

THE VULNERABILITY OF PROVING FRAUD AS THE BASIS FOR CANCELLING AGREEMENTS IN THE DIGITAL ERA

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ABSTRACT

Civil Law grants freedom to everyone to agree on something as long as it fulfills the valid agreement requirements stated in Article 1320 of the Civil Code. The consent condition is mentioned in Article 1321 of the Civil Code. Consent is invalid if there is a mistake, coercion, or fraud. This writing discusses consent that is not valid due to fraud. Article 1328 of the Civil Code states that 'fraud is a reason for the cancellation of an agreement if the deception used by one of the parties is so obvious and clear that the other party would not have agreed if there was no deception.' It is not easy to prove fraud in an agreement that has been made, as the party that feels deceived is not in a position of 'being forced' and voluntarily signs or digitally approves the agreement with a submitted or accepted mark. More detailed regulations regarding canceling agreements due to fraud are needed to provide legal certainty and justice for the parties.

Keywords: agreement; cancellation; fraud.

INTRODUCTION

Every individual or business entity that enters into an agreement with another party aims to mutually benefit or gain advantages from the contractual relationship established through the joint agreement. Civil Law is the law that governs the relationship between individuals or groups of individuals or legal entities who have goals and interests among the parties involved in the agreement. Article 1338 of the Indonesian Civil Code ("**Civil Code**") states that all legally made agreements are binding as a law for the parties who made them. It shows that the legal consequences of the agreement made only bind the parties who agreed. The rights and obligations that arise from the parties' agreement reflected in an agreement only bind the parties who have agreed. An agreement is legally considered valid if it meets the requirements as stated in Article 1320 of the Civil Code, which are: 1) consent between the parties involved, 2) capacity, 3) a certain matter, and 4) a legitimate reason. Consent is a requirement placed in the first position because the parties' consent mutually meets their desires in the form of respective rights and obligations. Therefore, there must be no coercion or compulsion from any party in making an agreement. The consent referred to is the parties' free will to enter into the agreement. In achieving the consensus, there must be no defects, where the parties' consensus is free from mistake, not because of coercion or fraud (Article 1320 of the Civil Code).

In reaching a consensus, the parties must have good faith that benefits and provides advantages to each other. Suppose consent is made by one party due to intentionally providing untrue, incomplete, or inaccurate information or withholding important information that would have affected the other party's decision. In that case, the consent is considered flawed. Providing false or incomplete information to 'deceive' the other party concerning the object of the agreement is

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categorized as fraud. This action intends to deceive the other party and gain an unfair advantage by providing false or incomplete information, causing the other party to agree. The party who believes that false information was provided with bad intent must provide evidence to support their claim before the consensus is made.

In the Civil Code, just a few articles can be used as a reference for cases involving agreements made through fraud. Fraud in the Civil Code refers to the deception that persuades another person to enter a consensus without coercion. It makes it difficult to prove fraud in civil law. There is no further explanation or regulation on how fraud can occur without coercion.

On the other hand, interactions in civil matters have been rapidly advancing. Parties enter into agreements and consent through the internet or online, which is considered more practical and efficient. For example, models of fraud that occur online need to be accommodated as a strong legal foundation to ensure legal certainty and justice.

One of the problems judges face in civil trials is that some issues are not regulated in legislation, or the regulation is unclear or incomplete, or the regulation no longer matches the development and values of justice in society.¹ Therefore, updating and improving Book III of the Civil Code is necessary.

METHODS

This paper used the juridical-normative research method. The primary data sources used are the Civil Code Book as the main reference and reference books, journals, and court judgments related to the above topic. The analysis is conducted qualitatively.

DISCUSSION

Development of Society, Legal Certainty, and the Importance of Updating the Civil Code

Dutch civil law originated from French civil law based on the French Code Civil, applied in the Netherlands during the Napoleonic era when France colonized the Netherlands.² After the Netherlands became independent, they created the *Burgelijk Wetboek* ("BW"), which was free from French influence, although its content and form largely resembled the French Code Civil. Since Indonesia was a Dutch colony (called the Dutch East Indies) then, Dutch civil law, mostly based on the Code Civil, was also applied in Indonesia based on the principle of concordance. However, the civil law applied in Indonesia was adjusted to the civil law in the Netherlands, especially compared to the French Code Civil. The codification of the Indonesian Civil Code was announced on April 30, 1847, through Staatsblad No. 23 and became effective in January 1848.

The political guidelines of the Dutch government regarding the law in Indonesia were stated in Article 131 IS (*Indische Staatsregeling*) as follows:³

1. Civil and commercial law must be codified into legal codes;

¹ Mohammad Kamil Ardiansyah, "Pembaharuan Hukum Oleh Mahkamah Agung Dalam Mengisi Kekosongan Hukum Acara Perdata di Indonesia", *Jurnal Ilmu Kebijakan Hukum*, Vol. 14, No. 2, 2020, p. 361-367.

