement concerned. If the coercion is carried out third party who is disinterested in the agreement made.

Anna Triningsih [2] stated that: “Each legal system has a choice of form of law enforcement mechanism and procedure with a different approach from other legal systems. The legal system adopted by countries in the world is more than one, however, this paper discusses law enforcement in the two legal systems adopted by

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most countries in the world, respectively the European legal system which we use Civil Law System in this discussion and Common Law System for the British Legal System."

Ariyanto [3] stated that: "A brief explanation of the difference between civil law (European Continental) and common law (Anglo Saxon) can be seen in terms of the development of both laws. The development of the civil law system was inspired by legal experts in determining or making legal rules in a systematic and complete manner. While the development of the common law system lies in the decisions of judges, who do not only apply the law but also set the law."

Thus, researchers are interested in bringing this case up into a study of Coercion according to the Civil Law System and the Common Law System in the agreement.

Based on the description above, the problems in this study are:

1. What is the concept of coercion according to the Civil Law System (Indonesian Civil Code) and the Common Law System (British Jurisprudence) in the agreement?
2. What is the position (due to the law) of the agreement that contains coercion (Dwang/Duress) according to the Civil Law System (Indonesian Civil Code) and the Common Law System (British Jurisprudence) in the agreement?

The aims of this research are:

1. To find similarities and differences in the concept of coercion (Dwang/Duress) in making international agreements in a practical manner.
2. To find similarities and differences from the concept of coercion (Dwang/Duress) theoretically according to the Civil Law System (Indonesian Civil Code) and the Common Law System (British Jurisprudence) to provide a deeper understanding and to grow mutual understanding among nations.

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II. LITERATURE STUDY

Joseph Dainow [4] stated that: “The Anglo Saxon legal system (Common Law), originated from the United Kingdom, is based on court decisions as its legal basis. It is because at the beginning of the history of the British Empire the King's order which was used as a rule of law had not yet been formed by a panel of judges or parliament in passing the verdict. When a case was decided by a judge, the decision did not only bind the litigant but also apply generally to similar cases.”

Gerald Paul Mc Alinn [5] stated that: “Whereas the Civil Law legal system is known based on public interest because it originates from the codification of written regulations which are used as the basis for the decision making of the state that adheres to this legal system. Based on this concept, the source of law in a country that adheres to this legal system comes from laws, written legal regulations, and jurisprudence.”

Georges R. Delaume [6] stated that: “Legal unification is needed in the making of an international agreement so that an agreement does not only become the dominance of a country. For example, a creditor country in a credit agreement. A country that is positioned as a debtor feels more secure if the loan agreement has public characteristics compare to the civil nature so that an international agreement is possibly summarize the two legal systems in different countries.”

Richard Kearney & Robert Dalton [7] stated that: “Negotiation is also often used in the preparation of international agreements. Compromise is one solution to solve a problem that might happen later.”

III. RESEARCH METHOD

3.1. Type of Research

In this type of research, the researchers used a type of descriptive normative legal research, which is a legal research conducted by examining the legal aspects using secondary data in the form of primary, secondary, and tertiary materials, obtained by doing a library research.

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3.2. Nature of Research

This research was a descriptive analysis that described the legal material obtained to provide an overview of the problem and then an analysis was conducted to find answers to the problems.

3.3. Research Approach

This study used conceptual approach and statue approach.

3.4. Types of Legal Materials

The types of legal materials used in this study include:

(1) Primary Legal Material:

a. Code of Civil Law

b. Law Number 24 of 2000 concerning International Treaties

c. Article 38 (1) Status of the International Court of Justice in the UN Charter, 26 June 1945

(2) Secondary legal material:

Reading material obtained from books and search results through the internet network whose sources' validity can be academically accounted for.

(3) Tertiary legal materials:

Indonesian Dictionary (online), English Dictionary and Law Dictionary.

3.5 Technique for Collecting Legal Materials

In collecting legal materials, the author used literature study techniques, namely by examining various existing sources and which always become a reference in making legal decisions, then an inventory of books and materials that were related to the problem being investigated.

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3.6. Processing and Analysis of Legal Materials

After obtaining all legal materials, primary, secondary and tertiary, then the legal materials were processed according to the part of the problem. Then it was arranged in such a way as to answer the legal problems that have been formulated. After the legal materials were processed, the researchers attempted to analyze the legal materials qualitatively with an approach to legal sources that were related with existing problems.

IV. RESULTS AND DISCUSSION

4.1. Results

Data: secondary data in the form of primary, secondary, and tertiary materials, obtained by doing a library research.

4.2. Discussion

4.2.1 The concept of coercion According to the Civil Law System and the Common Law System in Agreement

The agreement must be free, there is no coercion. It is said that there is no coercion, if people who do the actions are not under threat, both with physical violence and with frightening efforts (Abdulkadir Muhammad, 1992), but if we pay attention to article 1324 BW, we can conclude that coercion is not only coercion aimed at oneself, but also includes fear of loss to one's wealth, from which interpretation can be concluded that coercion here is not only violence, but also more broadly, encompassing every threats to the loss of one's legal interests. The point is not the violence itself, yet, the fear that arises from the violence. Therefore, people tend to call it "coercion", which has a broader meaning than violence (J. Satrio, 1992).

