CHAPTER II

LITERATURE REVIEW

2.1 Theoretical Framework

2.1.1 Progressive Law according to Satjipto Raharjo

Satjipto Rahardjo brought forth the theory of Progressive Law (*Hukum Progresif*), the idea that law as a science is always changing due to constant developments in society. Unlike earlier contemporaries in the like of Mochtar Kusumahatmadja and Soerjono Soekanto, Satjipto's thoughts represents a more contemporary and postmodernist thinking that concerns the extraordinarily rapid developments in science and technology and, in turn, the law that must anticipate such developments[18]. According to Satjipto, "Law is an institution that continuously builds and transforms itself towards a better level of perfection. The quality of its perfection can be verified in the factors of justice, welfare, concern for the people, among others."[19] Therefore, law in the progressive concept is a constantly ongoing process. In other words, law is not stationary, but a moving institution. In this regard, the theory of Progressive Law is similar to the theory of law as a tool of engineering propounded by Roscoe Pound.[20]

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[18] Otje Salman and Anthon F. Susanto, Teori Hukum: Mengingat, Mengumpulkan, Dan Membuka Kembali (Bandung: PT Refika Aditama, 2007), 139.

[19] Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Yogyakarta: Genta Pub., 2009), 6.

[20] Pound propounded the idea that law is a task as well as a process of social engineering designed to eliminate friction and waste in the satisfaction of unlimited human interests and demands out of a limited store of goods in existence."
Linus J McManaman, "Social Engineering: The Legal Philosophy of Roscoe Pound," St. John's Law Review 33 (December 1958), 16.

As summarized by Yudi Kristina in her dissertation, the basic characteristics of progressive legal theory are as follows: First, progressive law has the basic assumption that law exists to serve humans and not vice versa. Second, law is not an institution that is absolute and final, because the law is always in the process of being continuously made (law as a process, law in the making).[21]

In regard to the first point, the law exists to serve humans, and therefore, is not an institution that is independent of human interests. The quality of law is determined by its ability to serve human welfare, and thus, the legal system is an instrument that must be devoted to and serve human interests.[22] Satjipto Rahardjo also stated that the law adhered to must be based on Pancasila which places more emphasis on substance, not mere procedures in statutory regulations. In other words, the law must embody substantive justice instead of only prioritizing procedural fairness. A law that focuses on Pancasila prioritizes moral justice or the rule of justice.[23]

As to the second point, the idea that law is a process means that the law is not something static, absolutely final, stagnant and unchanging, but can always change or flow, because law is in the process of becoming.[24] Satjipto states that law is a genuine science that must always be interpreted so that it is up to date.[25] Since knowledge and science is constantly developing, so too must legal science. Satjipto

[21] Yudi Kristiana, " Rekonstruksi Birokrasi Kejaksaan Dengan Pendekatan Hukum Progresif, Studi Penyelidikan, Penyidikan Dan Penuntutan Tindak Pidana Korupsi" (dissertation, 2007).
[22] Satjipto Rahardjo, "Hukum Progresif (Penjelajahan Suatu Gagasan),'" 2004, 1-14.
[23] Satjipto Rahardjo, "Suatu Versi Indonesia Tentang Rule of Law, Sisi-Sisi Lain Dari Hukum Indonesia," Kompas, 2003, 10.
[24] Hyronimus Rhiti, "Landasan FILOSOFIS Hukum Progresif," Justitia Et Pax 32, no. 1 (2016), https://doi.org/10.24002/jep.v32i1.760, 40.
[25] Satjipto Raharjo, "Pidato Emeritus Guru Besar Fakultas Hukum UNDIP," Pidato Emeritus Guru Besar Fakultas Hukum UNDIP, (December 15, 2000), 1.

stated that the boundaries of scientific knowledge are always changing, shifting and becoming more advanced.[26] Scientific ideas that are relevant in a given era may over time be replaced new ideas to answer problems that have never been answered before. According to Satjipto, such is the case with social sciences including law.[27]

An example of the dynamic and changing nature of law in response to technological developments can be seen in adoptive regulations surrounding artificial intelligence (AI) around the world. In the United States, artificial intelligence has been used to help judges make legal decisions, and there is also the development of predictive analytics technology that allows making predictions regarding the outcome of litigation.[28] The United States has also implemented predictive coding using AI to determine whether a recidivist will commit more crimes or not in the future.[29] In 2017, the robot Sophia was granted citizenship by Saudi Arabia.[30] In addition, the UK has set up an artificial intelligence committee in the House of Lords to examine issues and legislation related to artificial intelligence.[31] Therefore, in accordance with Progressive Law, the law must be

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[26] Ibid, 11.
[27] Otje Salman and Anthon F. Susanto, Op. Cit., 145.
[28] Cromwell Schubarth, "Y Combinator Startup Uses Big Data to Invest in Civil Lawsuits," Silicon Valley Business Journal, 2016, https://www.bizjournals.com/sanjose/blog/techflash/2016/08/y-combinator-startup-uses-big-data-to-invest-in.html.
[29] Adam Liptak, "Sent to Prison by a Software Program's Secret Algorithms," The New York Times (The New York Times, May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html.
[30] Tracy Alloway, "Saudi Arabia Gives Citizenship to a Robot," Bloomberg.com (Bloomberg, October 26, 2017), https://www.bloomberg.com/news/articles/2017-10-26/saudi-arabia-gives-citizenship-to-a-robot-claims-global-first.
[31] Sam Shead, "The House of Lords Is Going to Carry out a Public Inquiry into Artificial Intelligence," Business Insider (Business Insider), accessed November 3, 2022, https://www.businessinsider.com/house-of-lords-to-carry-out-public-inquiry-into-ai-advances-2017-7.

developed not only to attune to human interests but also to accommodate the development of technology to develop for the welfare of humans and science.

2.1.2 Contract Law in Indonesia

2.1.2.1 Definitions

A contract is an "agreement between parties, creating mutual obligations that are enforceable by law."[32] According to Black's Law dictionary, a contract is a "deliberate engagement between competent parties, upon a legal consideration, to do or abstain from doing, some act."[33] According to Ricardo Simanjuntak, an agreement as a contract is "an agreement that has binding legal consequences for the parties whose implementation will be related to the law of property of each party bound in the agreement."[34] As stipulated by Article 1338, individuals are free to make contracts and are legally bound to all agreements they make in a contract.

2.1.2.2 Elements of contract

In Indonesian legal theory, there are three main elements that build the contract or agreement. These elements are categorized into essential elements (*unsur essensialia*), natural elements (*unsur naturalia*), and accidental elements (*unsur aksidentalia*).