² Abdulkadir Muhammad, *Hukum Perdata Indonesia*, Citra Aditya Bakti, Jakarta: 2019, p. 6-7.

³ Subekti, *Pokok-Pokok Hukum Perdata*, Internusa, Jakarta: 1985, p. 11-12.

2. For Europeans, the legislation applicable in the Netherlands (principle of concordance) is applied;
3. For the indigenous Indonesian and foreign eastern groups, regulations for Europeans may be used if their needs require it, and they are allowed to make new regulations jointly. The regulations that apply to the native population may also deviate according to public and community interests;
4. Before laws for Indonesians were written in legislation (codified), customary law still applied to them.

Updating and improving the Indonesian Civil Code is essential to accommodate the rapid development of society's interactions in the civil law, such as online agreements made through the internet. Proving fraud in civil law is also challenging due to the lack of detailed regulations on non-coercive fraudulent acts. Additionally, judges may face problems during civil court proceedings when certain issues are not adequately addressed in legal regulations or when regulations do not align with current societal values and principles of justice. Therefore, it is necessary to renew and improve the Indonesian Civil Code.

Prof Subekti, forty years ago, had already said, "We are trying to compile a national law codification, but since it has not been achieved, the BW and W.v.K are still in effect."⁴ It means there has been a long-standing desire to reform the Civil Law Code to adapt it to the conditions of Indonesian society, but until now, it has not been successful. Meanwhile, societal changes, especially in civil interactions, are rapidly developing.

After Indonesia's independence, based on Article 2 of the transitional provisions of the 1945 Constitution, the Dutch East Indies Civil Code was still in effect until replaced by a new law based on this Constitution. The Dutch East Indies BW is the foundation of Indonesia's civil law. Until now, there has been no replacement for the Civil Law Code, which still applies to matters with no specific regulations, such as Book III on Contracts that still apply today. The Civil Law Code has been in effect in Indonesia since 1848 and is still in force today. The Civil Law Code is 173 years old, and if counted since Indonesia's independence, it has been 73 years. Still, there has been no significant update to its substance, especially in the regulations in Book III of the Civil Law Code. Only updates or adjustments to the Indonesian language spelling and several sections that are not in line with developments in Indonesia have been eliminated.

It must be acknowledged that the principles in the Civil Law Code are still up-to-date since it only regulates its main points, making it flexible to changes. For example, the principle of freedom to contract allows everyone to enter into agreements with anyone. Still, it is limited by the conditions

⁴ *Ibid.*, 14.

listed in Article 1320 and also restricted by the provisions of Article 1321, which stipulates that there is no freedom in consensus made based on coercion, mistake, or fraud.⁵

However, with the passage of time and the rapid development of society, particularly in civil law interactions, changes have occurred that are not accommodated by the Civil Code. Legal certainty is needed as a reference for resolving civil conflicts. For example, Article 1320 of the Civil Code stipulates that consent is valid only if there is a consensus between the parties. In today's civil law interactions, where people conduct legal relationships through the internet, parties are in different places and times. It makes it increasingly difficult to prove defects in consensus, as provided in Article 1321 of the Civil Code. A consensus is invalid if it is reached due to fraud. Article 1328 of the Civil Code states that fraud is a reason for invalidating an agreement if the deceit used by one party is such that it is clear and obvious that the other party would not have agreed if the deceit had not occurred. Fraud is not presumed but must be proven. However, there is no further regulation or explanation regarding the invalidation of an agreement due to fraud. Thus, it is not surprising that to prove fraud as a reason for one party to request the invalidation of an agreement, the interested party (the one who feels deceived) waits for a court decision on the same case submitted criminally. It is to strengthen the claim of invalidating the agreement due to fraud. Although the Supreme Court has issued a circular regarding civil fraud cases, it is entirely up to the judge's "conviction" to adjudicate them.

Validity Requirements for Agreements in the Usage and Development of Information Technology

An agreement made between parties is considered legally valid if it meets the requirements as stated in Article 1320 of the Civil Code, which is:

1. Consent

The main requirement for an agreement to occur is consent between the parties making the agreement. This consent includes the object of the agreement (if it involves the purchase and sale of goods, including specifications), price, place, method of signature (conventional signature or e-signature), and other matters deemed necessary by the parties. The more detailed the matters agreed upon, the less potential for conflict due to differences in opinion or interpretation if something important is forgotten in the agreement. The breach of contract arises from the consent's substance, in which one party fails to perform the agreed-upon terms. Therefore, if the consent is made as detailed as possible regarding the object of the agreement, then if there are differences of opinion among the parties in the future, they can refer to the agreement already made. Many civil lawsuits are caused by the lack of detail in the agreements made when the parties consent. Parties use the rapid development of technology that provides convenience for human interaction. Still, the importance of agreeing on the use of information technology is often overlooked and becomes a problem in some cases. Information technology provides comfort for humans to be more efficient in using time and

