

## RECONCEPTUALIZING CONSUMER CONTRACTS IN THE PHILOSOPHICAL PERSPECTIVE OF PANCASILA

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**Abstract**

*This study aims to develop the concept of consumer contracts from the philosophical perspective of Pancasila in Indonesia to achieve the legal objectives of legal certainty, justice, and legal benefits. The research is formulated to question how to conceptualize consumer contracts from the philosophical perspective of Pancasila. By using doctrinal research, this study concludes that consumer contracts in Indonesia do not meet the values of Pancasila. Therefore, the article attempts to conceptualize the consumer contract by offering communal principles to realize mutual benefits between the parties in a consumer contract without ignoring the special characteristics of the nation that existed before the independence of the Republic of Indonesia.*

**Keywords:** *Consumer Contracts, Pancasila Philosophy.*

### A. Introduction

Economic growth is compatible with community development. One important aspect of the economy is contract. Contract law constantly develops along with the rapid pace of science and technology. As a result, agreements are required to recognize technological advances and globalization, leading to a term better known as a business contract.<sup>2</sup> In currently developing business law theory, contractual relations have several terms classifying the types of contracts. Two of these types of contracts are frequently used in everyday life, namely commercial contracts and consumer contracts.<sup>3</sup>

A commercial contract is an agreement with commercial purpose between business entities. Commercial contracts emphasize the creation mutually-beneficial ventures based

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<sup>2</sup>In general, business contracts originate from an attempt to bridge differences in interests, Agus Yudha Hernoko, *Hukum Perjanjian (Asas Proporsionalitas dalam kontrak komersial)* (Kencana 2010) 1.

<sup>3</sup>Ibid 34.

on agreement and respect for the continuity of a business, following the rules of applicable contract law rather than imposing the will of others.<sup>4</sup>

On the other hand, consumer contracts are those made between a business entity and an individual, where the parties have unequal bargaining power. One party may have a stronger bargaining position, usually the business actor (either due to the mastery of capital/funds, technology or skills or the seller), while the individual party may have a weaker bargaining position. Thus, the party with the weaker bargaining position must simply accept all contract provisions, lacking any meaningful alternatives. Thus, there are only two alternatives for the parties who have a weaker bargaining position, to accept or reject an agreement (take it or leave it). The imbalanced position in consumer contracts can be seen in the standard clauses, which contain biased tendencies.<sup>5</sup> These standards of consumer contracts are often seen in Banking Agreements, Financing Company Agreements, and Insurance Agreements.<sup>6</sup>

Research into this problem is based on some underlying reasons of the normative basis, philosophical basis, and empirical basis, as follows.

The normative basis in this paper is that contract law in Indonesia is regulated in the Civil Code (KUHPer) /*Burgelijke Wetboek* (B.W.) of the third volume, which is about Engagement.<sup>7</sup> This third volume explains that an agreement must adhere to several principles, including: the principle of freedom to enter into an agreement (partij autonomy), the principle of mutual consent (conformity of the will), the principle of habit, the principle of binding force, the principle of equality of law, the principle of balance, the principle of public interest, the principle of good intention, the moral principle, the principle of obedience, the principle of protection for the weak, the principle of proportionality, and the principle of an open system.<sup>8</sup> Of the several principles for a standard agreement, one is of the most well-known principles, namely the principle of freedom of contract, as a universal principle used in almost all countries today.<sup>9</sup>

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<sup>4</sup>Marsella Tridarani, 'Perbedaan Antara Kontrak Komersial dan Kontrak Konsumen' (Bacheor thesis, Universitas Airlangga 2018) 2.

<sup>5</sup>Jonneri Bukit *et.al.*, 'Eksistensi Asas keseimbangan pada kontrak konsumen di Indonesia' (2018) 14(28) DIH Jurnal Ilmu Hukum 25.

<sup>6</sup>Marsella Tridarani (n.4) 3.

<sup>7</sup>Ridwan Khairandy, *Hukum Kontrak Indonesia Dalam Perspektif Perbandingan (Bagian Pertama)* (UII Press 2013) 12.

<sup>8</sup>Ibid 86.

<sup>9</sup>Agus Yudha Hernoko (n.2)105.

The legislation actually has established legal rules that aim to balance the rights and obligations of the parties in doing business. Some examples of these legal rules are Law Number 5 of 1999 concerning Antitrust and Unfair Competition, Law Number 8 of 1999 concerning Consumer Protection, and others.<sup>10</sup> It is hoped that this legislative product can become a legal instrument to prevent monopolistic practices and unfair business competition and protect consumers from the ill will of producers and traders alike. However, in Indonesia, these laws are considered to be less able to control and prevent the negative side of business activities. The inability of the law to prevent harmful business practices mostly leads to countless businesspeople and consumers who are victimized by fraudulent business behavior.

The second basis is the philosophical basis, which refers to Pancasila in this context. Pancasila is the founding principle of the state, which is arranged in some stages to represent the whole elements of the state. These elements are contained in the Preamble to the 1945 Constitution (UUD 45) paragraph IV. This framework shows that Pancasila is essentially the philosophical basis for the state and the order of Indonesian law.

