BUKTI KORESPONDEN ARTIKEL JURNAL

TERINDEKS SCOPUS

Judul Artikel : The Principle of Balance Formulation as the Basis for Cancellation of Agreement in Indonesia

Jurnal : Lex Scientia Law Review, Volume 6 Issue 1 2022

Penulis : Faizal Kurniawan

No	Perihal	Tanggal
1.	Bukti Submit artikel	26 April 2022
2.	Bukti Konfirmasi Review I	09 Juni 2022
4.	Bukti Revisi dan resubmit	09 Juni 2022
5.	Bukti accepted dan Publis	13 Juni 2022

1. BUKTI SUBMIT / KONFIRMASI SUBMIT ARTIKEL (26 April 2022)

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The Principle of Balance Formulation as the Basis for Cancellation of Agreement in Indonesia

Faizal Kurniawan, Xavier Nugraha, ...

Round 1 Status

Submission accepted.

Notifications

[LeSRev] Editor Decision	2022-06-09 08:21 PM
[LeSRev] Editor Decision	2022-06-13 01:45 PM
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Our decision is to: Accept With Revision (Revision Required)

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The Principle of Balance Formulation as the Basis for Cancellation of Agreement: An Effort to Create Equitable Law in Indonesia

Faizal Kurniawan, Xavier Nugraha, Gio Arjuna Putra, Vicko Taniady, Bart Jansen[5]

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Lex Scientia Law Review

Volume 6 Number 1 May, 2022

Type: Research Article

The Principle of Balance Formulation as the Basis for Cancellation of Agreement in Indonesia

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Abstract

This study aims to examine the essence of the principle of balance in the agreement and dissect the position of the principle of balance as the legal reason for the cancellation of an agreement in order to realize equitable law in Indonesia. The research method used in this research is doctrinal research by using a statutory approach, a conceptual approach, and a comparative approach. Based on the research conducted, it was found that the essence of the principle of balance is a principle that emphasizes the existence of balance or equality of the rights and obligations of the parties in an agreement. Furthermore, the principle of balance can be used as a reason to cancel an agreement in Indonesia that has fulfilled the conditions for a valid agreement in Article 1320 jo 1338 of the Indonesian Civil Code as long as it is interpreted in the form of abuse of circumstances.

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Keywords *Formulation, The Principle of Balance, Cancellation of Agreement, Equitable Law*

1. Introduction

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Economic activities cannot be separated from the creation of agreements.[1] In the current globalization era, agreements are very important to support trade

[1] Deviana Yuanitasari, "The role of public notary in providing legal protection on standard contracts for Indonesian consumers," *Sriwijaya Law Review* 1, no. 2 (2017): 179–89, https://doi.org/10.28946/slrev.Vol1.Iss2.43.pp179-190.

and business transactions.[2] An agreement is an event where one person promises to another person or where two people promise each other to carry out certain matters.[3] In Indonesia, the classic measure to determining the validity of an agreement is Article 1320 of the Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Indonesia*, hereinafter referred to as the Indonesian Civil Code), which is often known as the requirement of the validity of an agreement. The requirement for the validity of an agreement are (i) the consensus of those who intends to bind themselves (*de toestemming van degenen die zich verbinden*); (ii) the capacity or ability to conclude an engagement (*de bekwaamheid om eene verbintenis aan te gaan*); (iii) a particuar subject matter (*een bepaald onderwerp*); and (iv) a lawful cause (*eene geoorloofde oorzaak*). The juridical consequence of not fulfilling the first two requirements is that the agreement is voidable (*vernietigbaar*), and if it does not fulfill the third and fourth requirements, then the agreement is null and void (*nieteg van recht*).[4]

In practice, even though an agreement has fulfilled the legal requirements as stated in Article 1320 of the Indonesian Civil Code, an agreement can still be voidable. As with the old maxim: "*cum adsunt testimonial rerum, quid opus est verbist* (when there is evidence from the facts, then words became meaningless)." In relation to the annulment of a voidable agreement, even though an agreement fulfills the requirements of the validity of an agreement, it can be seen in one legally binding (*inkracht van gewjisde*) Court Decision, namely the Supreme Court

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[2] Syprianus Aristeus, "Transplantasi Hukum Bisnis di Era Globalisasi Tantangan Bagi Indonesia," *Jurnal Penelitian Hukum De Jure* 18, no. 4 (2018): 513–24, https://doi.org/10.30641/dejure.2018.v18.513-524.

[3] Niru Anita Sinaga, "Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian," *Binamulia Hukum* 7, no. 2 (2018): 107–20, https://doi.org/10.37893/jbh.v7i2.20.

[4] Margaretha Donda Daniella, William Tandya Putra, dan Erich Kurniawan Widjaja, "Asas Itikad Baik Dalam Memorandum Of Understanding Sebagai Dasar Pembuatan Kontrak," *Notaire* 2, no. 2 (2019): 231, https://doi.org/10.20473/ntr.v2i2.13122.