⁵ Muskibah and Lili Naili Hidayah, "Penerapan Prinsip Kebebasan Berkontrak Dalam Kontrak Standar Pengadaan Barang dan Jasa Pemerintah di Indonesia", *Jurnal Refleksi Hukum*, Vol. 4, No. 2, 2020, p. 175-186.

energy, so the agreed-upon use of the technology in the consent process is often forgotten or neglected. For example, in the past, decisions were made together through face-to-face meetings. Still, joint decisions (consent between parties) are often made online, and this must be agreed upon so that there is no dispute among the parties later on. An example is a General Meeting of Shareholders held online through electronic media (teleconferencing, group WhatsApp, or other electronic media), because an agreement between the parties will be made, it must be clearly agreed upon, which means it will be used to make decisions. It is important to state when the consensus was made legally to anticipate the possibility of a dispute regarding the consensus made through electronic media.⁶ Is it legally allowed? The principle of freedom to contract gives parties the freedom not only to determine the content of the agreement but also how the parties will agree.

A legally valid agreement is a contract, which means that the obligations arising from the agreement can be enforced if they are not fulfilled.⁷ It is a moral consequence of the principle of freedom to contract, which means that anyone who meets the requirements set out in Article 1320, including Article 1321 of the Civil Code, can enter into a legal relationship and reach a consensus with anyone. If no elements are mentioned in Article 1321, then morally, what has been consented to must be implemented, and if it is not implemented, it can be enforced. Therefore, the parties who will consent should think ahead and anticipate all possible future scenarios. It will reduce the potential for conflict between the parties in the future. Consent may be void if the provisions regarding the validity of an agreement specified in Article 1320 of the Civil Code are violated, such as the violation of Article 1330 of the Civil Code, where the agreement is made by a person who is not legally capable, or the agreement is made by violating Article 1321 (consent upon due to mistake, coercion or fraud), 1254, 1335 jo. Article 1337 of the Civil Code, where the agreement is made on false pretenses, without a valid reason, or in violation of the law, morality, or public order.⁸

When does “consent” in an agreement occur? To answer this question, there are several theories as follows:⁹

a. Offer and Acceptance Theory;

According to this theory, consent can occur after one party makes the other party gives an offer and acceptance.

b. Will Theory;

⁶ Yanly Gandawidjaya, “Kesepakatan Para Pemegang Saham Dalam Rapat Umum Pemegang Saham Melalui Media Elektronik”, (*Proceeding APHK, IV: Mencari Model Pembaharuan Hukum Perikatan*, Palembang, 9-11 October 2017), p. 460-463.

⁷ Badriyah, “Perlindungan Hukum Bagi Kreditur Dalam Penggunaan BTS Sebagai Obyek Jaminan Fidusia Dalam Perjanjian Kredit”, *Jurnal Media Hukum*, Vol. 22, No. 2, 2015, p. 205- 215.

⁸ Nyoman Satyayudha, “Pembatalan Sertifikat Hak Milik dan Akibat Hukumnya Terhadap Akta Jual Beli”, *Jurnal Bina Mulia Hukum*, Vol. 1, No. 1, 2016, p. 62-67.

⁹ Munir Fuady, *Konsep Hukum Perdata*, Raja Grafindo Persada, Jakarta: 2016, p. 188-190.

According to the will theory, consent has already occurred when the parties intend to agree to the contract in their hearts and minds.

c. Statement Theory;

The statement theory is the opposite of the will theory. According to this theory, an agreement occurs when a statement, whether spoken or written, is in the contract.

d. Dispatch Theory;

According to the dispatch theory, consent occurs when the response accepting the offer is dispatched by the party consents to the offer.

e. Mailbox Theory;

Consent occurs when the receiving party has placed the letter accepting the offer in the mailbox to be sent to the party making the offer in the contract.

f. Knowledge Theory;

Consent occurs when the party making the offer knows the other party has accepted it.

g. Receipt Theory;

Consent is considered to have occurred when the party making the offer has received a response accepting the offer.

h. Belief Theory;

Consent is considered to have occurred when there is a statement from the accepting party.

i. Speech Theory;

Consent is considered to have occurred when the accepting party has prepared a response agreeing to the offer.

j. Assumption Theory;

According to the assumption theory, consent is deemed to have occurred when the recipient of an offer has sent their reply, and the offeror should assume that the recipient's response has been read and understood by them.