This concept can be specified as follows: (a) Pancasila is the philosophical basis of the state (the spiritual principle of the state), philosophy of life; (b) The Indonesian state was founded on this basis with the principle of state politics (statehood) in the form of a republic with people's sovereignty; (c) both become the basis of the implementation of Indonesian national independence, namely the implementation and administration of the state as stated in Indonesia's positive laws as stipulated in the constitution of the Indonesian state; (d) the government structure and all other elements of positive legal regulations that apply for all the people of Indonesia in a family-based unity are based on the constitution; (e) the whole elements as mentioned above are for the achievement of a common goal, namely collective happiness, both physically and spiritually. Thus, all aspects of the administration of the state are encompassed and embodied by the spiritual principle of Pancasila. In this sense, Pancasila is positioned as the spiritual principle and

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<sup>10</sup> Jonneri Bukit et.al. (n.5) 25.

the basic philosophy of the Indonesian state.<sup>11</sup> In addition, Pancasila is also set as a fundamental norm of the country, which is the highest legal norm.<sup>12</sup>

Apart from being a spiritual principle, the five precepts of Pancasila in their position as the legal ideals of the Indonesian people in social life, nation and state are the guiding light providing guidance and guideline in all walks of life. Affirmatively, they give content to each statutory regulation, and negatively, limiting the coverage of the contents of laws and regulations. The content of the laws and regulations of the precepts, both individually and together, both single and in pairs is a general legal principle.<sup>13</sup> With this description, it is clear that the Pancasila is the State's Fundamental Norm (Staatsfundamentalnorm) and at the same time a legal ideal, which is the basis and source and guidance for the Body of the 1945 Constitution (UUD 45) and the Basic Rules of the State (Varfasungsnorm) and regulations for other legislation.<sup>14</sup>

Secondly, the KUHPer / B.W. is the basis for judges in Indonesia to decide civil cases. It is also used by various groups as a basis for conducting legal transactions. B.W. in the Netherlands, based on the principle of concordance, is applied to European groups in the territory of Indonesia. Then B.W that is adopted as KUHPer applies to the Indonesian people based on Article II of the Transitional Provisions of the 1945 Constitution which stipulates that "All existing regulations up to the time of independence of Indonesia remained in effect as long as no new provisions were made according to this constitution."

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<sup>11</sup>Sulistiowati, Nurhasan Ismail, *Penormaan Asas-Asas Hukum Pancasila (Dalam Kegiatan Usaha Koperasi dan Perseroan Terbatas)* (Gadjah Mada University Press 2018) 8. See also Dodik Setiawan Nur Heriyanto, 'Contracting Out Public Services to NGO Practices in Asian Countries' (2016) 1 (1) Public Goods and Governance 30, 36.

<sup>12</sup>In the system of legal norms of the Republic of Indonesia, legal norms apply to a multilevel and tiered system as well as in groups. In this way, a norm is always applicable, sourced, and based on even higher norms, thus so on until it reaches a basic norm of the state (staatsfundamentalnorm) of the Republic of Indonesia, namely Pancasila. Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan (dasar-dasar dan pembentukannya)* (11<sup>th</sup> Edin, Kanisius 2006) 39.

According to Sudjito Atmoredjo, Pancasila is a *Philosophisce Grondslag* and has a special position in the life of the state and law of the Indonesian nation as its core or spirit. The Preamble of the 1945 Constitution as a *Staat fundamental norm* has the essence and position that is permanent, strong and unchanging, attached to the survival of the state, and in the orderly hierarchy of Indonesian law. It is at the highest position and a source of law for articles in the Constitution as well as other laws and regulations. Sudjito Atmoredjo, *Ideologi Hukum Indonesia Kajian tentang Pancasila dalam perspektif ilmu hukum dan Dasar Negara* (Lingkar media 2016) 15.

<sup>13</sup>The supremacy of the Pancasila in the legal system was again found in Law No. 10 of 2004 on the Formation of Legislation. Article 2 of this Act states "Pancasila is the source of all sources of state law". The law was later replaced by Law No. 12 of 2011, which regulates similar things. Article 2 confirms the same thing as in Law No. 10 of 2004 that Pancasila is the source of all sources of state law. Thus, Pancasila is the supreme norm in the Indonesian state legal system making it as a view of life, awareness and legal ideals, and moral ideals legally legitimized. Fais Yonas Bo'a, 'Pancasila sebagai sumber hukum dalam sistem Hukum Nasional' (2018) 15 (1) Jurnal Konstitusi 36

<sup>14</sup>Maria Farida Indrati Soeprapto (n.11) 39.

Indonesia has yet to have a governing contract law, and thus until now Indonesian contract law is still guided by the KUHPer / B.W., which is more individualistic in nature and is in contrast to Indonesia's more communal characteristics. In the Netherlands, the B.W., was amended in 1992 to Nieuw Burgelijke wetboek (N.B.W.). Ideally, the formation of a law, including contract law, must be in accordance with the characteristics and view of Indonesia's national law and also not in conflict with the values contained in the state philosophy of Pancasila. As philosophical-ideological foundations for realizing the ideals of the state, law must follow both in the purpose of the constitutionalism principle as a formal legal state, as well as the four ideals of statehood contained in the Preamble of the 1945 Constitution, namely: protecting the whole nation and the whole elements of Indonesia; promoting public welfare; enriching the life of the nation; participating in maintaining the world order based on eternal peace and social justice.