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[32] "Contract," Legal Information Institute (Legal Information Institute), accessed November 2, 2022, https://www.law.cornell.edu/wex/contract#:~:text=A%20contract%20is%20an%20agreement,consideration%3B%20capacity%3B%20and%20legality.

[33] "Contract Definition & Meaning - Black's Law Dictionary." The Law Dictionary, July 19, 2022. https://thelawdictionary.org/contract/.

[34] Ricardo Simanjuntak, *Hukum Kontrak Teknik Perancangan Kontrak Bisnis* (Kebayoran Lama, Jakarta: Kontan Pub., 2011), 30-32.

Essential Elements

The essential element is the main element that must be present in a contract because if there is no agreement on this essential element by the parties, then there is no contract. For example, the requirement for the agreement to be lawful or "halal" causes is considered an essential element to the contract. Likewise, in a sale and purchase contract there must be an agreement regarding goods and prices because without an agreement regarding goods and prices in a sale and purchase contract, the contract is null and void because nothing has been agreed upon.[35]

Natural Elements

A natural element of the contract is one that is regulated by law so that if it is not stipulated by the parties in the contract, it will be governed by the law. In this case, a natural element is classified as a governing law (*hukum bersifat mengatur* or *regelend recht*) or complementary law (*hukum bersifat menambah* or *aanvullend recht*), by which such law may be set aside if the parties concerned have made their own rules in an agreement. Thus, such natural element is considered to exist in the contract if it is not otherwise expressly stated in the agreement.[36] One example of this is the seller's obligation to bear the delivery fee or the buyer's obligation to bear the collection fee. Article 1476 stipulates: "The costs of the delivery shall be borne by the seller, and the pick-up costs shall be at the expense of the buyer, unless

[35] I Ketut Oka Setiawan, Hukum Perikatan (Jakarta: Sinar Grafika, 2016), 43.
[36] Ibid, 44.

otherwise stipulated." While this article stipulates the respective obligations for a buyer and seller, it also states that it is permissible for the parties to create different obligations from the ones stated in the law.[37]

Another example of a natural element is in Article 1504 of the Civil Code, which stipulates:

> "The seller shall be bound to warrant against hidden defects of the sold assets, which would render them unsuitable for the intended use, or which would reduce the use in such manner, that if the buyer had been aware of such defects, he would not have purchased those assets, or would have purchased them at a lower price."

In this case, if the parties to a contract do not stipulate a provision regarding hidden defects, the law will provide an additional element that stipulates the seller's obligation to give warranty regarding hidden defects. If the parties do not include a provision regarding the matter, the provisions of Article 1504 of the Civil Code stipulating that the seller is "bound to warrant against hidden defects of the sold assets" automatically apply. [38]

Accidental Elements

Accidental elements are additional elements in a contract or agreement. This element exists or is binding on the parties if the parties agree on it. The law itself does not regulate accidental elements. An accidental element is a complementary provision in an agreement that can be omitted and would not affect the validity of the contract.[39] For example, in a contract of sale and purchase with installments it

[37] Ibid.
[38] Ibid.
[39] Ibid.

is agreed that if the debtor fails to pay his debt, a penalty of two percent per month is imposed for delay, and if the debtor fails to pay for three consecutive months, the goods that have been purchased can be withdrawn by the creditor without going through a court. This provision is not regulated by law and would be agreed by the parties to the agreement.

2.1.2.3 Principles of contract

According to Peter Mahmud Marzuki, the rules of contract law are the embodiment of the philosophical foundations contained in legal principles. A legal principle is a source containing the ethical, moral, and social values of society by which a legal system is based on.[40]

M. Isnaeni emphasized several legal principles as the pillars of contract law along with the principle of freedom of contract, namely:

1. The principle of pacta sunt servanda;
2. The principle of equality;
3. The principle of privity of contract;
4. The principle of consent; and
5. The principle of good faith[41]

Alternatively, Mariam Darus Badrulzaman has stated the principles of contract law to include the following:

1. The principle that a valid agreement is law;

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[40] Peter Mahmud Marzuki, "Batas-Batas Kebebasan Berkontrak," *Yuridika* 18, no. 3 (May 2003), 196.

[41] M Isnaeni, "Hukum Perikatan dalam Era Perdagangan Bebas," *Training Materials, Presented at the Legal Engagement Training for Lecturers and Practitioners* (September 6, 2006), 5.

2. The principle of freedom of contract;

3. The principle of consent;

4. The principle of trust;

5. The principle of binding strength;

6. The principle of legal equality;

7. The principle of balance;

8. The principle of legal certainty;

9. Moral principle; and

10. The principle of decency.[42]

The principles of contract law cannot be separated from one another because their existence is independent and stand equal to one another. These principles function as a "checks and balances system" to contracts.[43]

Principle of Freedom of Contract

The principle of freedom of contract (*asas kebebasan berkontrak*) is "the ability of parties to bargain and create the terms of their agreement as they desire without outside interference from government."[44] This is a universal principle, meaning that it is adhered to by contract law in all countries in general.[45] Sutan

[42] Mariam Darus Badrulzaman, *Kompilasi Hukum Perikatan: Dalam Rangka Memperingati Memasuki Masa Purna Bakti USIA 70 Tahun* (Bandung: Citra Aditya Bakti, 2000), 91.
[43] Muhammad Syaifuddin, *Hukum Kontrak : Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: Mandar Maju, 2012), 78.
[44] "Freedom of Contract." Legal Information Institute. Legal Information Institute. Accessed November 2, 2022. https://www.law.cornell.edu/wex/freedom_of_contract.
[45] Muhammad Syaifuddin, Op. Cit., 81.

Remy Sjadeini explains that the principle of freedom of contract in the context of Indonesian contract law contains the following scope:

1. Freedom to make or not to make a contract
2. Freedom to choose the party with whom one wants to make contract
3. The freedom to determine or choose the cause of the contract
4. Freedom to determine the object of the contract
5. Freedom to determine the form of a contract
6. Freedom to accept or deviate from the provisions of the law with laws that are optional (*aanvullend*)[46]

In Indonesian contract law, the principle of freedom of contract is regulated in Article 1338 of the Civil Code, which stipulates:

> "All legally executed agreements shall bind the individuals who have concluded them by law. They cannot be revoked otherwise than by mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith."

Apart from being limited by the normative provisions in Article 1338 of the Civil Code freedom to make contracts is also limited by the limitative provisions in Article 1337 of the Civil Code, because this article prohibits contracts whose substance is contrary to law, public order, and decency. Therefore, as long as it fulfills the requirements determined by laws and regulations, public order, and decency, every contract remains valid.