2. Capacity

Capacity according to the Civil Code (BW), includes two aspects: being of legal age and having physical and mental health. Legal age is measured based on the birth date on official identification documents (such as ID cards or birth certificates). The legal age currently recognized by judges in their decisions is 18 years old, except for specific requirements explicitly stated in the law, such as the age requirement for obtaining an ID card or driver's license. The legal age for marriage for men and women is 19 years old.¹⁰ In addition to age, a person is considered "capable" if they can assume responsibility for their rights and obligations as a legal subject. Individuals declared or categorized as under guardianship must provide a certificate from a relevant expert. Nowadays, physical and mental health cannot always be determined solely based on appearance. Some people may seem physically and mentally healthy, but under certain conditions, they may not understand their rights and obligations as

¹⁰Law No. 16 of 2019 amends the minimum age for marriage for men and women as stated in Law No. 1 of 1974 regarding the Marriage.

legal subjects like a normal person would. If such a situation is discovered, holding them accountable for fulfilling their obligations may be difficult.

Related to the “capacity” condition as referred to above, it is more difficult to see if consensus is made virtually or online. Like online buying and selling transactions, since usually the seller and buyer do not show their real face (if done through WhatsApp, the profile picture is often not the real face). The same goes for buying and selling through intermediaries (merchandising), even though it is safer because the intermediary will forward the buyer's payment to the seller if the buyer declares that the goods have been received and there are no complaints.

3. Specific object

The “specific object” referred to in the Indonesian Civil Code (KUH Perdata) is related to the object of the agreement. The parties enter into an agreement because of the presence of a certain thing or object that motivates them to consent. The parties consent because they have a goal in mind, such as to gain a profit. The parties make no consent without a goal that they want to achieve. This goal is related to the “specific object” or the object of the agreement. Therefore, no agreement exists without a “specific object” that motivates the parties to agree. The parties who consent must receive clear, detailed, and open information about the “specific object” that is the object of the agreement. Thus, the parties have obtained accurate information about the object of the agreement in deciding to consent. After the other party obtains accurate and honest information about the object of the agreement, they are free to decide whether to agree or not. If, later on, a party considers that there was dishonest information provided by the other party that, if known at the beginning, would have caused the party not to agree. The agreement can be canceled as stated in Article 1321 of the Indonesian Civil Code. Consent to a “specific object” that was not honestly informed or hiding something so that the other party is forced to agree, then the agreement is considered “defective”. Through Article 1321 of the Civil Code, the lawmaker explains that consent is potentially defective, which may be caused by error, duress, and fraud (*dwaling, dwang, and bedrog*).¹¹ The requirements for the object of the agreement are: 1. it is a tradable item;¹² 2. the type of item that is the object of the agreement can be determined when the agreement is made;¹³ 3. the object of the agreement can be counted and determined at a later time if it is not yet certain when the agreement is made;¹⁴ 4. the object of the agreement is an item that will only exist in the future.¹⁵

¹¹ Moh. Isnaeni, “Urgensi Asas Konsensualisme Dalam Kontrak”, *Proceeding APHK IV: Mencari Model Pembaharuan Hukum Perikatan, Palembang, 9-11 October 2017*, p. 2-4.

¹² Article 1332 Civil Code

¹³ Article 1333 paragraph 1 Civil Code.

¹⁴ Article 1333 paragraph 2 Civil Code.

¹⁵ Article 1334 paragraph 1 Civil Code.

4. Admissible Cause

The term “admissible cause” refers to a “specific object” that becomes the object of an agreement and is not something that violates the law, morals of society, or public order. An admissible cause is related to the principle of freedom of contract so that the parties do not misuse the principle of freedom of contract. It means that freedom is not absolute, and the legislators set limits on things that cannot be the object of an agreement if they violate legal regulations, morals, and public order.

The consequence of an agreement that does not fulfill agreement and competency requires that it can be canceled, which means that the cancellation of the agreement depends entirely on the parties who made the agreement and only has legal implications after a court decision has been made. Before the decision is made, legal action still applies.

Whether the Principles of Agreement in the Civil Code Still Relevant?

In an agreement, some principles must be implemented by the parties who will reach an agreement. These principles are moral and ethical foundations that surround the parties in reaching an agreement, known as the principles of agreement, as follows:

1. Freedom of Contract Principle

The parties who consent on a specific matter are free to determine the contents of the contract/agreement they will make. They are free to agree or refuse. They are not allowed to force each other, and the contract or agreement cannot happen due to coercion. The parties who consent must declare their agreement with free will, not in a pressured or forced position or under the influence of others. The freedom of contract principle contains a moral message that when someone consent or makes an agreement, it must be done in an atmosphere that is not pressured, not in coercion, and not under the influence of others. The binding power of the agreement comes from the parties' free will, where the parties are free to determine what they want to include in the agreement.¹⁶ However, freedom of contract is not absolute freedom without limits. The limitations to the principle of freedom of contract are:

- a. meeting the requirements stated in Article 1320 of the Civil Code;
- b. not violating laws and public order;
- c. fulfilling the principle of good faith.