The empirical basis. This study proposes that the implementation of contract law, especially consumer contracts in Indonesia, only meets the element of legal certainty, and do not meet the elements of justice and societal benefits. This is because the principle of freedom of contract dominates consumer contracts, which allows "any legal subject to do anything" as long as it fulfils the elements of ability, agreement, certainty of the object of the agreement, and legality (article 1320 of the Indonesian Criminal Code), does not contain elements of coercion, fraud, and negligence (article 1321 KUHPer), and contains good faith (Article 1338 Civil Code). Unfortunately, despite the facial legality, many contracts entered into by private companies and state-owned companies actually result in people being discriminated against by containing high interest, forfeited collateral, and other regulations.<sup>15</sup>

To achieve certainty, fairness and most importantly, to achieve legal benefits in consumer contracts, we cannot complete this by principles that answers the criticism on

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<sup>15</sup> It is possible to observe the imbalance in contract from several contract models, especially the standard consumer contracts, which include clauses with biased contents. In the practice of lending in the banking environment, for example, there is a clause requiring customers to comply with all bank instructions and regulations, both existing and to be regulated later, or clauses that free banks from customer losses as a result of bank actions. Agus Yudha Hernoko, *Asas Proporsionalitas sebagai landasan pertukaran hak dan kewajiban para pihak dalam kontrak komersial* (LaksBang Mediatama, 2008) 3.

Also see examples of standard contract clauses that burden the buyer or lease purchase. For example, there is a clause containing the payment obligations in full and immediately if the buyer of the lease is in arrears of two consecutive payments, Sri Gambir Melati Hatta, *Beli sewa sebagai perjanjian tak bernama: Pandangan Masyarakat dan sikap Mahkamah Agung Indonesia* (Alumni Bandung, 2000) and Abdul Kadir Muhammad, *Perjanjian Baku dalam Praktik Perusahaan Perdagangan* (Citra Aditya Bakti, 1992) 12-17.

the principle of freedom of contract, namely the principle of Good faith,<sup>16</sup> the principle of proportionality,<sup>17</sup> and the principle of Balance.<sup>18</sup> This is because after all, the powerful large enterprises that dominate the state economy will have a superior position to an economically disadvantaged community, and the principles governing an agreement do not adequately accommodate consumer rights based on Pancasila. Therefore, it is necessary to conduct a study to conceptualize consumer contracts in Indonesia in an effort to fulfil consumer rights based on the Pancasila philosophy.

To analyse and solve the problems in the central issue mentioned above, this research formulates the problem in the question of “How to Reconcept Consumer Contracts in the Perspective of Pancasila Philosophy.”

## **B. Research Method**

The paradigm<sup>19</sup> used in this study is the Pancasila<sup>20</sup> paradigm. This paradigm is selected to determine the extent to which research pays attention to the historical, socio-cultural, economic and political contexts in consumer contracts, intended to analyse consumer contracts from the perspective of the Pancasila Philosophy. The basic

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<sup>16</sup>Although good faith is an important principle in contract law in various legal systems, the principle of good faith still raises a number of problems. These problems are related to the unclear meaning of good faith leading to various notions of good faith with different interpretations according to time, place, and person. Additionally, there is no single meaning of good faith. In practice, there are also issues arising from benchmarks and good faith functions that is based more on the attitudes or views of judges that determined a case on a case-by-case basis, Ridwan Khairandy, *Iktikad Baik Dalam Kontrak di Berbagai Sistem Hukum* (UII Press, 2017) 126.

<sup>17</sup> The Proportionality Principle opens the opportunity for imbalance but with the condition that the fair exchange of achievements takes place in a fair and proportional manner. The example of profit sharing in a franchise agreement (70:30) is mathematically unbalanced, but can be accepted as a proportional result. However, the proportionality principle is used in commercial contracts and it is ineffectively used in consumer contracts because the parties in a consumer contract position is not equal, Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 324.

<sup>18</sup> The principle of balance is a state of burden sharing on both sides to make it in a balanced state. If an agreement raises an unbalanced situation and condition, the imbalance must be assessed from the perspective of three aspects of the agreement, namely the act, the contents of the agreement, and its implementation. Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia (Hukum Perjanjian Berlandaskan Asas-asas Wigati Indonesia)* (Citra Aditya Bakti, 2015) 551-552.

<sup>19</sup>The paradigm according to Heddy Srhi Ahimsa can be defined as a set of concepts that relate to one another logically forming a framework of thought that functions to understand, interpret and explain the reality and / or the problem at hand. Syamsudin. *Ilmu Hukum Profetik* (Pusat Studi Hukum (PSH) FH UII Press, 2013) 29.

<sup>20</sup>According to Sudjito Atmoredjo “Pancasila paradigm is a science category that is uniquely Indonesian, but objective-universal. The Pancasila paradigm of science has unique characteristics, character, nature, and foundations. Its specialty lies in the dimensions of its philosophical foundation, both ontology, epistemology and teleology or its axiology”, in King Faisal Sulaiman, ‘Political Law Testing Regional Regulations by the Supreme Court and the Government Post Amendment to the 1945 Constitution of the Republic of Indonesia’ (DPhil Dissertation, Universitas Islam Indonesia 2016) 177.

assumption<sup>21</sup> of the studied reality (ontological aspects)<sup>22</sup> in this research is that consumer contracts should accord with religious values, human nature values, the value of Indonesian unity and diversity, democratic values and the value of justice in relation to the Indonesian people.