[46] Sutan Remy Sjahdeini, *Asas Kebebasan Berkontrak Dan Perlindungn Yang Seimbang Bagi Para Pihak Dan Perjanjian Kredit Bank Di Indonesia* (Jakarta: Institut Bankir Indonesia, 1993), 47.

According to van Appeldoorn, freedom to make contracts is one of the several foundations of civil law.[47] In seeking a philosophical basis for the principle of freedom to make contracts, van Appeldoorn refers to Hegel's dialectical thinking which asserts that freedom to make contracts is a consequence of the recognition of the existence of property rights.[48] Meanwhile, property rights itself is the main realization of individual freedom and is the foundation for other rights. According to Hegel, freedom of will is a substantial basis for all rights and obligations. Holders of property rights must respect other holders of property rights. This mutual respect for property rights is the basis for contract law.[49]

The principle of freedom of contract has existed since the days of the Roman Empire.[50] Furthermore, the natural law-based approach to freedom of contract as a fundamental human freedom was advanced by Thomas Hobbes, who asserted that contracts were a method by which the fundamental rights of human beings could be transferred. The doctrine of freedom of contract was also accepted by the thinkers of laissez-faire economics in the 18th and 19th centuries including Adam Smith, who propounded that laws and regulations should not interfere with freedom of contract, as this freedom is essential to the continuation of commerce and industry.[51]

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[47] Van Dijk, A*ppeldoorn's Inleiding Tot De Studie Van Het Nederlandse Recht* (Zwolle: W.E.J.Tjeenk Willink, 1985), 508.
[48] Ibid.
[49] Muhammad Syaifuddin, 83.
[50] Harold Joseph Berman, *Law and Revolution* (Cambridge (Mass.): Belknap Press of Harvard University Press, 2006), 227-228.
[51] Sutan Remy Sjahdeini, Op. Cit., 21.

Although freedom of contract allows parties to freely make contracts, it does not mean unlimited freedom, because the state must intervene to protect socially and economically weak parties or to protect public order, decency.

Principle of Consent

The principle of consent (*asas konsensualisme*) refers to the requirement for parties to a contract to agree or reach a consensus. A contract will exist if there if consent is reached regarding the object of agreement. For example, in a sale and purchase contract an agreement is made regarding the goods and the price. However, certain contracts require formalities including formal agreements (*perjanjian formal*)[52] such as grants as well as real agreements[53] (*perjanjian riil*) such as such as lease agreements, borrowing, etc. For example, grant contracts, must be made formally with a notarial deed (Article 1682 of the Civil Code) in order to be valid.[54] The principle of consent has ethical values originating from morality. According to Grotius, the basis for the notion of consent in Natural Law is *pacta sunt servanda*, the principle that agreements must be kept.[55]

The principle of consent is embedded in Article 1320 paragraph (1) of the Civil Code, which requires an agreement between the parties making the contract.

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[52] A formal agreement is an agreement in which, in addition to requiring an agreement, certain formalities are also required, in accordance with what has been determined by law.
Herlien Budiono, *Ajaran Umum Hukum Perjanjian Dan Penerapannya Di Bidang Kenotariatan* (Bandung: Citra Aditya Bakti, 2011), 46.

[53] A real agreement is an agreement that not only requires an agreement, but also requires the surrender of the object of the agreement or the object.
Ibid.

[54] Ibid, 77.

[55] I Ketut Oka Setiawan, Op. Cit., 46.

A contract will be binding on the parties if an agreement has been reached regarding the main points of the contract. Consent is sufficient if stated orally. However, verbal consent is difficult to prove because there is no written evidence, especially if there are no witnesses, and if there is only one witness it would not count as valid evidence (the principle of unus testis nulus testis in the law of evidence).[56] Therefore, in order to provide guarantee of protection and legal certainty for contracts, it is sensible for parties to not rely solely on verbal consent but to also use a legal safeguard in the form of a written contract or in the form of an authentic deed in the presence of two witnesses.[57] In addition, according to Article 1321, consent is not valid if it is obtained by error, obtained by duress or by fraud.

In the text of a contract, consent can be observed in a statement of agreement between the two parties.[58] For example, "Party A agrees with Party B to enter a sales and purchase contract for the following products…"

Advances in science and information technology in the advent of globalization of international trade have resulted in reduced personal contact between parties. As a consequence, consent is not always reached through face-to-face contact between the parties.

To ensure legal certainty, legislators also require certain contracts to be drawn up in a certain form as a condition to fulfill validity. For example, an authentic deed is required and is a determining condition for establishing the

[56] Ibid, 78.
[57] Ibid.
[58] Ibid, 79.

existence of formal contracts like land purchases (in accordance with Law no. 5 of 1960 concerning Agrarian Principles).[59]

The principle of consent is also contained in Article 1338 paragraph (2) of the Civil Code wherein contracts "cannot be revoked otherwise than by mutual agreement, or pursuant to reasons which are legally declared to be sufficient."[60] If one party wants to terminate the contract, they must obtain the consent of the other party. If the parties do not reach an agreement, arising in a dispute, then the dispute is resolved by the district court through a lawsuit procedure (Article 1266 of the Civil Code). Therefore, consent does not only have to exist at the time of making the contract (vide Article 1320 of the Civil Code), but also during execution and even termination of the contract.[61]

Principle of Pacta Sunt Servanda

The principle of pacta sunt servanda requires the parties to fulfill what has been their bond with each other in the contract they made. It is observed in Article 1338 paragraph (1) of the Civil Code which states: "All legally executed agreements shall bind the individuals who have concluded them by law."

According to Herlien Budiono, the adage pacta sunt servanda is recognized as a rule which stipulates that all contracts made between legal subjects, given the legal power contained therein, are intended to be implemented and must be

[59] Ibid, 80-81.
[60] Ibid, 81.
[61] Ibid.

executed by law.[62] Article 1338 paragraph (1) of the Civil Code indicates that the binding nature of contracts allow legal subjects to carry out legal actions as if the contract was the law. Therefore, the contract is considered as a source of law in contract law.

According to Fried, the power of binding contracts is based on morals and "legal obligations can be imposed only by the community" so the community can ensure its objectives are met "rather than neutrally endorsing those of the contracting parties."[63] The binding power of a contract limited to the parties making the contract, results in rights and obligations that are personal and relative.[64]

The binding power of a contract depends on whether the contract is legally valid. If such contract is legally valid (vide Article 1320 and other relevant and relevant articles in the Civil Code), then the contract is binding and applies as law for the parties who make it (vide Article 1338 paragraph (1) of the Civil Code).[65]

According to van Appeldoorn, there is a certain analogy between contracts and laws. To some extent, the contracting parties act as private legislators, but whereas the law is binding for everyone and is abstract in nature, contracts only bind parties who intend to carry out concrete actions.[66] The parties making the contract autonomously regulate the pattern and substance of the contractual legal relationship between them.

