

# Agreements Contracts in Indonesia : Application of the Consensualism

*Zhanya Zalshabila**Syamsul Alam**Muhammad Ya'rif Arifin*

Faculty of Law, Universitas Muslim Indonesia, Indonesia

Faculty of Law, Universitas Muslim Indonesia, Indonesia

Faculty of Law, Universitas Muslim Indonesia, Indonesia

This study aims to determine and analyze the form of application of the principle of consensualism in contract agreements made by the parties and to determine what are the impacts of the application of the principle of consensualism on the protection of the rights of the parties in the agreement. This study uses a normative research method. This study uses a normative legal method that focuses on the analysis of legal norms in laws and regulations, doctrines, and court decisions. The results of this study indicate that the application of the principle of consensualism is a fundamental principle in contract law which emphasizes that an agreement is considered valid and binding on the parties since the agreement is reached. The application of the principle of consensualism also has an impact on providing space for the parties to draft agreements according to their needs, but it can also pose a risk of injustice, especially for parties who have a weak bargaining position. Therefore, effective legal protection, contract supervision, and legal education for the community are important to overcome the negative impacts of the application of the principle of consensualism. The recommendation of this study is To protect the rights of the parties in the agreement, stricter supervision of contract practices is needed, especially in situations where one party has a weaker bargaining position. The government and related institutions are advised to strengthen regulations governing minimum standards for certain agreements.

---

## INTRODUCTION

Agreement is a incident Where somebody promise to another person or where two people promise each other to do something which as a result creates an obligation for both of them to fulfill a performance as the object of the agreement.[1] Agreement according to provisions of Article 1313 of the Civil Code is a action Where one person or more to tie up self to one other person or more . This is means that agreement cause existence rights and obligations between the parties who made it . In every agreement with Meaning that every the agreement that has been made and agreed together by the parties must implemented with faith good , as specified in Article 1338 paragraph (3) of the Civil Code which states that all agreement must done with faith good . Faith Good at the time make a agreement means honesty . People who have faith Good put trust fully to party the opponent he considered honest and not hide something bad that will happen later day can cause difficulties .

The law allows man or individual for free determine what to do agreed . Human No only free For do or No do a acts formulated by law , but rather in a more meaningful sense wide , because with freedom that's it He can determine the best settings for himself . It should be understood that every legal regulation is rooted or based on a legal principle, namely a value that is believed to be related to the arrangement of society to achieve a just order. Because the material truth of a legal system that is the formal basis of a legal system refers to the principles that are the foundation of the entire building of legal rules that apply as positive law that must be obeyed in the country where it is applied. Legal principle become thoughts the basis contained inside and behind system laws , each formulated in rules relevant legislation and judicial decisions with provisions and decisions individuals who can viewed as the description .

The legal principles that are the foundation of positive law are actually an abstraction of a more general rule whose application is broader than the provisions of positive legal norms. The principles law That born from content reason morals and conscience human being that causes man can differentiate good-bad , fair-unfair fair , and humane-not humane . System law contract own a number of principle among them principle consensualism , Principle of consensualism contained in provisions of Article 1320 paragraph (1) of the Civil Code , which states that a agreement legitimate If there is agreement between the parties who will later will binding on the parties . Based on principle consensualism that , is adopted understand that source obligation contractual is meet him will (convergence of wills) or consensus of the parties who make it contract . However in condition certain Where in the agreement There is a things that reflect No realization agreement . Consensualism or consensuality is one of principle important in law agreement . Principle of consensualism determine that sutau agreement made between two or more people have tie so that has give birth to obligation for one or more party in agreement said , immediately after those people reach agreement or consensus , although agreement the has achieved in a way oral solely . This means in principle binding and valid agreement as engagement for the parties who promise No need formalities .[2]

Based on the description above , then writer interested For research and discuss it in a way scientific in form thesis entitled " " Analysis implementation principle consensualism in agreement contracts in Indonesia".