The freedom of contract principle is regulated in Article 1338 of the Civil Code and is relevant to the current society. Article 1338 paragraph (3) states that an agreement must be executed in good faith. Freedom should not be in such a way as to undermine the principles of honesty, appropriateness, justice, and legal certainty. In the digital era, agreements, including cheating, are recorded digitally on the internet and can be known to the wider community through social media.¹⁷

¹⁶Fred G. Tumbuan, *Produk Legislasi dan Masalah Hukum di Bidang Hukum Perdata*, Gramedia Pustaka Utama, Jakarta: 2017, p. 4-5.

¹⁷Indah Kusuma Wardhani, “Perlindungan Hukum Bagi Pemberi Pinjaman atas Resiko Kredit Dalam Pelaksanaan Pinjam Meminjam Uang Berbasis Teknologi”, *Jurnal Mimbar Hukum Justitia*, Vol. 6, No. 2, 2020, p. 129-144.

2. Good Faith Principle

In civil law, the legal relationship between parties is based on mutual trust. It is related to article 1339, which states that "an agreement is binding not only for what is expressly stated in it but also for all things that, according to the nature of the agreement, are required by propriety, usage or law." It means that good faith is inherent, reasonable, and appropriate. The good faith of the parties who will establish a legal relationship must already exist from the beginning of the desire to establish the legal relationship based on something reasonable, honest, and appropriate. Good faith cannot be seen because it is intangible but can be proven through a logical and factual sequence of events. Currently, standard agreement models are created by one party and then agreed. In relation to agreements in standard models, good faith is very important. The norm of good faith is the most important thing in the Law of Agreement, which is very suitable for the development of society today. In the United States, courts are starting to oversee the abuse by stronger parties in relation to the use of these standard agreements. To prevent such abuses, courts in the United States apply a new concept or doctrine called unconscionability. This doctrine gives a judge the authority to set aside some or even all of the agreement to avoid things that are perceived as against conscience.¹⁸

3. *Pacta Sunt Servanda* Principle

The literal meaning of *pacta sunt servanda* is that agreement must be honored. The *pacta sunt servanda* principle is related to the principle of freedom to contract, where parties are free to express their will to be embodied in an agreement. Therefore, it morally binds the agreed parties because they freely expressed their will. Article 1338 of the Civil Code states that all agreements made legally (in accordance with Article 1320) are binding as law for those who make them. It means that everything agreed upon is binding for the parties in the same way as the binding force of law. It is what is meant by the principle of *pacta sunt servanda*. In today's practical and efficient society, the *pacta sunt servanda* principle is very relevant to be applied.

4. Equality before the Law Principle

This principle places parties who agree on equal footing, regardless of differences in rank, power, nationality, or skin color.¹⁹ Each party does not see any difference, and the parties who agree have the same legal position. The parties are obliged to respect each other.

5. Consensual Principle

This principle is found in Article 1320 of the Indonesian Civil Code. The first requirement for a valid agreement is an agreement (consensus) among the parties who will agree. There is a willingness of each party to agree and to bind themselves mutually. This willingness generates

¹⁸M Roesli, Sarbini, dan Bastianto Nugroho, "Kedudukan Perjanjian Baku Dalam Kaitannya Dengan Asas Kebebasan Berkontrak", *Jurnal Ilmu Hukum*, Vol. 15, No. 1, 2019, p. 5.

¹⁹Mariam Darus Badruzaman, *KUH Perdata Buku III Hukum Perikatan Dengan Penjelasan*, 3rd Edition, Bandung: Alumnus, 2011, p. 113-115.

the belief that the agreement will be fulfilled. This principle is closely related to the principle of freedom of contract. According to Mariam Darus,²⁰ like a Malay proverb, 'holding the ear of a buffalo, holding the promise of a human'.

6. Balance Principle

This principle states that each party to an agreement has rights and obligations that are balanced in the agreement. Creditors and debtors have equal rights and obligations in a balanced manner. In the current development of agreements, they are generally made using standard agreements created by one party, and then the other party agrees or disagrees. According to this principle, all the parties are equal before the law due to each party's balanced rights and obligations.

7. Fairness Principle

This principle can be seen in Article 1339 of the Indonesian Civil Code, which states that "an agreement is not only binding for what is explicitly stated in it, but also for everything that is required by fairness, customary practice, or the law according to the nature of the agreement." In the current development of modern society, the principle of fairness is important in the legal interactions of individuals in society.

