



# THE 3<sup>rd</sup> INTERNATIONAL CONFERENCE AND CALL FOR PAPER

**"Legal Development in Various Countries"**



**IMAM AS SYAFEI BUILDING**  
 Faculty of Law, Sultan Agung Islamic University  
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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# **The 3<sup>rd</sup> PROCEEDING**

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## **The 3<sup>rd</sup> PROCEEDING**

“Legal Development in Various Countries”

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## INFORMATION OF THE CONFERENCE AND CALL PAPER

**WORLD ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# Welcome to Participants on International Conference

## "LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

*This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.*

**KEYNOTE SPEAKER:**  
**Prof. Henning Glaser**  
Thammasat University, Thailand

**IMAM AS SYAFEI BUILDING**  
Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

**SPEAKERS :**

1. Prof. Shimada Yuzuru  
Nagoya University, Japan
2. Prof. Dr. Ruzian Markom  
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M  
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Indonesia, September 05<sup>th</sup> 2017

**WORLD ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# International Conference

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**5**  
September  
2017

**Prof. Henning Glaser**

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**IMAM AS SYAFEI BUILDING**, Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : **Faculty of Law UNISSULA**  
Semarang-Indonesia

**FACULTY OF LAW**  
Sultan Agung Islamic University

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5<sup>th</sup> 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3<sup>rd</sup> Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455  
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AND CALL FOR PAPER  
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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## PREFACE

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Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5<sup>th</sup> 2017

**Chairman of the Committee,**



**Dr. Anis Mashdurohatun, S.H., M.Hum**  
**NIDN : 06-02105-7002**

## **GREETING FROM THE DEAN OF FACULTY OF LAW**

---

*As-salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5<sup>th</sup> 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.


Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

*Wassalamu'alaikum Wr. Wb.*

Semarang, September 5<sup>th</sup> 2017

Dean,



**Prof. Dr. Gunarto, SH, SE, Akt, M.Hum**  
NIDN.062004670

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Contract Abolition Due to Undue Influence  
(Law Reconstruction of Obligation the Civil Code in Indonesia)

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**ABSTRACT**

The validity of the agreement is not only related to contracting or relating to the content and it is solely agreed but the factor of contract is determined by factor of a contract which has a legal disability. An abusing factors of circumstances in legal development by judges at the district, High Court or Supreme Court level are repeatedly used as the basis for the cancellation of contracts by parties that make contracts after defaulting and ultimately litigating in the Court. In determining an act to categorize as an element in resulting the birth of a defect contract because of the undue influence, there is no criterion that contained in the Law or in the Civil Code (Civil Code) which has been the basis in making the contract, thus causing diversity among Judges in determining whether the birth of a contract is an act of undue influence or not undue influence.

**Introduction**

The development of jurisprudence law in Indonesia especially regarding the abolition of the agreement due to undue influence (*misbruik van omstandigheden* / undue influence), the courts at the District Court, High Court and Supreme Court have decided cases to abolish the agreement due to undue influence (*misbruik van omstandigheden* / undue influence). Although Indonesia has not made any reforms to civil law in Indonesia especially in Book III Civil Code.

The Netherlands as country has been carrying the Civil Code to Indonesia as colonial country until now still adopted as Civil law in Indonesia, has included new teachings that are *misbruik van omstandigheden* or undue influence. In the Dutch Law especially in *Nieuw Burgerlijk Wetboek* (next referred to as NBW) undue influence which set in article 3:44 lid 1 NBW.<sup>1</sup>

The term undue influence in Indonesian law is the equivalent of the term in the Dutch language called *misbruik van omstandigheden*, which in the dictionary of *Misbruik van recht's* law, is defined as abuse of power, *abus de droit* (Pr.)<sup>2</sup> undue influence as a limiting freedom factor of contract, relating of birth contract, it's not caused of rule. Yet undue influence may be made possible by an unbalanced contractual content factor, but rather relate has occurred at the time of the birth of contract because it is not free to determine in contract.

The Court as the entrance to the parties as litigants question the legitimacy of the contract in the process of contracts the symptoms of undue influence to seek the justice. To answer it, the judge is to seek / explore the living law in the middle of society.