Decision Number 1369 K/Pdt/2017, dated 14 August 2017, whereby the panel of judges granted the lawsuit on the annulment of an agreement under the basis that the principle of balance is not fulfilled.

In the said Supreme Court Decision, the plaintiff is PT. Pos Indonesia (Persero), with the defendant PT. Donindo Menara Utama. The case position explained that the plaintiff and the defendant entered into a cooperation agreement to use the land of the defendant which was made in the context of utilizing the defendant's land for the construction of the Posindo Plaza/*Shopping Center* with a Built, Operate, and Transfer (BOT) scheme. However, the cooperation agreement was not fully implemented because of the low interest of business actors to rent a place at the Plaza. Due to such a situation, Plaintiff was forced to apply an ordinary commercial building rental rate which brought growth from 2009, which was only filled at 50% capacity, to 2012 where it is filled to almost 80% capacity, despite of the decline of performance in 2014 and 2015. On the other hand, the fact that Defendant still collects additional contribution fees and fines in accordance with the provisions of Article 6 paragraph (1) letters b, c, d and Article 12 paragraph (2) of the Agreement, as stipulated in the Deed Number 39 dated November 10, 2003 regarding the Cooperation Agreement between PT. Pos Indonesia (Persero) with PT. Donindo Menara Utama regarding the Utilization of Land Owned by PT. Pos Indonesia (Persero) at Jalan Lambung Mangkurat Number 19 Banjarmasin, as drawn up by Notary Robensjah Sjachran, SH. The total claim submitted by Defendant was Rp. 1,287,023,700.00 (one billion two hundred eight seven million twenty-three thousand seven hundred rupiahs), even though the management of the Plaza Posindo Building do not provide sufficient income to pay the bill for the additional contribution fee and fine. In fact, the cooperation agreement between Plaintiff and Defendant clearly contradicts the principle of balance due to the unfair and unbalanced imposition of obligations between Plaintiff and

Defendant. All costs related to investment in the construction and management of the Plaza Posindo Building are entirely borne by Plaintiff, plus additional contributions and fines. Not to mention that Plaintiff is charged to build a house of office as a form of compensation for the utilization of Defendant's plot of land. Given these reasons, based on the case position of the case, Plaintiff stated that the agreement between Plaintiff and Defendant is not concluded based on the principle of balance.

Despite Peter Noll's critique, that: " *die rechtswissenschaft ist bis heute cine teine rechtsprechung wissenschaft gebjlieben"* (until now, the science of law has only remained pure knowledge of the judiciary)[5], but it is undeniable that the said Court Decision creates the potential for annulment of an agreement on the basis of a legal principle *(in casu*: the principle of balance). The use of the principle of balance as the basis to annul an agreement that has fulfilled the requirement for a valid agreement (*vide* 1320 of the Indonesian Civil Code) certainly raises questions regarding theoretical justification considering that the principle of balance is at the level of legal principles, and it is not explicitly specified in prevailing Indonesian laws and regulations. This is in parallel with Sudikno Mertokusumo's opinion, that: "Legal principles are no concrete laws, but are general and abstract basic thoughts, or are the background of concrete regulations contained in and underlying every legal system that is embodied in laws and regulations and in judge's decisions, which is known as the positive law, and can be found on the characteristics or traits that are common in the concrete regulations.[6] A similar opinion was also expressed by H. J. Homes in his book *Betekenis van de Algemene Rechtsbeginsselen voor d praktijk*, that a legal

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[5] Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan 1* (Yogyakarta: PT Kanisius, 2020).
[6] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Maha Karya Pustttaka, 2020).

principle is not considered as concrete legal norm, but is seen as general principles or guidelines for applicable law.[7]

To date, the reason for annulment of an agreement under the basis of the principle of balance is still not evident or vacuum (*leemten in het recht*). However, it is also undeniable that there is a need for an arrangement related to the annulment of the agreement because of the imbalance position of the parties in an agreement. This is because sometimes even though the parties indeed agree, the agreement can be said to be unapparent simply due to the fact that a party is more superior to the other party, and such condition is used by the superior party to insert clauses that are detrimental to the party whose position is less superior. If this legal vacuum is left as is, then this could potentially create conditions where the superior party takes advantage of its position to include clauses that are materially detrimental to the weaker party. This matter surely contradicts the old maxim: "*inde datae leges ne fortior omnia posset* (laws must be created, otherwise stronger people will have unlimited power)".

In other countries with a higher *rule of law index* compared to Indonesia, such as the Netherlands, which shares a similar civil law system that is closely related to Indonesia, has explicitly stipulates the principle of balance in its civil national law, namely through the concept of *misbruik van omstandigheiden*.[8] Furthermore, the United Kingdom which uses the *common law* system also

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[7] Dewa Gede Atmadja, "Asas-asas hukum dalam sistem hukum," *Kertha Wicaksana* 12, no. 2 (2018): 145–55, https://doi.org/10.22225/kw.12.2.721.145-155.