From the above explanation, it can be concluded that theoretically, it is a person's right to file any lawsuit if they have strong reasons to do so, including filing a request for the cancellation of an agreement if it does not meet the requirements for a valid agreement or if the agreement was made due to mistake, coercion, or fraud. Opening up the possibility to request the cancellation of an agreement is an important means for a modern legal system to ensure the implementation of the principles of access to justice and to maintain the rule of law. Therefore, it is mandatory in countries with modern and democratic legal systems. The law must function as a protector of human interests, and to protect these interests, the law must be enforced. Many civil cases involve one party seeking the cancellation of an agreement, and the court has often dismissed the cancellation claims. However, there are still seekers of justice who are disappointed with court decisions that are deemed to not fully understand the complexity of legal developments where agreements between parties in the form of agreements have experienced rapid development.²¹

The Difference between Fraud in Indonesian Civil Code and Criminal Code

Fraud in the Indonesian Criminal Code²² ("**Criminal Code**") involves the element of deception to benefit oneself or others by using a false name or status or a series of lies, which moves others to hand over goods or other things. The Criminal Code explains what type of fraud is categorized under this article, mentioning the use of a false name, false status, or a series of lies.

Meanwhile, fraud in civil law as regulated in Article 1328 of the Indonesian Civil Code: "Fraud is a reason for the cancellation of an agreement if the deception used by one party is such that it is

²⁰ *Ibid.*

²¹ Nindyo Pramono, "Problematika Putusan Hakim Dalam Perkara Pembatalan Perjanjian", *Jurnal Mimbar Hukum*, Vol. 22, No. 2, 2010, hlm. 224, 233.

²² Article 378 Criminal Code.

clear and evident that the other party would not have entered into the agreement if the deception had not been used." This article emphasizes the use of the term "deception" which moves someone to enter into an agreement. If there had been no deception, the other party would not have entered into the agreement. This article does not explain what type of deception is categorized. Therefore, judges often analogize fraud in the Criminal Code to applying fraud in civil cases. Judges decide based on their understanding and "conviction" of justice in cases of fraud in civil law, as stated in the Supreme Court's circular letter, which leaves it to the judge to interpret and decide fairly based on their conviction. Fraud in civil law does not have as detailed an explanation as in the Criminal Code. Therefore, how to apply and prove that fraud has occurred in civil interactions is left to the judge's conviction to decide fairly. Generally, consent is made through signatures, as long as the signature is made voluntarily and genuine, it is difficult to prove fraud. Therefore, the Supreme Court leaves it to the judge based on their conviction because in the process of proving in court, judges are not only bound by formal evidence but use their "conviction" to reveal the truth and decide fairly.

The difference is clearly shown, fraud in the Criminal Code is committed through deception, causing someone else to surrender the property. The element of "surrendering" the property is a fact, a real situation where something is transferred to another party. Conversely, fraud in the Civil Code involves deception that moves someone to make an agreement, evidenced by a signature or other proof of agreement. Therefore, what needs to be proven is the existence of an agreement, not the "surrender" of property, as in criminal fraud. The phrase "moves someone to agree" reflects the absence of coercion. It is what makes it difficult to prove fraud in civil law. There is no further explanation or regulation about how fraud can be committed without coercion. It is highly subjective. It will certainly make it difficult for judges to apply decisions in cases of fraud in civil cases. Therefore, it is not surprising that in settling cases of fraud in civil cases in court, judges use analogies with fraud in criminal law, which is fundamentally different. Article 1328 of the Civil Code defines fraud: "the other party would not have entered into the agreement if the deception had not been communicated to them." This means there is no "coercion" element in civil fraud. The most important element is "dishonest information" communicated by one party so that the other party voluntarily and without coercion agrees or expresses their consent. It is difficult to prove that the agreement is "defective," as stated in Article 1321 of the Civil Code, precisely because it is voluntary. Article 1328 of the Civil Code states clearly that fraud must be proven, not presumed. Applying the law in cases of fraud in agreements is difficult due to the limited regulation, which is only in Articles 1321 and 1328 of the Civil Code. It complicates the application of justice and legal certainty to the parties in dispute.

In the development of contract law, especially in terms of consent made between parties through online media, fraud that causes defects in agreements and becomes a reason for allowing parties to file for annulment of the consent needs to be regulated in a separate article. As a comparison, in the Criminal Code, fraud is related to using false names, false dignity, and a series of

lies. Book III of the Civil Code needs to be updated under the times, including an article on the annulment of agreements due to fraud.