The authority of the Judge to assist the justice seeker does not mean that the Judge is impartial or judgmental, but the Judge only indicates the lawful way, so that the person who is illiterate and unable to write is not harmed<sup>3</sup> or not the victim of the rape of rights by a non-responsible even though by law the judge may exercise the freedom of using wisdom in the excavation of living laws in the middle of society to determine or regulate things. Including to determine criteria of abuse of circumstances in the process of birth of a contract.

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<sup>1</sup> Fani Martiawan, 2015, *Paksaan Ekonomi dan Penyalahgunaan Keadaan Sebagai Bentuk Cacat Kehendak dalam Perkembangan Hukum Kontrak*, *Yuridika*: Volume 30 No 2 Mei Agustus 2015 Page 199

<sup>2</sup> J.C.T Simorangkir, *Kamus Hukum*, Jakarta: Sinar Grafika, Page 99

<sup>3</sup> Abdul Kadir Muhammad, 2000, *Hukum Acara Perdata Indonesia*, Bandung: Citra Aditya Bakti, Page

The brief description illustrates above a legal state of societal social development, which ultimately requires Indonesian civil law to be able to respond to human patterns and behavior in contracting, in particular a state of contractual action that contains the phenomenon of contracting the birth of a contractual misuse of the parties to the contract. During this time the judge in court always uses the wisdom he has to decide cases undue influence with guidance against jurisprudence or doctrine.

In general, the courts interpret legitimate contracts as a genuine promise to carry out. The sight of the "sanctity" of a contract can lead to ethical conflicts<sup>4</sup> of Indonesia as a country that embraces a civil law system that puts forward the written law should it be the criterion of undue influence (misbruik van omstandigheden) was adopted in the renewal of the Civil Code with the elements that contain community values. Therefore in this study will formulat to determine whether an act of undue influence(misbruik van omstandigheden).

### **Undue Influence**

The Contracts made by the parties from the wishes one of the parties to submit an offer to the other party to fulfill his desire with the intention of achieving his wish. Offers made to other parties, usually the proposed offer gives hope to the beneficiary. Such a situation will occur bargaining position from both parties. It is undeniable bargaining by the parties will affect the position of each contract. To balance the wishes of each of these parties, civil law is not specifically regulated.

Unlike the provisions of English law, the wish of contracting parties to affirm the intention to create legal relation of an agreed contract or contract is firmly established into one of the conditions of contractual validity in contract law. Under the terms of English law, for example; for the validity of a contact must be fulfilled five conditions, namely: first, the offer of the offeror; second, acceptance of the offeree; third, each party has the legal capacity to carry out the legal relationship; fourth, the existence of a meeting of rights and obligations are clear (consideration); fifth, the desire of each party to the agreement is legally binding (intention to create legal relation.<sup>5</sup>

The unbound position in the manufacture will give rise to unbalanced or biased contacts. In the end there will be a mock-and-false contract. the weakly positioned party will accept the situation of pretending to accept with compulsion with a weak position, provided that momentary desire can be achieved. while those who feel strongly take advantage of others' circumstances to take advantage of others.

The unbalanced position, according to Hirman Purwanasuma, can be identified by looking at the characteristics of a situation:

1. Determination of terms of agreement by one party;
2. Terms of agreement exclude liability;
3. The value of achievement and counter achievement is very unbalanced;
4. Debtors have no other option (relative);
5. One party in a stronger psychological position.<sup>6</sup>

The position of one of the depressed parties which expresses an imbalance between the parties. So on the other hand not free to do his will. While on the other hand, the party who feels strong in his position take refuge in the principle of freedom of contract.