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[62] Herlien Budiono and Tristam P. Moeliono, *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia: Hukum Perjanjian Berlandaskan Asas-Asas Wigati Indonesia* (Bandung: Citra Aditya Bakti, 2006), 102.
[63] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford ; New York: Oxford University Press, 2015), 2-3.
[64] Moch Isnaeni, *Hipotek Pesawat Udara Di Indonesia* (Surabaya: Dharma Muda, 1996), 32.
[65] Muhammad Syaifuddin, Op. Cit., 92.
[66] LJ van Appeldorn, *Pengantar Ilmu Hukum* (Jakarta: Pradnya Paramita, 2004), 155.

Principle of Good Faith

Agreement must be carried out in good faith (*itikad baik*), a principle contained in Article 1338 paragraph (3) of the Indonesian Civil Code. The Civil Code does not, however, provide a definition of "good faith". "Good faith", according to Wex, is "a term that generally describes honest dealing."[67] According to the Fockema Andreae Law Dictionary, it is "the intent, the spirit that animates the participants in a legal action or those involved in a legal relationship".[68] Black's Law Dictionary provides the following definition of good faith:

> "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone,...In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."[69]

Subekti explains that good faith is one of the most important pillars of contract law, giving power to judges to supervise the implementation of a contract so as not to violate decency and justice. Judges have the authority to deviate from the contract if the implementation of the contract is unjust (*recht gevoel*) for one of the two parties.[70]

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[67] "Good Faith," Legal Information Institute (Legal Information Institute), accessed November 2, 2022, https://www.law.cornell.edu/wex/good_faith.
[68] Fockema Andreae S J., Nikolaas Egbert Algra, and Gokkel H R W., *Kamus Istilah Hukum Fockema Andreae: Belanda-Indonesia* (Bandung: Binacipta, 1983), 369.
[69] Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN: Thomson Reuters, 2021), 693.
[70] R. Subekti, *Hukum Perjanjian* (Jakarta: PT. Intermasa, 1987).

R. Wirjono Prodjodikoro explains that good faith consists of two kinds, namely:

a. Good faith at the time of entry into a legal relationship, wherein a person believes in good faith that the conditions for that legal relationship have been met. The law provides protection to parties with good intentions, while those with bad intentions (*te kwader trouw*) are liable to bear the risk. This good faith is subjective and static.
b. Good faith when implementing the rights and obligations in that legal relationship, which focuses on the actions carried out by both parties when implementing the contract. This type of good faith objective and dynamic in nature.[71]

In courts, judges will use their authority to interfere with the contents of contract if it is unjust. Good faith must exist not only at the stage of creation of the contract (signing), but also during implementation and before its creation. For example, in the civil case No. 341/K/Pdt/1985, it was decided that a loan interest of 10% per month was too high and created injustice. The Supreme Court thus lowered the interest rate from 10% to 1% per month.[72]

Principle of Balance

In relation to contracts, the principle of balance (*asas keseimbangan*) means a balance of the positions of the parties making the contract.[73] This principle

[71] Wirjono Prodjodikoro, *Azas-Azas Hukum Perdata* (Bandung: Sumur Bandung, 1992), 56-62.
[72] Muhammad Syaifuddin, Op. Cit., 96.
[73] Ibid, 97.

requires both parties to fulfill the agreement in a balanced manner. The creditor has the right to demand performance of the contract, if necessary, with the debtor's assets, but he is also obliged to carry out this promise in good faith. Thus, a creditor's rights are balanced by the obligation to be carried out in good faith, insofar that both creditors and debtors are balanced.[74]

According to Nieuwenhuis, in a reciprocal contract, the quality of the performance will be justified by the rule of law. However, if the position of one party is stronger than the other in that it unfairly benefits one party, it can affect the scope of the content as well as the aims and objectives of the contract. This inequality in the contract is an imbalance, which can be a basis for the aggrieved party to file a claim for the invalidity of the contract. Thus, the factor that determines the upholding of the principle of balance is not only the equality of performance promised by the parties making the contract, but also the equality of the parties making the contract, which reflects the will to realize fairness in the exchange of economic interests for the goods and services agreed in the contract. Where an imbalance occurs due to the unequal position of the parties to the contract which causes disruption to the contents of the contract, state intervention is required to uphold the principle of balance in the contractual legal relationship.[75]

According to Agus Yudha Hernoko state intervention to uphold the balance is particularly needed in relation to consumer contracts. Consumer protection is needed because there is an imbalance in the bargaining position of the consumer-

[74] I Ketut Oka Setiawan, Op. Cit., 48.
[75] Jacob Hans Niewenhuis, *Hoofstukken Verbintennissenrecht* (Deventer: Kluwer, 1976), 122.

producer relationship is assumed to be a subordinate relationship, as consumers are in a weak position in forming his contractual will. Agus Yudha Hernoko stressed the need for consumers to be empowered and to balance their bargaining position with producers.[76] Therefore, in order to balance the positions of the parties, the government enacted Law Number 8 of 1999 concerning Consumer Protection, Article 18 containing provisions prohibiting the inclusion of standard clauses in contracts by business actors or producers so as not to harm consumers.[77]

2.1.2.4 Validity of contracts

Whether a contract is legally binding on its parties depends on its validity. The validity of a contract can be ascertained by examining whether it fulfills the terms of validity of a contract as regulated in Book III of the Civil Code. Requirements for the validity of a contract are stipulated in Article 1320 of the Civil Code, and outside of Article 1320, in Article 1335, Article 1339, and Article 1347 of the Civil Code.[78]

Article 1320 of the Civil Code stipulates the following four conditions for an agreement to be valid, namely:

1. there must be consent of the individuals who are bound thereby;
2. there must be capacity to conclude an agreement;
3. there must be a specific subject;
4. there must be an admissible cause.

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[76] Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial* (Jakarta: Kencana, 2008), 66.
[77] Muhammad Syaifuddin, Op. Cit., 99.
[78] Ibid, 110.