To gain the correct knowledge of the situation (epistemological aspects)<sup>23</sup> the researcher, as an academic and legal practitioner collected and accommodated written regulations and customary law and studied the legal principles regarding the currently applicable legal agreement and legal contract.

In the context of legal studies, this research belongs to the tradition of doctrinal<sup>24</sup> legal studies. The object of this research is the legal principles regulated in the Penal Code as well as the principles that arise in customary law governing agreements, and philosophical matters that underlie the concept of communal help as a complement to pre-existing principles.

This research uses two following approaches:

- a. The philosophical approach, which examines in depth the values and habits of the Indonesian people to investigate and comprehensively explain the legal rationale underlying the formulation of Pancasila in an effort to meet people's welfare based on the values contained in Pancasila; and
- b. The conceptual approach, which systematically and comprehensively describes the opinions of experts in the field of Agreement Law, which is expected to give birth to a new concept of agreement, especially in consumer contracts.

The primary data in doctrinal law research is secondary legal materials. Secondary legal materials in normative legal research consists of:

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<sup>21</sup>Basic assumptions are views about a thing (can be objects, science, goals of a discipline, etc.) that have been accepted. This view is the starting point or basis for efforts to understand and answer a problem because it is considered true or believed to be true. These assumptions can arise from: (a) philosophical and reflective reflections; (b) sophisticated empirical studies; (c) careful observation. Heddy Shri Ahimsa, *Paradigma Profetik Islam Epistemologi, Etos, dan Moral* (UGM Press, 2017) 25.

<sup>22</sup>Legal science must have an ontological basis, since law cannot be separated from religious values, human nature values, the value of Indonesian unity and diversity, the value of democracy and the value of justice in relation to the community and the Indonesians. Syamsudin. (n.19) 2377.

<sup>23</sup>Epistemological aspects concern with the nature of the source of knowledge, the truth of knowledge, and the way to get knowledge. Syamsudin (n.19) 238.

<sup>24</sup>Pieter Marzuki said that normative or doctrinal research is a process of finding a rule of law, as well as legal doctrines to answer a problem. It is about what is done to produce new arguments, theories or concepts as a prescription in solving the problem at hand. Mukti Fajar, Yulianto Achmad, *Dualisme Penelitian Hukum Normative & Empiris*.(4<sup>th</sup> edn, Student Library 2017) 34.

- a. Primary Legal Materials are legal materials that has binding power, including Pancasila; Basic norms and rules, the Preamble of the 1945 Constitution; Basic Regulations including the body of the 1945 Constitution; Legislation; Uncodified legal materials such as customary law, Jurisprudence, Treaties; Legal materials which are the legacy of the colonizers, such as the Penal Code.
- b. Secondary Legal Materials provide an explanation of primary legal materials such as: academic texts; Bills; legal expert research results; and others.
- c. Tertiary Legal Materials provide an explanation of primary legal materials and secondary legal materials such as: dictionaries; encyclopedia; and others. Dictionaries that are often referenced by legal researchers, including Kamus Besar Bahasa Indonesia; Kamus Bahasa Inggris; and Black's Law Dictionary.

The collection of legal materials was compiled by doing documentary studies or literature studies. Documentary study techniques were carried out by conducting an inventory of all legal rules relating to consumer contracts contained in various existing legal products, books, research reports, theses, dissertations, customary and other social laws, legal documents such as legal treatises, draft laws, academic texts, scientific journals of law, mass media and online media (internet), which are directly related to the problem to answer in this study.

This doctrinal legal research used qualitative analysis, which is an analysis that does not rely on numerical data, but rather a narrative description of the findings, and therefore it concerns the quality of the data and not the quantity.<sup>25</sup> Data analysis techniques in this study include:

- a. The analysis technique using the means of deductive logical thinking, which is a process of analysis that starts from general statements to deduce specific statements with acceptable reasoning.
- b. Analytical techniques based on descriptive qualities by classifying, comparing, and linking legal materials regarding the concept of consumer contracts to the philosophical values of Pancasila, which are in line with state goals. This research is essentially formulated to find solutions related to problems arising in consumer contracts, as explained in the research background, to build a new theory of consumer contracts based on the philosophical perspective of Pancasila.

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<sup>25</sup> Mukti Fajar, Yulianto Achmad (n.24) 19.



## C. Reconceptualizing Consumer Contracts in the Philosophical Perspective of Pancasila

### 1. General Review of Consumer Contracts

Consumer contracts are any contracts that are characterized by the following elements:<sup>26</sup>

- a. The parties are consumers and business entities (business actors);
- b. In terms of bargaining position, the relationship between the two parties is a top-down relationship where the consumer has an inferior position to the business actor (subordinate).
- c. The form is standard (standard contract)
- d. In many standard consumer contract models, there is no negotiation between the parties;
- e. It is an adhesion contract (made by one of the parties, generally a producer or business actor), and the consumer must “take it or leave it”;
- f. Standard contract products are generally made in large quantities (massive);
- g. There is an exoneration clause or an exemption clause; and
- h. There is some regulatory intervention by certain authorities that aim to provide legal protection for consumers, by enforcing mandatory rules.