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<sup>4</sup> Soedjono Dirdjosisworo, 2003, Kontrak Bisnis (Menurut Sistem Civil Law, Common Law, dan Praktek Dagang Internasional), Bandung:Bandung, Page 52

<sup>5</sup> Ricardo Simanjuntak, Op-Cit Page 44

<sup>6</sup>[http://www.pkh.komisiyudisial.go.id/id/files/Materi/UMUM02/UMUM02\\_HIRMAN\\_PK.pdf](http://www.pkh.komisiyudisial.go.id/id/files/Materi/UMUM02/UMUM02_HIRMAN_PK.pdf), di Akses pada tanggal 28 Agustus 2017

## Acts of Usefulness as Reasons for the Birth of Contract

Freedom of contract adopted by the Civil Code (Civil Code) is not free as free as unlimited freedom. Freedom of contract by the parties shall not be contrary to moral norms and shall not violate public order. Freedom of contract is given to those who make it and everyone should respect that freedom. Nevertheless, the freedom of contract is still by the Civil Code given limitations as rules of the game in the obligation.

The theory of freedom of contract can be seen in a material sense, meaning that giving to an agreement any desired content or substance, and that we are not bound by certain types of agreement that have been clearly described before. Freedom of contract in the formal sense: an agreement can be distinguished in the desired way, in principle here there is no requirement whatsoever about form. Conformity of will or agreement between the parties alone is sufficient, then freedom of contract in this formal sense is often also called the principle of consensualism.<sup>7</sup>

The principle of consensuality as the basis for the birth of the contract certainly can not be separated from the values of justice and morality, meaning that freedom of contract can not be used as an excuse to take refuge in the state of someone whose position is weak while others take advantage. In the language of the proverb is often expressed looking for opportunities in narrow.

Undue influence in the contract in some jurisprudence in Indonesia, the judge has not yet uniformity, to determine the category of birth contract because it is deemed flawed in determining his will to give consent. This condition is caused by the influence of the Indonesian legal praxis that tends to the civil law system that is oriented to the written law. Nevertheless, the judge always uses his / her authority to seek / explore the values of justice by making legal discovery with legal construction.

Decision of the Supreme Court Number 2131 K / PDT / 2011<sup>8</sup> The Civil Court in the appeal level has decided as follows in the case of PT. BANK SUMUT, domiciled in Medan. Against H.M. YUNAN NASUTION, in his capacity as a debtor; and, SISKA EMILIA SARI NASUTION; SAFRIN UMAR NASUTION; ABDUL HALIM; H. SYAFARHUM SIREGAR, SH. (is the heir of Syamsiyah Lubis / Husband H.M Yunan Nasution) In the principal issue of the loan with the repayment of credit installment.

The judge of the Supreme Court adjudicating this case provides legal consideration to this matter as follows:

- a. That the Bank of North Sumatra is not justified to have a guaranteed object by way of making "sale and purchase" ostensibly
- b. That it is true that the agreement made by unequal parties;
- c. That can be proved, the contract act done by the parties is not a sale but the credit agreement can be proven with proof of loan repayment.

Reviewing some of the doctrines and jurisprudence in Indonesia as well as Supreme Court decisions, the categories of misuse of acts in a contract can be categorized as follows; 1) Contracts made are economically valuable. 2.) Misbehavior; 3) Elimination of the will due to unilateral urgent influence; 4) The dominance of unilateral economic status; and, 5) The principal contract or the contract of entry (Accessoir) is made by pretending.

Jurisprudence that reinforces other misuse can be seen from some decisions or jurisprudence of the Supreme Court of the Republic of Indonesia has provided support for the doctrine of *vanbrandic van omstandigheden*. For example in the decision of the Supreme Court of the Republic of Indonesia Number 3431 K / Pdt / 1985 dated March 4, concerning

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<sup>7</sup> Soedjono Dirdjosisworo, Op-Cit Page 69-70

<sup>8</sup> Putusan Mahkamah Agung Nomor 2131 K/PDT/2011

the application of 10% interest per month by creditors against debtors who declared to violate the principles of justice, 1904 K / Sip1982 dated January 28, 1984.<sup>9</sup>

### **Conclusion**

The unbalanced position in the contract making, raises a situation that one party can use to pressure the other to take advantage of others. Legal development in Indonesia through jurisprudence has canceled many contracts for reasons of undue influence, but until now the reason for abolition of agreement due to abuse has not been regulated in the Act so that it is natural that the institution authorized to renew the law of engagement in Indonesia especially include the element of abuse as a result of the abolition an agreement.

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<sup>9</sup> Ricardo Simanjuntak, Op-Cit Page 192