The first and second condition for the validity of a contract (consent and capacity respectively) constitute as subjective conditions because they relate to a legal subject, namely the parties making the contract. Meanwhile the third and fourth conditions (subject matter and admissible cause) are referred to as objective conditions, because they involve a legal object that was agreed upon by the parties to the contract.[79] A contract that does not any of the subjective and objective conditions stipulated in Article 1320 of the Civil Code may incur the following consequences:

1. "Non-existence", meaning there is simply no contract, in the case where there is no consent;
2. Cancellation (*vernietigbaar*), if the contract arises due to a non-fulfillment of the subjective requirements, i.e. defect of will (*wilsgebreke*) or incompetence (*onbekwaamheid*). Such a contract is voidable, and in other words, may be cancelled[80]; and
3. Void (*Nietig*); if the contract does not fulfill its objective requirements, i.e. have a specific subject matter or if the subject cannot be determined or has a cause that is prohibited. Then the contract is considered null and void by law.[81]

Consent

[79] Ibid.
[80] Vincensia Esti Purnama Sari, *Perjanjian Sewa Rahim Yang Dibuat Di Luar Negeri Dan Akibat Hukumannya Dalam Praktek Yang Berlaku Di Indonesia* (Tangerang: Fakultas Hukum Universitas Pelita Harapan, 2018), 192.
[81] Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, *Perjanjian Jual Beli Berklausula Perlindungan Hukum Paten* (Malang: Tunggal Mandiri Publishing, 2009), 21.

The first subjective requirement for the validity of a contract is the consent or agreement of those who bind themselves. However, the Civil Code itself does not provide an explicit explanation of the meaning of the word. According to J.H. Niewenhuis, consent is formed by two elements: first, an offer, or a proposal to enter into a contract that includes essential elements (element that absolutely must exist); and second, acceptance, through a statement of agreement from the party being offered.[82]

Mertokusumo emphasizes that there are five ways in which consent through a statement of intent can expressed:

1. Perfect written language;
2. 2. Perfect language through oral statement;
3. Imperfect language, as long as it can be understood and accepted by the other party;
4. Sign language, as long as it can be understood and accepted by the other party;
5. Silence, as long as it is understood or accepted by the other party.[83]

A defect of will or consent (*wilsgebreke*) may occur in in cases of error (*dwaling*) or if such consent is obtained through violence/coercion (*berdreiging, dwang*) and fraud (*bedrog*) by one or more parties making the contract. As Article 1321 stipulates: "No agreement is of any value if granted by error, obtained by

[82] Jacob Hans Niewenhuis, Op. Cit.
[83] Sudikno Mertokusumo, "Rangkuman Kuliah Hukum Perdata," Rangkuman Kuliah Hukum Perdata (Yogyakarta: Fakultas Pascasarjana, Universitas Gadjah Mada, 1987), 7.

duress or by fraud." Defective consent is further elaborated under Article 1322 to Article 1328 of the Civil Code.

Contracts that contain defects of consent may incur cancellation as a legal consequence.[84] Defects of will and the resulting cancellation may happen in the following cases:

1. Error/Mistake

   Error in consent is regulated in Article 1322 of the Civil Code as follows:

   "An error shall not render an agreement invalid unless such error relates to the substance of the subject matter of the agreement. Error shall not result in invalidity if it relates only to the identity of an intended party to the contract, unless the agreement is solely concluded with regard to this specific individual."

J.H. Niewenhuis explains that a mistake resulting in defective consent must be related to the nature of objects and/or identity of a person, and that the opposing party must know that the nature or circumstances would lead to error from the other party.[85]

According to Herlien Budiono, there are two kinds of error in the agreement namely:

a. Actual error (*eigenlijke dwaling*), in which a correct representation of the facts is lacking. In this case, the will and the statement agree, but the will

[84] Muhammad Syaifuddin, Op. Cit., 117.
[85] Jacob Hans Niewenhuis, Op. Cit. 12-16.

has been established based on an incorrect representation of the facts in situations.

b. Misrepresentation/false delusion (*oneigenlijke dwaling*), which results from a misunderstanding between the two parties. In this case, the will and statement do not align.[86]

2. Violence/Coercion

Violence or coercion in an agreement is regulated in Articles 1323 to 1327 of the Civil Code. Violence/coercion in an agreement occurs when a party gives their consent for fear of threats. Threats must be of acts against the law, such as threats to be killed, kidnapped, etc. Threats that do not conflict with the law cannot be considered as violence/coercion (for example, a threat to file a civil lawsuit).[87]

3. Fraud

Fraud in a contract is regulated in Article 1328 of the Civil Code. According to Niewenhuis, fraud is a form of mistake.[88] Fraud occurs when a party to a contract provides false information accompanied by deceit, thereby persuading the other party to give consent.[89] According to Herlien Budiono, fraud occurs when a person with will and knowledge has an intention to mislead others, conceal certain facts,

[86] Herlien Budiono, Op. Cit., 98.
[87] Muhammad Syaifuddin, Op. Cit., 119.
[88] Jacob Hans Niewenhuis, Op. Cit.
[89] Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, Op. Cit., 22

provide false information, or other deception.[90] To prove the existence of fraud, the deceived party must prove the existence of such intention.

Capacity

Article 1329 of the Civil Code contains a general norm that as long as it is not stipulated otherwise by law, every person (*natuurlijke persoon*) is deemed capable of taking legal action including forming contractual agreements. Those who are deemed incapable are the exception to this rule and cannot carry out legal actions.[91] According to Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, capacity requirements of the parties to a contract are necessary because only competent people are able to understand, carry out, and be responsible for the legal consequences of a contract.[92]

Article 1330 of the Civil Code sets out those who are incompetent to conclude agreements:

1. Minors;
2. Individuals under guardianship (under curatele).
3. Married women, in the events stipulated by law, and individuals who are prohibited by law from concluding specific agreements. This provision has been revised by the Supreme Court of Indonesia based on Circular Letter No. 3/1963 dated August 1963, which stipulated that women are capable as

[90] Herlien Budiono, Op. Cit., 99.
[91] Muhammad Syaifuddin, Op. Cit., 123.
[92] Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, Op. Cit., 23

long as they meet the requirements of being an adult and are not under guardianship.

In relation to paragraph 1 of Article 1330, Article 330 of the Civil Code stipulates that minors are those who have not reached the age of 21 years and have not been married. If the marriage ends before an individual is 21 years old, they will not return to their minor status.[93]

In regard to legal entities, a legal entity will have capacity to make a contract if the person representing the legal entity has the capacity to carry out legal actions.[94]

Contracts made by incapable parties may result in the cancellation of the contract while contracts made by parties who are not competent to carry out legal actions result in the contract being cancelled, meaning that one or two parties can cancel or not cancel. If one party does not cancel the contract, the contract will remain valid. The incapable party may cancel the contract himself or have his parents or guardian act on his behalf.[95] For example, a sale and purchase contract of a motorized vehicle sold to a minor may be canceled by the parents due to the minor's incompetence. However, if the parents do not cancel the sale and purchase contract, it will remain valid.