It is also possible that in the coercion that causes fear is accompanied by physical violence (pain) (Ibid).

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According to the Common Law, duress (coercion) arises when one party is asked to make an agreement under violence. The agreement is not given freely, and therefore this agreement can be canceled according to the wishes of the party that is asked under violent action or threats of violence. Duress (coercion) occurs if one party enters into a contract due to (under) violent action or threats of violence against himself or his close family, or threats of false prison sentences (will be detained), or threats to expose every member of his family (got a thread that the family will be humiliated) (Ibid).

Threats at the time of coercion must frighten those who are forced. The fear of loss in the future (after the agreement is closed) is attempted to be avoided by closing the agreement. Fear without threat is not enough to state that there is coercion (1326 BW). The word "fear" in article 1326 BW is more appropriate if interpreted as feeling reluctant. Feeling of reluctant has not justified people to demand cancellation. The measure of "fear" must use the understanding of a normal person or people in general. Besides, in order to be able to result in the cancellation of the agreement, a coercion/threat must be in the form of action that is prohibited (contrary to law).

Duress (coercion) in civil law needs evidence about: (1) Coercion of the victim's will; and (2) Coercion is against the law (Hardijan Rusli, 1996).

This understanding against the law is aimed at the action requested to be carried out. Thus, whoever threatens the debtor with legal remedies, for example suing in court, then this is not included as a threat (duress) that can be canceled. Pressure in trade can also be a reason to cancel the agreement if the pressure has affected the agreement (Ibid).

Article 1323 teaches us, that the threat does not necessarily come from the opposite party of our agreement. Yet, it may be able to come from anyone, even if the opponent of our agreement does not know about the threat (and never felt that she/he has ordered anybody to make a threat). Conversely, according to article 1325 coercion from other parties does not necessarily have to be directed at the person who closed the agreement. However, it could also be directed at someone else. The other people here

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are limited, as mentioned in article 1325 BW, that is refer to the husband / wife or relatives in a line up or down.

There must be a causal relation between coercion and the signing of an adverse agreement. Besides, in article 1324 BW, it is said that the loss must be clear and immediate. The fact that the loss is real is already it is, since people do not close the agreement because they are affected by the fear of the loss. As for the terms of the loss, it must be immediately evident. According to Rutten, it is inaccurate because his concern is precisely for the losses that could arise in the future (after the signing of the agreement) (J. Satrio, Op.Cit. P.252).

4.2.2. Legal Consequences of the Agreement Containing Coercion (Dwang/Duress) According to the Civil Law System (Indonesian Civil Code) and the Common Law System (British Jurisprudence) in the Agreement

In studying and tracing the relevance of the Common Law and Civil Law systems in standard agreements in Indonesia, it is necessary to first understand the existence of law in Indonesia. Agreement law is still considered under the influence of Romano-Germanic law (Civil Law) based on tradition and history. According to Ifdhal Kasim, the main stream of the flow of legal thought into Indonesian land, apart from the impact of the colonization of the Dutch East Indies government, also the role of the Dutch teachers who started the pillars of teaching and legal study in Indonesia (Ernu Widodo, 2010).

In its development the influence of the Common Law has been increasing in Indonesia because since the legal community interacts with international economic forces and it cannot be denied that English has become the main language of world. The influence of the Common Law that is worldwide is the use of common law terms in international business agreements, such as mortgages, in consideration of, liquidated damages, and others (Ibid).

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According to the Doctrine and Jurisprudence, it turns out that an agreement that contains coercion remains binding on the parties. The agreement can be canceled (requesting cancellation) only upon the demands of those who feel they have given a statement containing the coercion. However, if fear is merely caused by respect for father, mother or other relatives in the upward line without any violence actions, it is not enough to cancel the agreement (article 1326 BW).

Coercion that causes an agreement can be requested for cancellation. It does not include physical coercion such as someone who is forced to take a bus. This physical coercion does not lead to an agreement (both pure and pseudo) of the person being forced. Therefore, this agreement is null and void, it is not requested to be cancelled. Besides, the request to cancel the agreement on the basis of coercion may only be carried out if the person is concerned, after the coercion stops and the person does not agree with the agreement (article 1327 BW).

If a deal in an agreement is affected by an undue threat by the opposing party, causing the injured party to have no other choice, then such an agreement is subject to cancellation. Thus, this agreement can be canceled according to the wishes of the party requested with violence or threat of violence. Whereas a contract made because of physical coercion is null and void.