Fraud Must be Proven, Not Presumed

In the common law system, proving or providing proof is referred to as “proof and evidence,” which means the evidence presented in court so that the court can decide on disputed events. Evidence is the tool that leads to a decision, including oral and documentary testimonies.²³ The juridical proof is historical proof because what needs to be proven in a civil dispute is something that has already happened and has passed, which attempts to establish what happened in reality (*in-concreto*).²⁴ The proof is related to proving the existence of legal events and relationships, which aim to achieve truth and produce a verdict.

Fraud that causes defects in consent or renders consent invalid is a series of lies, dishonest information intentionally provided by one party to deceive the other party into a consensus they would not have entered if they had known the truth. The existence of this series of lies must be proven, as without it, the other party would not have made an agreement, or an agreement would not have existed. Therefore, what is proven is the legal event that includes the whole situation, occurrence, and legal relationship. This proof occurs in a series of court hearings seen and witnessed by a judge. Article 1328 of the Civil Code explicitly states that defects in consent due to fraud must be proven. It is not easy to prove because the agreement process occurs voluntarily without coercion. If the evidence or sign of consent is a signature, for example, then the signatures are given voluntarily. In the current era of digital transactions conducted online, the process is recorded digitally with a programmed system or application. It is essential to read the terms and conditions carefully, as if digital consent has been given, it is considered consent. Ahmad Ali²⁵ distinguishes between the understanding of “event” and “legal event,” in which the “event” that must be proven in a broader scope is related to the whole situation, occurrence, and legal relationship, which is not just an occurrence and is often not fully visible to the senses. Meanwhile, a legal event is given legal consequences by the law.

The question is, what kind of event needs to be proven? There are 2 (two) events need to be proven to determine the truth, namely:²⁶

1. *Racio desidendi*; the essence of a legal case, the part considered to have a decisive nature (material fact), an essential factor in resulting in a decision;
2. *Obitur dictum*; a part of the legal event that is unimportant to consider.

Therefore, in a civil case, not all arguments that form the basis of the lawsuit need to be proven true, arguments that are not challenged or acknowledged by the opposing party do not need

²³ Achmad Ali, *Asas-asas Hukum Pembuktian Perdata*, Kencana Media Group, Jakarta: 2012, p. 17-18.

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 32-33.

²⁶ *Ibid.*, p. 35-36.

to be proven. The judge will determine who among the parties is obligated to provide evidence or bears the burden of proof.²⁷

The Attitude of the Supreme Court in Jurisprudence Rulings

In some court rulings, the Supreme Court allows judges to decide based on their own convictions in cases of civil fraud. It is because the proof process in such cases involves a series of court sessions witnessed and experienced by the judges. The judges' professionalism is required to ensure justice in their rulings. However, the judges' subjective elements may affect the objectivity of the ruling. It is due to the lack of guidance regarding fraud in the Civil Code, which is only mentioned in Article 1321 and Article 1328 of the Civil Code.

Individual transactions in society, which are becoming increasingly complex, begin with the assumption that healthy (reasonable) norms apply, honesty is upheld, and they are conducted in good faith. Trust is important in the contractual relationships between individuals. However, many cases occur contrary to this assumption, as anticipated by the legislator in Article 1321 and Article 1328 of the Civil Code. With the increasing complexity of social interactions and the advancement of information technology, which is designed for human efficiency, regulations on agreements made through fraud need to be updated to achieve certainty and justice. In contractual relationships between individuals, "freedom" to transact with anyone, regarding anything and anywhere, applies as long as the conditions for a valid agreement are met. If people cannot predict the behavior of others as an expression of their unlimited freedom, disorder, and uncertainty will arise. The logic behind the doctrine of *pacta sunt servanda* is the awareness that no one is willing to engage in an agreement if they intuit that few agreements are honored.²⁸

The legal stance of the Supreme Court towards parties who unilaterally terminate an agreement is considered an act against the law. This opinion is stated in Supreme Court Decision number 1051 K/Pdt/2014 (PT. Chuhatsu Indonesia vs PT. Tenang Jaya Sejahtera) dated November 12, 2014. In this verdict, the Supreme Court considered that the Respondent/Petitioner who unilaterally terminated the agreement with the Plaintiff/Applicant had committed an unlawful act, as it contradicts Article 1338 of the Civil Code, which states that an agreement cannot be revoked except by the consent of both parties. This decision was then reinforced in the Reconsideration of Verdict number 580 PK/Pdt/2015. In its consideration, the Supreme Court reiterated that the unilateral termination of an agreement is an act against the law, as previously stated, where the Supreme Court considers that the unilateral termination of an agreement is considered an act against the law and has become a consistent legal precedent in the Supreme Court since 2014. The reasons behind the unilateral termination of an agreement are understood by the judge, who finds them during the trial

²⁷ Retno Wulan Sutantio, *Hukum Acara Perdata Dalam Teori dan Praktek*, Penerbit Mandar, Bandung: 2009, p. 58.