Specific Subject

[93] Muhammad Syaifuddin, Op. Cit., 124.
[94] Ibid, 126.
[95] Ibid, 127.

The subject matter of a contract must be specific. What is agreed upon must be clear so that the rights and obligations of the parties can be implemented. For example, a contract of accounts payable must clearly state the amount, time period, place and method of return. Contracts that do not have specific subject are non-binding (null and void).[96] Asser-Rutten emphasized that the object of contract must fulfill the following conditions:

1. Can be determined;
2. Can be traded; (Article 1332)
3. Possible to be carried out;
4. Can be valued in money.[97]

A specific subject may constitute not only tangible objects, but also intangible objects that will exist in the future and can become the subject matter in the contract (Article 1334(1) of the Civil Code). An example of this is a commodity futures contract.[98]

If the particular object or subject matter is not specific in accordance with Article 1320(3), then the contract is null and void, meaning that the contract is deemed to have never existed from the start.[99]

Admissible Cause

[96] Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, Op. Cit., 23
[97] Herlien Budiono. Op. Cit, 107.
[98] Commodity futures contracts are a contracts that buy and sell commodities in a specific quantity, quality, type and price in a predetermined day in the future (vide Article 1 point 4 of Law no. 32 of 1997 concerning Commodity Futures Trading)
[99] Muhammad Syaifuddin, Op. Cit., 130.

The definition of admissible cause) is not explained in Article 1320 of the Civil Code. Vollmar propounds that causes are the intent or purpose of the contract.[100] According to Niewenhuis, a cause refers to the objective (causa finalis), namely the aim of the parties when creating the contract.[101] Niewenhuis' explanation is in line with the Hoge Raad decision dated January 6, 1922, which declared that the admissibility of the cause must be determined according to the time the contract was made. This means that if a new statutory prohibition contradicts the cause after the contract is drawn up, the contract will remain valid.[102]

According to Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, the following causes are prohibited:

a. The contract made must not conflict with the law. For example, a contract to commit murder for a certain reward is prohibited by Article 338 of the Criminal Code. Such contract is null and void, deemed to have never existed and the parties are not bound to execute it;
b. The contract must not conflict with decency, a vague criterion that depends on the on the values of society. For example, a contract with a film actress who is scantily clad or naked may be considered indecent;
c. Contracts must not conflict with public order. For example, a contract for the carriage of goods that exceeds the capacity of the vehicle can endanger public order.[103]

[100] H.F.A. Vollmar, *Pengantar Studi Hukum Perdata Jilid II*, trans. I.S. Adiwimarta (Jakarta: RajaGrafindo PErsada, 1995), 160.
[101] Jacob Hans Niewenhuis, Op. Cit., 171.
[102] J. Satrio, *Hukum Perjanjian: Perjanjian Pada Umumnya* (Bandung: Citra Aditya Bakti, 1992), 312.
[103] Annalisa Yahanan, Muhammad Syaifuddin, and Yunial Laili Mutiari, Op. Cit., 24.

This is stated in Article 1337, which states: “a cause is not permissible if it is prohibited by law, or if it violates good conduct, or public order.” Furthermore, Article 1335 states that an agreement without a cause, or concluded pursuant to a fraudulent or implausible cause, shall not be enforceable.”[104]

Causes prohibited by law are determined from three aspects of the contract: (1) the execution of the contract; (2) the substance of the contractual; and (3) the intent and purpose of the contract.[105]

Regarding decency, the exact definition is not explained in Indonesian law. “Decency” refers to unwritten social norms that are considered *halal* and followed by the community, and thus, norms of decency are developed in accordance with the values of the community. This creates a broad scope in its meaning that will differ according to place and time.[106] Ultimately, the determination of whether or not a cause is decent is left to the judge’s discretion with the values the community taken into account.[107]

Causes considered "contrary to public order", according to Cohen, are actions contrary to the basic principles of the social order.[108] Because it is not defined in the Civil Code, the meaning of “contrary to public order” is difficult to define. Therefore, legal and jurisprudential literature does not emphasize a distinction between contracts that conflict with public order and good decency.[109]

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[104] Muhammad Syaifuddin, Op. Cit., 134.
[105] Ibid.
[106] Ibid.
[107] Herlien Budiono, Op. Cit., 120
[108] Ibid.
[109] Muhammad Syaifuddin, Op. Cit., 136.

2.1.2.5 Interpretation of contracts

According to Black's Law Dictionary, the interpretation of a contract refers to "the art or process of discovering and ascertaining the meaning of a statute, will, contract, or other written document. The discovery and representation of the true meaning of any signs used to convey ideas."[110]

Contract interpretation is necessary when the formulation of sentences and articles in a contract is unclear and not concrete as to the will of the parties, thus giving rise to a variety of meanings, which then creates legal uncertainty about the rights and obligations of the parties. This ambiguity then has the potential to cause contract law disputes between the parties of the contract.[111] Because the contents of a contract are generally in the form of written language, the parties are often constrained by limited ability when expressing intentions effectively, so that they use words or terms with multiple meanings, are vague or even contradict one another.[112] In this regard, contract interpretation is a method that aims to "search and discover the implied legal meaning of what is stated in a contract". In the process interpretation, it is important not to add or expand the contents of the contract.[113]

In the Indonesian Civil Code, regulations that govern interpretation of a contract are outlined in Articles 1342 to 1351. Methods of interpretation follows a certain hierarchy in which one must always look at the plain meaning of the words

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[110] Henry Campbell Black, Joseph R. Nolan, and Michael J. Connolly, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (St. Paul: West Pub. Co., 1990), 817-818.
[111] Muhammad Syaifuddin, Op. Cit., 322.
[112] H.F.A. Vollmar, Op. Cit., 15
[113] Muhammad Syaifuddin, Op. Cit., 325.

first, and only if the words are unclear should it be interpreted in other ways. The following are ways in which to interpret a contract according to the Civil Code:

a. Where the wording of an agreement is clear, “one must not deviate from it by way of interpretation" (vide Article 1342). Here, “clear” means that the words do not have multiple interpretations,[114] and so the literal meaning of the words are taken. If the wording is clear, the parties are bound to the literal meaning even if the words are not in accordance with the original intent.[115]
b. If the words of an agreement are open various interpretations, “one shall ascertain the intent of the parties involved rather than be bound by the literal sense of the words" (vide Article 1343). In this case, interpretation of the words requires looking at the intention of the parties, even if the meaning deviates from the words contained in the agreement.
c. “If a stipulation open to two interpretations, one shall interpret it in the sense in which it produces some effect, rather than in the sense in which it would be entirely ineffective.” (vide Article 1344) The meaning that allows the implementation of the promise is chosen, which means the agreement must be interpreted as closely as possible to the intentions of the parties.[116]