Consumer contracts are often opposed to commercial contracts that have the following elements:<sup>27</sup>

- a. Both parties are generally oriented towards a "profit motive";
- b. Contractual relations between the parties are considered equal or balanced in terms of bargaining position;
- c. Acceptance of the terms and conditions in the contract can be negotiated by the parties, or by other forms agreed upon;
- d. The business character (mutual benefit) is more prominent: the exchange of rights and obligations is not seen from the context of mathematical balance, but in the process and results; a fair and proportional exchange of rights and obligations;
- e. It is not a consumer contract, meaning that one of the parties is not an "end user" or the last user of the product; and
- f. If in a consumer contract there is an intervention of certain authorities aimed at providing legal protection for consumers, in a commercial contract in the case of an regulatory intervention it is more intended to provide a legal basis for the creation of fair “rules of the game” between or among the parties.

Therefore, to group the types of contracts into the categories of commercial contracts or consumer contracts, we should not only look at the title of the contract (heading) but examine the substance of rights and obligations exchanged by the parties.

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<sup>26</sup>Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 34.

<sup>27</sup>Ibid 35.

The following are examples of consumer contracts which are differentiated from commercial contracts;<sup>28</sup>

- a. The sale and purchase contract of fuel oil (BBM) between the Gas Station (SPBU) with consumers is an example of a consumer contract, but the contract of buying and selling fuel oil between PT Pertamina with a gas station or with PT PLN (Persero) is not a consumer contract but a commercial contract;
- b. The contract of buying and selling electricity between P.T. PLN and customers in the Household category is an example of a consumer contract, but the power purchase contract between PT. PLN and customers in category I (Industry) is a commercial contract; and
- c. Credit agreements in the banking environment, for KMK loans (Micro and Small Credit) that caters to small customers with a standard contract model is included as consumer contracts. Meanwhile, the investment loans involving customers with business backgrounds who have a balanced position is classified as a commercial contract.

## 2. Principles in Consumer Contracts

The third volume of the KUHPer explains that agreements must adhere to several principles, including: the principle of freedom of agreement (*partij otonomy*), the principle of mutuality of consent (conformity of the will), the principle of habit, the principle of binding force, the principle of equality of law, the principle of public interest, the principle of intentional commitment good, the moral principle, the principle of obedience, the principle of protection for the weak, the principle of proportionality and the principle of an open system. The principles that are widely used in the field of contract law are the principle of freedom of contract, the principle of balance, the principle of proportionality and the principle of good faith. The descriptions are as follows:

This principle of freedom of contract means that anyone can freely make contracts about anything, anywhere and anytime, even if the agreement is contrary to the provisions of the contract law. The KUHPer gives the parties the right to enter into and make any agreements with anyone, as long as they fulfill the legal requirements of the agreement stipulated in the third volume of the KUHPer. Every agreement made lawfully binds the parties to it. This formula can be found in article 1338 paragraph (1) of the Indonesian Criminal Code, which is reaffirmed by the provisions of article 1338 paragraph (2) of the Indonesian Criminal Code, which states that the agreed agreement cannot be withdrawn unilaterally by one of the parties in the agreement without the approval of other party in the agreement, or in cases where by law is stated sufficient reason for withdrawal. In

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<sup>28</sup>Ibid 37.

general, legal scientists associate and treat the provisions of article 1320 of the Indonesian Criminal Code in conjunction with article 1338 paragraph (1) of the Indonesian Criminal Code as the principle of freedom of contract in the Agreement Law.

The Principle of Balance is a state of silence or harmony, none of which dominates the other or there is not one element that rules over another.<sup>29</sup> The principle of balance of the position of the parties are attributed to the operation of the three main principles of the agreement (freedom of contract, mutual consent and *Pacta Servanda*). The Balance Principle will be born when the three main Principles of agreement work and complement each other.<sup>30</sup> According to Herlien Budiono, the Principle of Balance is defined in two ways. First, the principle of balance is an ethical principle which means that a "load sharing situation on both sides is in a balanced state." The word "balance" here means that on one side it is limited by will (based on consideration of favourable circumstances) and on the other side of belief (of ability). Within the limits of both sides, balance can be realized. Secondly, the principle of balance is a juridical principle meaning that the principle of balance can be understood as a principle that is feasible and fair, and subsequently accepted as a basis for juridical attachment in Indonesian contract law. In the event that contractual balance is disturbed, the solution is to carry out the testing of the working power of the principle of balance, through action, content and implementation of the agreement.<sup>31</sup>

The Principle of Proportionality is another requirement in addition to the principle of balance, which is defined as the principle that underlies the exchange of rights and obligations of the parties according to their proportions or parts. The proportionality of the distribution of rights and obligations is manifested in the entire contractual relationship process, both in the pre-contractual phase, contract formation, and contract performance. The principle of proportionality does not dictate a balance (equality) of results, but rather emphasizes the proportion of the distribution of rights and obligations between the parties.<sup>32</sup>

The principle of good faith is one of the most important principles in contract law in various legal systems, but this principle still raises a number of issues. These issues are related to the abstract meaning of good faith that leads to various notions of good faith,

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<sup>29</sup> Herlien Budiono (n.18) 507.

<sup>30</sup>Ibid 304.

<sup>31</sup>Ibid 510.