²⁸ Budiono Kusumohamidjojo, *Teori Hukum, Dilema antara Hukum dan Kekuasaan*, Yrama Widya, Bandung: 2016, p. 67-68.

process. Regarding the decision to terminate or cancel an agreement due to indications of fraud, it won't be easy to prove, as the agreement has already been made and has fulfilled the requirements stated in Article 1320 of the Civil Code, although Article 1321 states that the agreement can be canceled.

The stance of the Supreme Court in the above case pertains to a lawsuit filed by one party for the "cancellation of the agreement." To understand the motive or reason behind the lawsuit, only the judge who understands it through the trial process can determine it. The judge will refer to legal sources (laws, jurisprudence, and expert opinions). Jurisprudence and expert opinions will refer to legal regulations, in this case, the Civil Code. As the relationship in civil matters becomes increasingly complex, when the Civil Code was drafted and codified, the drafters did not imagine the type of interaction found in today's digital age. Therefore, it is time to refine some of the articles in Book III of the Civil Code to make them "responsive" to the development of the times.

Ideally, judges should make rulings based on legal considerations in four aspects: philosophical, legal principles, positive legal rules, and the culture of legal society.²⁹ Legal rules as a reference to the substance of civil cases must provide legal certainty and reference for judges in applying justice for the parties involved. Judges, as a subsystem within the justice system, are the final decision-makers in a struggle for justice, as reflected in their rulings. There are three legal principles or juridical oceans: the principle of legality, which gives birth to legal certainty, justice, and usefulness.³⁰ Judges should only declare an agreement null and void by ordering actions that restore the parties to their original position. In this case, judges should not be fixated on the plaintiff's petition, which usually only asks the judge to declare the agreement null and void and impose a penalty for damages. A ruling can impact the loss of one party if the judge's decision is inaccurate because the arguments presented are not based on sufficient knowledge or legal doctrines in legal literature. There are still seekers of justice who are disappointed with judges' rulings that are perceived as not fully understanding the complexity of legal developments where agreements made by parties in the form of agreements are developing rapidly. Therefore, to uphold legal certainty and justice to provide benefits for seekers of justice who bring their legal disputes to judges, judges must professionally uphold the law by always paying attention to three legal principles: legal certainty, usefulness, and justice. Legal certainty means the existence of legal rules that become a reference for judges in upholding the law.

As relationships in civil law become increasingly complex, where at the time the Civil Law Code was drafted and codified, its creators did not imagine the interactions in civil law that are found today, such as digital interactions. Therefore, it is time to improve some of the articles in Book III of the Civil Law Code so that they are "responsive" to the development of the times and able to provide the legal certainty that judges use to achieve justice.

²⁹Dwi Handayani, "Kajian Filosofis Prinsip Audi Et Alteram Partem Dalam Perkara Perdata", *Jurnal Ilmiah Kebijakan Hukum*, Vol. 4, No. 2, 2020, p. 388.

³⁰Christina Maya Indah, "Menggagas Cita Moral Dalam Penafsiran Hukum Hakim", *Jurnal Refleksi Hukum*, Vol. 4, No. 1, 2019, p. 41-50.

CLOSING

Consent is the first requirement stated in Article 1320 of the Indonesian Civil Code for a contract to be valid. There can be no contract/agreement without consent. To prevent the abuse of consent by the parties involved, the legislator regulates in Article 1321 of the Civil Code that consent can be canceled due to coercion, mistake, or fraud. It is not easy to prove fraud in an agreement because the other party gave their agreement without being coerced. It is different from the concept of fraud in criminal law. The Civil Code does not provide much guidance on this matter, only Article 1328, which explains the fraud meant in Article 1321, a series of lies that lead to the other party's consent, which would not have been given if the lies had not been told. Proving the existence of a "series of lies" is not easy, as it requires the proof of a series of events to conclude that it fulfills the fraud requirements. Meanwhile, as individual interactions in civil matters become more sophisticated, there are many cases where one party claims the consent is invalid due to a fraudulent agreement. On the other hand, judges must always interpret the meaning of laws and regulations that serve as the basis for their application.³¹

Individual interactions in civil law are rapidly evolving with the increasing use of information technology, which facilitates people to be more efficient in using their time and energy. Meanwhile, the legal rules accompanying it, which serve as a basis or guide for regulating interactions in civil law, still refer to the Civil Code, which is approximately 173 years old. Therefore, as a suggestion, it is time to realize the renewal of articles that are unable to provide legal certainty to the parties involved in litigation, especially those regulated in Book III of the Civil Code, particularly the article related to fraud. The renewal and improvement of Book III of the Civil Code should be made to ensure legal certainty and justice. The renewal can be done by creating a law on contract/agreement.

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