[114] J. Satrio, Hukum Perjanjian: Perjanjian Pada Umumnya (Bandung: Citra Aditya Bakti, 1992), 415.
[115] Muhammad Syaifuddin, Op. Cit., 333.
[116] I Ketut Oka Setiawan, Op. Cit., 48.

d. If words are open to two kinds of interpretation, then the meaning that is interpreted to correspond most with the nature of the agreement (Article 1345). For example, in a loan agreement the word "interest" has multiple definitions, but only one obviously corresponds to the nature of the agreement.

e. "If the wording is ambiguous, it shall be interpreted in a manner which is customary in the country or location where the agreement was made." (vide Article 1346)

f. If there is ambiguity, the words in the contract must be interpreted against the party who stipulated something, and in favor of the party who has bound himself to it" (vide Article 1349). In this case, if an agreement is interpreted to be detrimental to one of the parties, then the interpretation must be directed to the creditor's loss and the debtor's profit. This provision is based on decency.[117]

In order to avoid dubious meanings, parties must ensure the contract contains clear words with clear intentions and meanings as well as concrete descriptions of their contractual legal rights and obligations. If the interpretation of the contract still gives rise to different meanings, it can lead to contract law disputes that is settled through court decisions or arbitration decisions and other alternative dispute resolution, such as negotiation, mediation, and conciliation.[118]

[117] Muhammad Syaifuddin, Op. Cit., 334.
[118] Ibid., 335

2.1.2.6 ITE Law and electronic contracts

Law no. 11 of 2008 concerning Electronic Information and Transactions (ITE Law) recognized electronic contracts as a valid form of contract, defining it as an “agreement of parties entered through an electronic system[119]" (vide Article 1 number 17 ITE Law). Electronic contracts are contracts that are created through a legal action in the form of "electronic transactions".[120] As defined by Article 1 point 2 of the ITE Law, electronic transactions refer to "legal actions carried out using computers, computer networks and/or other electronic media". According to Article 17 paragraph (1), the implementation of electronic transactions, can be carried out within the scope of public or private law. Furthermore, according to Article 18 paragraph (1) of ITE Law, "Electronic transactions that are poured into electronic contracts bind the parties who make them". Business transactions can be carried out in the form of electronic transactions as outlined in electronic contracts, which are known as "e-commerce".[121]

2.1.2.6.1 Validity of electronic contracts

The legal relationship arising from an electronic contract is based on the law binding traditional contracts. Therefore, Contract Law as outlined in Book III in the Civil Code can be applied as general law rules (lex generalis) for electronic contracts.[122] Article 46 of Government Regulation no. 71 of 2019 concerning

[119] According to Article 1 point 5 of the ITE Law, an electronic system is "a series of electronic devices and procedures that function to prepare, collect, manage and/or disseminate electronic information".
[120] Muhammad Syaifuddin, Op. Cit., 334.
[121] Ibid, 335.
[122] Ibid, 256.

System Management and Electronic Transactions states that an electronic contract will be valid so long as it fulfills the requirements of 1) Consent, 2) Capacity, 3) Specific subject and 4) Admissible cause, as outlined in Article 1320 of the Civil Code.

With regard to electronic contracts based on electronic business transactions, the ITE Law addresses the first legal requirement (consent) in Article 19, which states that parties conducting electronic transactions that are stated electronic contracts must use an agreed-on electronic system.[123] Unless otherwise specified by the parties, electronic transactions occur when the transaction offer sent by the sender has been received and approved by the recipient, meaning that it occurs upon agreement between the parties, which can be done through, among other things, checking data, identity, personal identification number (PIN) or inputting a password. The approval of the offer must be carried out with an electronic acceptance statement (vide Article 20 paragraph (1) and paragraph (2)). The provisions in this article are thus in accordance with the Acceptance Theory (Onvans Theorie), wherein a contract is born when the letter of acceptance from the offeree has arrived to the offeror, regardless of whether he knows of or has read the acceptance.[124]

With regard to the second requirement of contract validity (capacity), Article 9 of the ITE Law requires business actors offering products through an

[123] Ibid, 263.leg
[124] Acceptance Theory (*Onvans Theorie*) is one of four theories explaining at what moment a contract arises, along with Statement Theory (*Uitings Theorie*), Delivery Theory (*Verzendings Theorie*), and Theory of Knowledge (*Verneming Theorie*).
Yahya Ahmad Zein, *Kontrak Elektronik & Penyelesaian Sengketa Bisnis e-Commerce Dalam Transaksi Nasional & Internasional* (Bandung: Mandar Maju, 2009), 56.

electronic system must provide complete and correct information regarding the terms of the contract, the manufacturer, and the products being offered. In the explanation of the law, what is meant by "complete and correct information" also includes information containing the identity and status of legal subjects and their competencies, both as producers, suppliers, operators and intermediaries (vide Article 9 and its Explanation, especially letter (a). Complete and correct information about the status of legal subjects and their competence is an indicator of the authority and competence of the parties making electronic contracts.[125]

Article 9 of the ITE Law is also pertinent to the third requirement of contract validity (specific subject matter). The explanation of Article 9 states that "complete and correct information" also includes information that describes the goods and/or services offered, such as names, addresses, and descriptions of goods/services (vide Article 9 and Explanation). This article ensures certain that determinable objects or subject matters can be ascertained by the parties making electronic contracts as the products offered online must be described correctly and completely. Furthermore, Article 28 states that it is prohibited to commit acts that intentionally and without rights spread false and misleading news that results in consumer losses. False and misleading information and can cause harm to a party, because the object or subject matter in the electronic contract is not certain or cannot be determined in truth and completeness.[126]

[125] Muhammad Syaifuddin, Op. Cit., 265.
[126] Ibid, 266.