<sup>32</sup>Agus Yudha Hernoko, *Hukum Perjanjian* (n.2) 324.

differing in terms of time, place, and person. Additionally, there is no single meaning of good faith. Therefore, in practice, issues arise from benchmarks and good faith functions that are based more on the attitudes or views of judges who determined them on a case-by-case basis.<sup>33</sup>

Implementation of the principles of balance, freedom of contract, proportionality, and good faith according to researchers cannot solve problems related to consumer contracts, because the parties involved in consumer contracts are not in a balanced position. Rather an imbalance exists between those who have a stronger bargaining position and those who have weaker bargaining position. Therefore, in this sense, it is impossible to apply the principles of balance, proportionality, and good faith. These three principles are only suitable for use in commercial contracts where both parties have a balanced or equal bargaining position. Economic imbalances between the parties in consumer agreements, which is frequently found, will affect the formation of the agreement. Based on the Indonesian perspective or mindset, this imbalanced bargaining position can disturb the balanced position between the two parties.

In addition, it is emphasized that the use of the Indonesian Criminal Code, especially the Third Volume on Engagement, has proven to be inconsistent with the implementation of Pancasila values because these regulations are outdated and are not compatible with the development of Indonesian society. Thus, it is necessary to have a conceptual arrangement of the contents of the agreement in civil contracts, especially consumer contracts in Indonesia to allow all people to have equal justice and the potential to prosper.

### **3. Application of Pancasila Values Consumer Contracts**

Pancasila is a reflection of the soul and ideals of Indonesian national law, which is the basis and source of all sources of law, both written and unwritten. The values of Pancasila must be followed in all fields and all walks of life as a nation and state including in the area of contract law, especially in consumer contracts that will be analyzed based on all precepts of Pancasila as follows.

#### **a. The Precepts of Belief in the One and Only God**

Belief in the one and only God contains the understanding and belief in God the Almighty and implies explicitly that humans must establish relationships with God, with other human beings, and with the universe as a whole. This is proof that no

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<sup>33</sup>Ridwan Khairandy, *Iktikad Baik Dalam Kontrak* (n.16) 126.

religion teaches to prioritize individualism to its adherents. Thus, the consumer contract must have the hallmark of the social life that believe in the one and only God by putting aside the nature of individualism.

b. The Precept of Just and Civilized Humanity

Just and civilized humanity implies the concept of a whole human being, spiritually and physically. As a spiritual entity, the existence of a conscience is no less important than reason. Conscience carries the function of morality so that humans can distinguish between right or wrong, good or bad, fair or unfair. This mandates that the direction of human life is always on a straight path. On the other hand, reason carries the functions of creativity and progressiveness that continuously pushes human progress. In the dimension of legal science, creativity and progressiveness of the mind are controlled by the conscience. Hence, it requires people always be focused on the achievement of absolute truth and justice.<sup>34</sup>

The precept of just and civilized humanity in the field of consumer contracts can be realized by the following: recognizing equal rights and obligations among human beings (everyone is equal before the law); upholding the value of kinship; mutual respect and love for others; development of tolerance; upholding the value of humanity; defending truth, justice and expediency; and able to work together with all people.

c. The Precept of a Unified Indonesia

A unified Indonesia is the embodiment of the ideology of Indonesian nationalism imbued by the Belief in One and only God and Just and Civilized Humanity.<sup>35</sup>

The Precept of a Unified Indonesia in consumer contracts can be realized by the following principles: placing national unity, unity and safety above personal and discreet group interests; willing to sacrifice for the benefit of the nation and state; increasing national unity with Unity in Diversity; helping each other; and fostering the love of national customs.

d. The Precept of Democracy, Led by The Wisdom of the Representatives of the People

This precept implies the concept that the people or people's representatives in exercising their power must be led by wisdom, with a full sense of responsibility, both to God the Almighty and to all Indonesian people. Their actions shall never be based on

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<sup>34</sup> Sudjito Atmoredjo (n.12) 34.

<sup>35</sup> Ibid 127.

power or formal legality. A philosophical wisdom will arise if humans love the truth. The closer a man is to absolute truth and God the Almighty, the wiser he is.<sup>36</sup>

To realize this fourth precept in consumer contracts, the following principles must be followed: prioritizing deliberation and consensus; realizing the balance of rights and obligations of the parties; prioritizing good faith and responsibility in the process of making and implementing agreements.

e. The Precept of Social Justice for All Indonesians

Social justice means justice that applies to society in all walks of life, both the material and spiritual aspects. The intended justice is not formal justice born from legislation, but rather justice that is associated with the social habitat of Indonesians in belief in one and only God.

To realize the principle of social justice for all Indonesians, attention must be paid to the following measures: strengthening the spirit of communal help in an effort to improve the welfare of the people; prioritizing the values of justice and expediency in various aspects; prioritizing the welfare of the community over foreigners; prioritizing the spirit of togetherness, and being willing to help others and avoid individualism.

#### **4. The Concept of Consumer Contracts in the Philosophical Perspective of Pancasila**

The term philosophy is derived from the Greek word *Philosophia*, meaning love of wisdom. In the beginning, philosophy was defined as love for or the search for wisdom. Pythagoras was the first to call himself *philosophos*. He did not call himself a wise person, so he sought wisdom in life. For the Pythagoreans, philosophizing is not solely for scientific reasons (looking for truth), but rather the practice philosophy as a way of life, that is, as a way of life about the ways in which humans reach perfection, so as to escape the continual transfer of souls.<sup>37</sup>

A nation as a group of individuals has values that are upheld as a normative culture that gives direction to every decision and activity. These values are the nation's view of life, which is the manifestation of the national values, believed to be true empowering people to realize it. Without having the view of life, a nation will easily be shaken and lose

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<sup>36</sup> Ridwan Khairandy, *Iktikad Baik Dalam Kontrak* (n.16) 126.