## METHOD

Study This use method law normative which focuses on the analysis of legal norms in regulation legislation , doctrine and decisions court . The focus is to study arrangement law civil related franchise , in particular termination agreement in a way unilateral . Analysis includes Article 1320 of the Civil Code about condition legitimacy agreement , Article 1338 concerning principle freedom contract .[3]

## RESULTS AND DISCUSSION

### The Principle of Consensualism in Contract Agreements

The principle of consensualism is one of the fundamental principles in civil law, especially regarding agreements. This principle emphasizes that an agreement is considered valid and binding since an agreement is reached between the parties, without requiring additional formalities such as written documents or certain legal actions, as long as it meets the valid conditions of an agreement as stipulated in Article 1320 of the Civil Code (KUH Perdata). The principle of consensualism [4], which is reflected in Article 1320 paragraph (1) of the Civil Code, stipulates that one of the valid conditions of an agreement is an agreement between the two parties involved. In this context, the agreement is considered the core of a valid agreement, where the agreement itself is formed when the will of the two parties is in line and is reflected in a statement they make. Thus, the principle of consensualism teaches that in many cases, an agreement can be formed without requiring certain procedures or formalities, as long as both parties agree with the contents and objectives of the agreement. This means that the most important thing in this principle is mutual will (consensus) between the parties, not in a formal or procedural form that must be met. The agreement itself can be explained as a condition in which there is a match between the intentions and statements issued by the parties, which in this case forms a valid legal bond. This agreement can be achieved in various forms, from oral to written, depending on the type of agreement and the applicable legal provisions.[5]

A real agreement is an agreement that is valid if it is implemented in real terms, for example with actions that directly lead to the implementation of the contract, while a formal agreement is an agreement that must meet a certain form, such as written, either in the form of an authentic deed

or a private deed. In contrast to German law, in Roman law various types of agreements are known. requires the fulfillment of certain forms, such as *contractus verbis literis* (agreements that fulfill certain form requirements, for example agreements made through words or writing) and *contractus innominat* (agreements that are not included in the category of formal or real agreements).[6]

Nevertheless, both legal traditions show the importance of form or procedure in creating a valid agreement, although the basic principle of all these agreements is the existence of an agreement between the parties. In the Civil Code, the principle of consensualism places more emphasis on agreement as the main element in forming an agreement. This means that even though an agreement does not require a formal form to be considered valid, the agreement must still meet other requirements stipulated in Article 1320 of the Civil Code, such as the capacity of the parties, the object of the agreement, and reasons that do not conflict with the law, morality, or public order. Thus, the principle of consensualism guarantees that an agreement formed on the basis of an agreement between the two parties still has binding legal force, even though it is not accompanied by formalities as stipulated in a formal agreement. [7] In Article 1320 of the Civil Code, there are four requirements for a valid agreement, namely:

Agreement of the parties (*consensus*) which shows agreement without coercion, error, or fraud.

The legal capacity of the parties to perform legal acts.

A certain thing that is promised, in the form of a clear and definable object.

A lawful reason is that the purpose of the agreement does not conflict with the law, morality or public order.

Article 1338 paragraph (1) of the Civil Code complements the principle of consensualism by affirming the principle of freedom of contract, where "all agreements made legally apply as laws for those who make them." This provision gives the parties the freedom to determine the content, form, and mechanism of implementation of the contract, as long as it does not conflict with applicable legal provisions. The principle of consensualism not only reflects freedom of contract, but also affirms the principle of trust and responsibility in legal relations. The application of this principle provides flexibility for the parties, but still requires caution to ensure that the agreement is not only valid, but also has adequate evidentiary force. As a fundamental principle in civil law, the principle of consensualism affirms that the core of an agreement is the agreement of the parties based on their free will. This principle is in line with the spirit of providing flexibility and autonomy in legal relations between individuals, reflecting trust in the capacity of the parties to determine their own rights and obligations. However, the application of the principle of consensualism also brings challenges, especially in the context of evidence. In practice, agreements that are only made verbally are often difficult to prove if one party denies the contents of the agreement. To overcome the potential for conflict, many agreements are now written down as valid evidence in court, as stipulated in Article 1867 of the Civil Code. In the development of modern law, the application of the principle of consensualism has also been adjusted Use the "Insert Citation" button to add citations to this document.

to the needs of positive law. [6]For example, Law Number 1 of 2023 concerning the Criminal Code (new Criminal Code) emphasizes the need for the principle of legality that regulates certain formalities for several agreements in the field of public law. In addition, in business agreements such as franchises, Law Number 42 of 2007 concerning Franchises requires that agreements be made in writing to ensure legal certainty for the parties. It is also important to understand that the principle of consensualism cannot be separated from the principle of freedom of contract as stipulated in Article 1338 of the Civil Code. This principle provides space for the parties to innovate in making agreements that suit their needs, as long as they do not violate the law, morality, or public order. This freedom, on the one hand, allows flexibility, but on the other hand requires responsibility so as not to harm either party.