With regard to the fourth requirement of contract validity (admissible cause), the ITE Law sets out several prohibitions that violates law, order and decency, pertinent to the cause of an electronic contract[127]:

1. Article 27(1), (2), (3) and (4) states that it is prohibited to "commit acts that intentionally and without rights distribute and/or transmit and/or make accessible electronic information and/or electronic documents related to electronic contracts that have content that violates decency, gambling, insults and defamation. as well as extortion and/or threats".
2. Article 34(1) states that it is prohibited to intentionally and without rights or against the law to produce, sell, procure for use, import, distribute, provide, or own:
    a. computer hardware or software specifically designed or developed to facilitate prohibited acts as referred to in Article 27 (vide Article 34(1)(a));
    b. computer passwords, access codes, or the like to make the electronic system accessible with the aim of facilitating prohibited acts as referred to in Article 27 (vide Article 34 paragraph (1) letter b).
3. It is prohibited to commit acts intentionally and without rights or against the law as referred to in Article 27 and Article 34 which result in losses for other people (vide Article 36).
4. Article 37 states it is prohibited to intentionally commit acts as referred to in Article 27 and Article 36 outside the territory of Indonesia against

[127] Articles 27-37 in Chapter VII of the ITE Law sets out several prohibited acts.

electronic systems that are in the territory of Indonesia's jurisdiction. This article is made to prevent unlawful acts by parties outside the jurisdiction of Indonesia which result in disruption and damage to electronic systems which are indispensable as a medium for making electronic contracts. This article is also related to Article 2 which stipulates that the law applies to everyone who commits legal acts governed by the ITE Law, both within the jurisdiction of Indonesia and outside, which has legal consequences in the jurisdiction of Indonesia and/or outside the jurisdiction of Indonesia and detrimental to the interests Indonesia.[128]

An electronic contract that violates any of the above articles will not fulfill the requirement of admissible cause and will be void by law.

2.2 Conceptual Framework

2.2.1 Smart Contract

The term "smart contract" was coined in 1997 by Nick Szabo, a computer scientist, lawyer and cryptographer, who wanted to use a distributed ledger to store contracts. In an early paper, he described a smart contract as "a set of promises, specified in digital form, including protocols within which the parties perform on these promises."[129] In another paper, Szabo defined smart contracts as "digital, computable contracts where the performance and enforcement of

[128] Muhammad Syaifuddin, Op. Cit., 267.
[129] Nick Szabo, "Smart Contracts: Building Blocks for Digital Free Markets," Extropy Journal of Transhuman Thought, 1996, 16.

contractual conditions occur automatically, without the need for human intervention".[130]

A smart contract is commonly compared to a vending machine, which, like a smart contract, guarantees a certain output if the right inputs are made. A vending machine is programmed to dispense a snack only when a buyer makes a selection and money is inserted into the vending machine. Likewise, a smart contract is programmed with the same logic that automates a transaction when certain conditions are met. For example, in the context of e-commerce, a payment system can be automated in which a buyer pays for a product, but the seller will not receive the money until the buyer receives the product. This resolves the issue of trust, allowing a faster and more secure transaction.

2.2.2 Smart legal contract

Smart legal contracts are a subset of smart contracts, a term defined by the UK Law Commission as: "A legally binding contract in which some or all of the contractual terms are defined in and/or performed automatically by a computer program." Depending on the role played by the code, smart legal contract can take three forms: 1) natural language contract with automated performance, 2) hybrid contract[131], or 3) solely code contract.

[130] David Allessie et al., "Blockchain for Digital Government: An Assessment of Pioneering Implementations in Public Services," Blockchain for Digital Government: An assessment of pioneering implementations in public services § (2019), 9.
[131] This type of contract is also known as a Ricardian contract, introduced in 1999 by Ian Grigg. Diego Geroni, "What Are Ricardian Contracts? A Comprehensive Guide," 101 Blockchains, August 15, 2022, https://101blockchains.com/ricardian-contracts/.

An example in which a smart legal contract can exist in application is in the form of an escrow agreement. In an escrow agreement, one party deposits funds or an asset with a third party (i.e. escrow agent) and when the contractual obligations are met, the escrow agent will hand over the retained asset to the party entitled to receive it.[132] For example, in a sales and purchase contract of a real estate property, a buyer deposits the funds needed to purchase the property with an escrow agent, and only when the seller transfers the assets (e.g. property title) to the buyer will the escrow agent release the funds to the seller. With a smart legal contract, this contract could be automated by code. Although the buyer and the seller would negotiate and draft contractual terms in natural language, they would employ an agent that provides escrow service using an algorithmic code to release the funds once the obligations have been fulfilled by the parties.[133]

2.2.3 Electronic contract

Electronic contract (or e-contract) is a contract that is formed electronically and is drafted, negotiated, and executed online. Article 1 number 17 of the ITE Law defines electronic contract as an "agreement of parties entered through an electronic system". Electronic contracts qualify legally binding agreements if they meet the requirements of contract specified in Article 1320 of the Civil Code.[134] An example of an electronic contract is an agreement between a borrower and a lender in fintech

[132] James Chen, "What Is an Escrow Agreement? How It Works, Uses, and Types," Investopedia (Investopedia, November 17, 2022), https://www.investopedia.com/terms/e/escrowagreement.asp.
[133] Law Commission, "Smart Legal Contracts: Advice to Government," Smart Legal Contracts: Advice to government § (2021), 13.
[134] See Article 46 of Government Regulation no. 71 of 2019 concerning System Management and Electronic Transactions

lending or peer to peer lending such as a loan, which must use a funding agreement in the form of an electronic document.[135]

Article 48(3) of Government Regulation no. 71 of 2019 states that electronic contracts that carry out electronic transactions must contain at least: 1) Identity data of the parties, 2) Objects and specifications, 3) Electronic Transaction Terms, 4) Prices and costs, 5) Procedure in the event of cancellation by the parties, and 6) Provisions that entitle the aggrieved party to be able to return goods and/or request a product replacement if there are hidden defects.[136]

The procedure for using electronic contracts is regulated in the Article 18 ITE Law[137]:

1. Electronic transactions made through an electronic contract system are binding on the parties.
2. The parties have the right to determine the law that applies or is applied in electronic transactions as outlined in electronic contracts.
3. If the parties do not determine the choice of law in electronic transactions, then the applicable law is based on the principles of International Private Law.
4. The parties have the right and authority to determine the authority to determine alternative dispute resolution institutions such as court forums,

[135] Article 32 of the Financial Services Authority Regulation Number 10/POJK.05/2022 concerning Information Technology-Based Joint Funding Services
[136] Cindy Aulia Khotimah and Jeumpa Crisan Chairunnisa, "PERLINDUNGAN HUKUM BAGI KONSUMEN DALAM TRANSAKSI JUAL BELI-ONLINE (E-COMMERCE)," BUSINESS LAW REVIEW 1 (n.d.), 16.
[137] R. Indra, "Pengertian Dan Kedudukan Perjanjian/Kontrak Elektronik," Doktorhukum.com, November 15, 2020, https://doktorhukum.com/pengertian-dan-kedudukan-perjanjian-kontrak-elektronik/.

arbitration, or other institutions authorized to handle disputes that may arise as a result of conducting electronic transactions.

5. If the parties do not elect a forum or institution that has the authority to resolve disputes that arise, the authority to handle disputes over the occurrence of electronic transactions is a stipulation and is guided by the principles of international private law.