<sup>37</sup> Tjipta Lesmana et al. *Konsistensi Nilai-Nilai Pancasila dalam UUD 1945 dan Implementasinya* (PSP Press 2010) 57.

its grip on solving the problems it faces, whether in terms of political, economic, social, cultural, defense, or security aspects.<sup>38</sup>

The view of life of the Indonesian nation is Pancasila, because Pancasila has long been rooted in the socio-cultural culture of the Indonesian nation and is the nation's character. Pancasila is a distinctive feature of the Indonesian nation that is different from other countries in the world. The characteristics that appear in Pancasila are a sense of kinship, affinity, communal help, consensus, tolerance, diverse cultural arts and so forth. This view of life is then used as the basis of the state, and in turn the source of all law.

Consumer contracts is types of agreements or contracts that have a distinct character. The uniqueness of a consumer contract is generally related to its standardized format. This standardized nature concerns the both the format of the agreement and the contents of the agreement. In this case, the form and content of the agreement are generally determined and made by a party that has a superior bargaining position, for example the creditor in a loan agreement. Consumers are basically only given the opportunity to accept or reject the contents and form of a contract, without being given the opportunity to engage in discussion of the contents of the contract. Considering its standard nature, it is not uncommon to ask where the mutuality of agreement element is required under 1320 KUHPer.

The many injustices caused by consumer contracts are due to the legal basis of consumer contracts, the Indonesian Penal Code / BW. This legal basis is the legacy of the Netherlands that does not represent the Indonesian communal character. Therefore, there are a number of questions regarding the concept of justice as applied to consumer contracts that has a distinctive Indonesian character. In this way, we should be able to describe the relationship between justice, legal certainty, and legal usefulness that depends on the values, culture and way of life of the Indonesian nation, Pancasila.

Therefore, the researcher argues that to bring the law of consumer contracts in line with the philosophical perspective of Pancasila, we need to apply the communal help principle.<sup>39</sup> The communal help principle is essentially employing cooperation to achieve

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<sup>38</sup>Ibid 59.

<sup>39</sup>The principle of communal help means the activity of working together to achieve a common goal. Communal help or to help and to support each other is interpreted as a form of cooperation between one person to another in the framework of shared welfare goals). In communal help, the community provides unconditional help (without any interest) that does not rely on or expect any compensation, both for now and in the future. In this communal help the interests of individuals are absorbed into the totality of shared life on the principle that in a communal life, one must put the common interests before one's own interests to seek

common goals, which is a characteristic that is directly sourced from customary rules. In this principle, community members who provide assistance do not expect any rewards, either for the present or in the future. The assistance given to other members of the community is a form of pride for the helper. Individual interests are integrated into the common interests and are inseparable from it. The spirit of communal help is expressed in daily life in the form of cooperation among community members to achieve the goal of mutual prosperity.<sup>40</sup>

The implementation of the communal help principle as an effort to provide justice and benefit to the community is based on the following considerations. First, the communal help principle is a principle that existed before Indonesia's independence, and has become a characteristic of the Indonesian people in solving problems that arise in social relations and has become the way of life of the Indonesians. This is reflected in the will of the national founding fathers, who emphasized that the principle of communalism must underlie the social relations of Indonesians.<sup>41</sup> The basis of the Indonesian state, as stipulated in the Preamble to the 1945 Law, is Pancasila.

According to Sukarno, the essence of these five precepts is a communal help principle. Soekarno, one of the BPUPKI members in the BPUPKI Meeting in the June 1, 1945 session stated that if I have to squeeze these five precepts to three and three precepts to one, I can get an Indonesian term known as "gotong royong" (communal help). The country of Indonesia that we founded must be a country of communal help."<sup>42</sup>

Afterwards, on August 15, 1945, two days before Indonesia declared its independence, at the BPUPKI Great Meeting forum, Muhammad Hatta stated that

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for and maintain order, peace and prosperity in society. This collaboration in communal help is a manifestation of the principle of harmony. In Paripurna P Sugarda, 'Posisi Hukum Adat Dalam Hukum Kontrak Nasional Indonesia' (2015) 4(3) Jurnal Yustisias 512.

<sup>40</sup>Herlien Budiono (n.18) 191.

<sup>41</sup>Customary law recognizes the principle of peace, the principle of properness or appropriateness, and the principle of harmony. The principle of harmony is closely related to one's views and attitudes regarding ways of communal living in society (interdependence among people), in everyday life. This principle is embodied in the concept of deliberation and consensus of communal help. The principle properness or appropriateness is related to morality and at the same time common sense directed at the evaluation of a particular factual action or situation. In other words, it should include both the moral element that is related to the evaluation of good or bad or the element of common sense, namely the assessment that is in accordance with the law of logic. The principle of harmony provides answers to a problem that is considered satisfactory both by those directly involved and by the community based on a measure of legal and moral needs and feelings. The basis of these principles can be found in Indonesian ideology, values, morality and norms adopted by the community, as well as in the essential worldview of Indonesian people: kinship ties, mutual cooperation, and help. Ibid 242-245.

<sup>42</sup>Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, Djilid I (Jajasan Prapantja 1959) 91 in Paripurna P Sugarda (n.39) 511.