The principle of consensualism in civil law reflects the basic principle that a valid agreement occurs only with an agreement between the parties involved. This agreement is sufficient to give rise to binding legal consequences, without having to go through additional formal procedures, as long as it meets the valid requirements as stipulated in Article 1320 of the Civil Code (KUH Perdata). Thus, the parties are given the freedom to draft an agreement according to their wishes, which creates flexibility and efficiency in various forms of legal relationships. However, although this principle provides freedom of contract, its application is also not free from challenges, especially related to proving an agreement that is only based on an oral agreement.[8]

The principle of consensualism provides a number of positive impacts and significant benefits when applied in a contract or agreement. These benefits contribute to increasing the effectiveness of legal relations between the parties involved, as well as strengthening the agreement system in the context of civil law. Overall, the application of the principle of consensualism in contracts provides many benefits for the parties involved, both in terms of flexibility, efficiency, and legal protection. However, it is important to continue to pay attention to other principles such as *pacta sunt servanda* and good faith, which ensure that the contract made is not only legally valid, but also implemented with full responsibility and honesty. The application of these principles creates a strong foundation for a fair, profitable, and legally accountable agreement.

#### The Impact of the Implementation of the Principle of Consensualism on the Protection of the Rights of the Parties in an Agreement

The application of the principle of consensualism in an agreement has a significant impact on the protection of the rights of the parties involved. This principle, which focuses on free agreement between the parties, ensures that their rights are respected and protected in the contract-making process. In practice, the principle of consensualism provides broad flexibility for the parties to draft agreements that suit their needs, desires, and goals without having to be bound by a particular form or format, as long as the agreement meets the requirements for a valid agreement. This principle reflects the value of freedom of contract, which is one of the foundations of modern civil law, especially in horizontal civil relations. This freedom is explicitly supported by Article 1338 paragraph (1) of the Civil Code (KUH Perdata), which states that all agreements made legally apply as laws for the parties who make them. This provision emphasizes that the law gives full authority to the parties to determine their own rights and obligations, as long as they do not violate legal limitations. Furthermore, the law also stipulates that this freedom is not absolute. Article 1337 of the Civil Code limits the scope of the principle of consensualism by stipulating that agreements made must not conflict with the law, public order, and morality. Thus, the freedom of the parties to agree on the contents of the contract is protected, but remains within the corridor that accommodates legal values, social norms, and moral principles that apply in society.

The principle of consensualism on the one hand provides a number of advantages. The contractual freedom recognized in this principle allows the parties to draft innovative, flexible agreements that are in accordance with their specific needs, without being bound by overly rigid provisions. This also strengthens the principle of autonomy of will, where individuals are considered capable of determining what is best for themselves in a legal transaction. Thus, this principle encourages efficiency and provides room for creativity in designing mutually beneficial legal relationships. However, on the other hand, the application of the principle of consensualism also poses challenges, especially regarding the protection of parties who have a weaker bargaining position. In many cases, information asymmetry is a major problem. For example, in contracts between consumers and business actors, business actors often have more knowledge about the products or services offered than consumers. This imbalance can cause consumers to not fully understand the contents and implications of the contracts they sign. In addition, abuse of circumstances ( *misbruik van omstandigheden* ) is also a serious risk in the application of the principle of consensualism.[1]

When one party is in a pressing or vulnerable position, such as in urgent need of funds or under psychological pressure, the other party in a stronger position can take advantage of the situation to

gain unfair advantage. In this context, the freedom of contract promoted by the principle of consensualism can become a tool of exploitation if not balanced with adequate legal supervision. Therefore, although the principle of consensualism provides flexibility and freedom for the parties to regulate their legal relations, its implementation must be accompanied by an effective protection mechanism. This aims to ensure that the agreement made truly reflects substantive justice and protects the rights of all parties involved, especially parties who are more vulnerable or have a weak bargaining position. The following are some of the main impacts of the application of the principle of consensualism on the protection of the rights of the parties in the agreement: [9]

**Granting Freedom to Determine the Content of the Agreement.** The principle of consensualism gives the parties the freedom to negotiate and determine the content of the agreement according to their needs and desires. The parties can draft mutually beneficial provisions without having to be bound by a certain formal form, so that they have flexibility in drafting their respective rights and obligations. This freedom provides protection for parties who wish to make an agreement that best suits their conditions and goals.