The person who signs the sale and purchase agreement under the threat of a gun. The person is faced with a choice, signed or killed. The person, out of fear, chose to sign the agreement. Thus, there is a desire to choose to close the agreement rather than die. The signature is a statement of his will, also for example by frightening, it will reveal secrets.

In the case of Kaufan V Gerson (1904): Gerson had embezzled Kaufman's money. Kaufman threatened to sue Gerson if Gerson's wife did not surrender his property (the object). Gerson's wife agreed to do it, in order to preserve (save) her husband's honor.

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V. CONCLUSIONS

5.1 Conclusions

The conclusion of this research are:

1. Coercion or threat to reveal shame (humiliation) the family according to the Common Law is the close family while according to Civil Law (Indonesia) the threat to the family is limited to the husband/wife or relatives in a line up or down. In addition, there must be a causal relationship between coercion or threat of coercion and losses according to Civil Law (Indonesia).
2. Agreements that contain duress or coercion or threat of coercion according to the Common Law and Civil Law (Indonesia) can be requested for cancellation provided that there is evidence of coercion and coercion that is against the law.

5.2. Suggestion

The suggestions of this research are:

1. In order to provide legal protection to weak parties in an agreement that contains coercion, judges should not only be fixed on the concept given by the Indonesian Civil Code.
2. Judges in Indonesia should also be able to use Jurisprudence which applies force in an agreement even though it is not regulated in the Indonesian Civil Code

REFERENCES

[1] H.R. Sartjono. 1991. Bunga Rampai Perbandingan Hukum Perdata, IND HILL. Co, Jakarta.

[2] Anna Trianingsih. 2015. Pengadilan Sebagai Lembaga Penegakan Hukum (Perspektif Civil Law dan Common Law, Jurnal Konstitusi: Volume 12, Nomor 1, (Maret 2015).https//:media.neliti.com. Accessed 01 November 2019.

[3] Ariyanto. 2016. Perbandingan Asas itikad Baik Dalam Perjanjian Menurut Sistem Hukum Civil Law (Eropa Kontinental) dan Common Law (Anglo Saxon), Jurnal Komunikasi Hukum: Vol 2, No. 2 (2016) Faculty of Law and Science Ganesha

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DOI 10.17605/OSF.IO/VJMXU

University of Education. https://ejournal.undiksha.ac.id. Accessed 01 November 2019.

[4] Joseph Dainow. 1967. The Civil Law And The Common Law: Some Points Of Comparison, The American Journal Of Comparative Law: Vol. 15, No. 3, (1966 – 1967) Oxford University Press. https://www.jstor.org/stable/838275?. Accessed 08 February 2020.

[5] Gerald Paul Mc Alinn. 2010. An Introduction to American Law. Carolina Academic Press.

[6] Georges R. Delaume. 1962. The Proper Law of Loans Concluded by International Persons: A Restatement and Forecast. American Journal of International Law, Vol. 56, 1962. https://www.cambridge.org/core/journals/american-journal-of-international law/article /proper-law-of-loans-concluded-by-international-persons-a-restatement-and-a-forecas. Accessed 08 February 2020.

[7] Richard D. Kearney and Robert E. Dalton.1970. The Treaty on Treaties, Merican Journal International Law. Volume 64, Issue 3. July 1970. https://www.cambridge.org/ core/journals/american-journal-of-international-law/article/treaty-on-treaties/. Accessed 08 February 2020.

[8] Nana Kwame Agyeman and Alfred Momodu.2020. Universal Human Rights 'Versus' Cultural Relativism: the Mediating Role of Constitutional Rights**.** African Journal of Legal Studies. Volume 12: Issue 1. https://brill.com/view/journals/ajls/12/1/article-p23. Accessed 08 February 2020.

[9] E. W. Vierdag. 1982. The Law Governing Treaty Relations Between Parties To The Vienna Convention On The Law Of Treaties And States Not Party To The Convention, Department of State, American Journal of International Law, Vol. 76, No. 4, 1982. https://www.cambridge.org/core/journals/american-journal-of-internationallaw /article /law-governing-treaty-relations-between-parties-to-the-vienna-convention-on-the-law-of-treaties-and-states-not-party-to-the-convention. Accessed 08 February 2020.

[10] Abdulkadir Muhammad. 1992. Hukum Perikatan, Citra Aditya Bakti, Bandung.

[11] Ernu Widodo. 2010. Relevansi Sistem Civil Law dan Common Law Dalam Pengaturan Hukum Perjanjian Baku di Indonesia, Jurnal Syariah dan Hukum, Volume 2 Nomor 2, Desember 2010, Fakultas Hukum Universitas Dr. Soetomo Surabaya. https//:media.neliti.com. Accessed 01 November 2019.

[12] Miller, Vaughne and Arabella Lang. 2016. Brexit: how does the Article 50 process work? Briefing Paper, Number 7551, 30 June 2016, House of Commons Library, http://researchbriefings.files.parliament.uk/documents/CBP-7551/CBP7551.pd. Accessed 08 February 2020.