“What I propose is no other than making the country we founded as a governing state to avoid this country from being a power state, an oppressive state. Thus, we put forward the basis of communal help and joint efforts. In short, it is the basis of collectivism.”<sup>43</sup>

In addition to the principle of communal help, the ideal foundation of the Republic of Indonesia also adheres to the principle of mutual assistance and the principle of kinship. This understanding was expressed among others by Sukarno at the Great Meeting as mentioned above, where he said: “Therefore, if we really want to base our country on the ideology of kinship, the idea of helping, the mutual cooperation, and social justice, we shall get rid of the thought of individualism and liberalism from our mind.”<sup>44</sup>

Soekanto and Taneko explained the mindset of Indonesians, which is characterized by the bond of togetherness at the core of the social life of Indonesians and is the basis for communal help and mutual assistance. The principle of communal help is based on cooperation to achieve a common goal. It is a characteristic that is derived from traditional law. In traditional law, community members who provide assistance do not rely on or expect compensation, either now or in the future. The assistance given to other community members is a kind of pride for the helper. Individual interests are integrated into the common interests and are inseparable from it. The spirit of communal help is expressed in daily life in the form of cooperation among everyone to achieve the goal of mutual prosperity.<sup>45</sup>

Second, Indonesian leaders drafted the 1945 Constitution and believed that the ideals of social justice in the economic field could achieve equitable prosperity. This aim is covered in Article 33 of the 1945 Constitution that reads as follows: (1). The economy is structured as a joint effort based on the principle of kinship. (2). The branches of production, which are important for the state and which control the lives of many people are controlled by the State. (3). The earth and water and the natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people (4). The National Economy is based on economic democracy with the principles of

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<sup>43</sup> Ibid.

<sup>44</sup> Ideology that provides economic aspects to the old social cooperatives known as communal help. The ideals of Indonesian cooperatives are completely against individualism. The Indonesian cooperative ideology creates a collective Indonesian society, rooted in the original customs of Indonesian life, but grown at a higher level, in accordance with the demands of modern times, see Sudjito Atmoredjo, *Ideologi Hukum Indonesia (Kajian tentang Pancasila dalam Perspektif Ilmu Hukum dan Dasar Negara Pancasila)*, (Lingkar Media, Yogyakarta, 2016) 57.

<sup>45</sup> Registrar and Secretary General of the 2017 RI Constitutional Court, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Undang-Undang Tentang Mahkamah Konstitusi* (Seventh Edition, January 2017) 114.

togetherness, fair efficiency, sustainability, being environmentally friendly, independence, and maintaining a balance between progress and national economic unity. Third, TAP MPRS Number II of 1960 stipulates that national law must have the following characteristics: mutual assistance, kinship, and anti-colonialism, anti-imperialism and anti-feudalism. National law must also prioritize uniformity, fairness and legal certainty that must not conflict with legal awareness.<sup>46</sup>

The application of the Communal Help Principle should make a positive contribution to the legal system in Indonesia. Hence, this principle can be the basis for formulating the yet uncodified contract law. In addition, it is also suggested that Indonesian Judges take into account the principle of communal help in deciding cases arising in the realm of agreement law to make decisions that benefit all Indonesians and does not conflict with the national philosophy of Pancasila.

#### **D. Conclusion**

Based on the above description, it is conclusive that consumer contracts in Indonesia do not meet the values of Pancasila. This contrast can be seen from the fact in business contracts, in which companies and individuals who have a higher economic position often reap more profits by including unbalanced clauses in agreements, while consumers who are in a weaker position have to agree to what is stated in such agreements. Inevitably these provisions discriminate against consumers and are not, therefore, in accordance with the values of Pancasila.

The Penal Code tends to contain principles that are individualistic in nature and are contrary to the communal characteristics of the Indonesian nation. Therefore, to bring consumer contract law in line with the philosophical perspective of Pancasila, we need to incorporate the concept of communal help principle into consumer contract law. The principle of communal help is derived from the customary law principles, which is the basis of thought and way of life and ideology of Indonesians. By applying the principle of

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<sup>46</sup> See also the Guidelines of the State Policy (GBHN) of 1960, which contain directions for the development or construction of a new legal system, among others (1). To make the principle of fostering National Law in accordance with the direction of the state (2) Development of National Law shall be based on customary law that is in accordance with the development of awareness of the Indonesians and does not hamper the creation of a just and prosperous society, Herlien Budiono (n.18) 27. See also Law No. 10 of 2004 on the formation of Statutory Regulations in Article 2 positioning Pancasila as the source of all sources of state law. The position of Pancasila as the source of all sources of state law is in accordance with the Preamble of the 1945 Constitution, which positions Pancasila as the basis and ideology of the state as well as the philosophical basis of the nation and state so that any material contained in the laws and regulations must not conflict with values contained in Pancasila, Ahmad Redi, *Hukum Pembentukan Peraturan Perundang-Undangan* (Sinar Grafika 2018) 88.

communal help in contract law, an unequal position between the two parties will not be a problem as long as both parties are able to provide benefits and justice.

Therefore, it is suggested to use the principle of communal help as a basis for conceptualizing consumer contracts that guarantee the realization of certainty, justice and legal benefits for both parties and serve as benchmarks of contracts based on the national characteristics of Pancasila. In addition, the government should immediately ratify the draft law on agreements, which reflect the culture and development of Indonesian society that is communal and does not conflict with the Pancasila as the philosophy of the Indonesian state.

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