**Protection of the Desires and Interests of the Parties Involved,** Because the agreement is based on mutual agreement, both parties have full control over the contents of the agreement they make. No party is forced to accept unwanted or detrimental conditions, so the application of this principle prevents coercion or fraud in making an agreement. Thus, the rights of both parties are protected, and they can make the most beneficial decisions for them without any intervention from other parties.

**Providing Legal Certainty.** After there is an agreement between the two parties, the agreement becomes valid and has binding legal force, in accordance with Article 1338 paragraph (1) of the Civil Code. This provides legal certainty to both parties, where every implementation of the agreement can be accounted for and enforced before the law. With legal certainty, the rights that have been agreed upon will be protected and can be submitted to court if a dispute occurs.

**Reducing the Risk of Disputes.** The application of the principle of consensualism also reduces the risk of disputes because agreements made based on the agreement of both parties are more accommodating to their wishes. In other words, the risk of disputes is reduced because both parties have agreed on the things that are the object of the contract, such as price, quality, and time of implementation. However, in situations where there is disagreement or violation of the contents of the agreement, the party who feels aggrieved can file a claim based on the principle of *pacta sunt servanda* contained in Article 1338 paragraph (1) of the Civil Code, which states that a valid agreement binds the parties involved.

**Encourage Goodwill and Trust.** The principle of consensualism prioritizes good faith in making agreements, as regulated in Article 1338 paragraph (3) of the Civil Code. With this principle, parties are expected to act honestly and with good intentions in implementing the agreement, which in turn will protect their rights and avoid actions that could harm other parties. The trust created from good intentions also provides a sense of security for both parties in carrying out the agreed obligations and rights.

**Increasing Efficiency in Business Processes.** The principle of consensualism reduces the administrative burden required in making agreements, such as the need for written formalities or witnesses. This allows contracts to be executed more quickly and efficiently, which ultimately speeds up the completion of transactions and reduces operational costs. This efficiency also benefits both parties because they can focus more on implementing their rights and obligations rather than being hampered by formal procedures.

**Reducing Dependence on Formal Legal Procedures.** By implementing the principle of consensualism, the parties do not need to rely too much on formal legal procedures, such as the requirement for registration or legalization of documents by a third party (notary or other official

institution) to validate their agreement. This certainly reduces the time and costs that must be incurred, and gives the parties the freedom to make agreements that suit their practical needs, which do not always require complicated formalities.

Maintaining a Balance of Obligations and Rights. The principle of consensualism serves as an important reminder to maintain a balance between agreed obligations and rights. Although this principle prioritizes freedom of contract, individual rights cannot be ignored. All agreements made with the principle of consensualism must still comply with applicable legal provisions, including those regulated in Article 1338 of the Civil Code regarding the obligation to act in good faith and avoid agreements that contain elements of fraud or injustice. Thus, this principle also protects the weaker party in a contract, ensuring that their rights are not violated. The parties involved in an agreement generally have certain goals or intentions underlying their wishes. This goal is expressed through promises made and accepted by both parties involved. In the economic world, agreements play a very important role, especially in achieving economic changes, such as in the distribution of goods and services. As a legal instrument, agreements aim to create better conditions for both parties involved. According to Patrick S. Atiyah, agreements have three main purposes, the first is to enforce a promise and protect the reasonable expectations that arise from it. This purpose ensures that the promises made are accountable and meet the reasonable expectations of the parties involved. Second, the agreement aims to prevent unjust or improper enrichment, ensuring that no party takes unlawful advantage or harms the other party. Third, the agreement also aims to prevent certain losses or damages that may arise from disagreements or failures to carry out the agreement.

Ultimately, this agreement creates satisfaction and balance, both materially and immaterially. As a result, the principle of balance that is the basic spirit of the agreement can function as a harmonization between various existing legal institutions, by considering the deep way of thinking of the Indonesian people about social values and justice. In Soepomo's view, the fourth goal of the agreement is to achieve balance, propriety, or a certain social attitude. This is intended to reflect a sense of gratitude or satisfaction, as well as an effort to achieve immaterial existence in social life. This view is in line with John Rawls' theory of justice, which states that happiness or inner satisfaction is the basis of the principle of good justice. Rawls divides this aspect of happiness into two parts: first, success in implementing rational plans that have been prepared by individuals; second, the individual's self-confidence supported by good reasons that this success will last in the long term. The conditions for achieving balance as the fourth goal of the agreement can be achieved through social propriety and immaterial existence, which are ultimately reflected in the spirit of balance. In this case, the interests of individuals and society are simultaneously guaranteed by objective law. If the substance of the agreement is contrary to morality or public order, then the agreement will be null and void by law.

## CONCLUSION

The application of the principle of consensualism in contract agreements made by the parties is a fundamental principle in contract law which confirms that an agreement is considered valid and binding on the parties since the agreement is reached. This principle, as regulated in Article 1338 paragraph (1) of the Civil Code, provides freedom for the parties to determine the content, conditions, and form of the agreement, as long as it does not conflict with the law, public order, and morality and Article 1320 of the Civil Code regarding the conditions for the validity of the agreement. This reflects respect for the autonomy of the will of the parties in contracting. The impact of the application of the principle of consensualism on the protection of the rights of the parties in the agreement provides space for the parties to draft the agreement according to their needs, but can also pose a risk of injustice, especially for parties who have a weak bargaining position. Imbalance of information or abuse of circumstances can result in violation of the rights of one of the parties. Effective legal protection, contract supervision, and legal education for the community are important to overcome the negative impacts of the application of the principle of

consensualism. To maximize the benefits of the principle of consensualism, the parties who make the agreement are advised to understand the principles of contract law in depth, including the legal limitations that have been regulated in Article 1337 and Article 1338 of the Civil Code. In addition, it is important for the parties to use clear and detailed language in the agreement, so as to reduce the potential for disputes in the future. Broader legal education is also needed so that the community understands their rights and obligations when drafting contracts.

## References

1. N. A. Sinaga, "PERANAN ASAS-ASAS HUKUM PERJANJIAN DALAM MEWUJUDKAN TUJUAN PERJANJIAN," 2018.
2. M. M. F. ramadhan. Andi Muhammad Fikri, "Law Enforcement in Child Fighting Crimes That Result in Death," *Jurnal Hukum: HorizonPublicLegal Studies*, vol. 4, no. 1, pp. 1-30, Feb. 2024, doi: 10.15294/panjar.v4i1.55017.
3. N. I. Wahab, S. Nawi, and D. S. Busthami, "Penuntutan Pengembalian Mahar Akibat Perceraian: Studi Putusan No.517/Pdt.G/2015/Pa.Mrs.," *Journal of Lex Generalis (JLS)*, vol. 2, no. 2, 2021.
4. Salmawati Salmawati, "EKSISTENSI TANAH WAKAF DALAM PEMANFAATANNYA," *Jurnal Cendekia Hukum*, vol. 4, no. 2, pp. 153-165, Dec. 2019, doi: 10.3376/jch.v4i2.106.
5. S. Ulfah, "The Absolute Responsibility Principle in Environmental Environment System," in *IOP Conference Series: Earth and Environmental Science*, Institute of Physics Publishing, Jul. 2018. doi: 10.1088/1755-1315/175/1/012036.
6. A. Aswari, "Peran Ganda Administrator sebagai Mediator dalam Sengketa Transaksi Ponsel Bekas secara Online," *Jurnal Ilmiah Kebijakan Hukum*, vol. 12, no. 3, p. 259, Dec. 2018, doi: 10.30641/kebijakan.2018.v12.259-274.
7. A. Pratiwi, B. Santoso, P. Studi, and M. Kenotariatan, "Arti Penting Pengaturan Franchise Dalam Sistem Tata Hukum Perdata Indonesia," *NOTARIUS*, vol. 16, 2023.
8. M. Arsy and A. P. Buana, "Tanggung Jawab Pengembang Terhadap Kualitas Bangunan Yang Telah Terjual di Kota Makassar," *PLENO JURE*, vol. 10, no. 1, pp. 1-8, Apr. 2021, doi: 10.37541/plenjure.v10i1.528.
9. Dhira Utari Umar, "PENERAPAN ASAS KONSENSUALISME DALAM PERJANJIAN JUAL BELI MENURUT PERSPEKTIF HUKUM PERDATA," *Lex Privatum*, vol. 7, no. 1, pp. 38-48, Mar. 2020.