[8] B Purnomo, Hartono Widodo, dan M.Rikhardus Joka, "Penyalahgunaan Keadaan (Misbruik van Omstandigheden) Dalam Bidang Hubungan Industrial yang Mengakibatkan Pembatalan Atas Surat Pengunduran Diri Pekerja (Studi Putusan Mahkamah Agung Nomor 1016 K/Pdt.Sus-PHI/2019)," *Krisna Law* 3, no. 2 (2021): 1–9, https://doi.org/10.37893/krisnalaw.v3i2.443.

recognizes the annulment of an agreement due to *undue influence*[9] which incidentally is a manifestation of the principle of balance in an agreement. In addition, the Uncitral Model Law, specifically under Article 18, emphasizes equality or equal conditions in filing cases; thus, Article 18 of the Uncitral Model Law is actually a manifestation of the principle of balance.

Siti Malikhatun Badriyah stated that the presence of the agreement is to achieve a balance of interests between the parties.[10] In fact, Salim H.S stated that the principle of balance is a principle that requires both parties to fulfill and implement the agreement.[11] Thus, the principle of balance is crucial from the pre-contractual, contractual, to the implementation phase of an agreement. The manifestation of the principle of balance in the construction of a legal agreement is also directed at ensuring every consensus will create an equitable contract.

Based on existing research, there are at least some previous studies that have examined this legal issue. First, the research conducted by Muhammad Irayadi with the title "The Principle of Balance in Contract Law" examines the legal issue of the principle of balance in the perspective of contract law in Indonesia.[12] The second research is by Jonneri Bukit, Made Warka, Krisnadi Nasution through his writing entitled "The Existence of the Principle of Balance

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[9] Nabiyla Risfa Izzati, "Penerapan Doktrin Penyalahgunaan Keadaan (Undue Influence) Sebagai Alasan Pembatalan Perjanjian Kerja Di Pengadilan Hubungan Industrial," *Masalah-Masalah Hukum* 49, no. 2 (2020): 180–91, https://doi.org/10.14710/mmh.49.2.2020.180-191.

[10] Aryo Dwi Prasnowo dan Siti Malikhatun Badriyah, "Implementasi Asas Keseimbangan Bagi Para Pihak dalam Perjanjian Baku," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 8, no. 1 (2019): 61–75, https://doi.org/10.24843/jmhu.2019.v08.i01.p05.

[11] Togi Pangaribuan, "Permasalahan Penerapan Klausula Pembatasan Pertanggungjawaban Dalam Perjanjian Terkait Hak Menuntut Ganti Kerugian Akibat Wanprestas," *Jurnal Hukum & Pembangunan* 49, no. 2 (20019): 443–54, https://doi.org/http://dx.doi.org/10.21143/jhp.vol49.no2.2012.

[12] Muhammad Irayadi, "Asas Keseimbangan Dalam Hukum Perjanjian," *Jurnal Hermeneutika* 5, no. 1 (2021): 1–6, https://doi.org/10.33603/hermeneutika.v5i1.4910.

in Consumer Contracts in Indonesia", examines legal issues arising from consumer contracts due to the imbalance in the position of the contract agreement.[13] Thirdly, research conducted by Octaviana Carolina, Suradi, and Aminah entitled "Implementation of the Principle of Balance in Online Transactions Reviewed from the Perspective of Law No. 8 of 1999 on Consumer Protection", analyzes the issue of the principle of balance from the perspective of online trading transactions and consumer protection.[14] Fourth, research conducted by Tiar Ramon with the title "Criteria for Balance in Bank Credit Agreements to Realize Commutative Justice", assesses legal issues related to the practice of bank credit agreements where prior to signing the agreement, the bank as a creditor has a strong position economically, have prepared the contents or clauses of the agreement in standard printed form, which creates an unbalanced situation.[15] Lastly, the research conducted by Eni Suarti with the title "The Principle of Balance of the Parties in the Land Purchase Contract", which discusses the legal issues of the principle of balance in the sale and purchase of land.[16]

Based on these previous studies, it can be understood that this legal writing has a new idea by examining the nature of the principle of balance from

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[13] Jonneri Bukit, Made Warka, dan Krisnadi Nasution, "Eksistensi Asas Keseimbangan Pada Kontrak Konsumen di Indonesia," *DiH: Jurnal Ilmu Hukum* 14, no. 28 (2018): 24–32, https://doi.org/10.30996/dih.v0i0.1788.

[14] Octoviana Carolina, Suradi, dan Aminah, "Implementasi Asas Keseimbangan Dalam Transaksi Jual Beli Online Ditinjau dari UU No. 8 Tahun 1999 tentang Perlindungan Kosumen," *Diponegoro Law Journal* 6, no. 8 (2017): 1–16, https://doi.org/https://doi.org/10.20885/iustum.vol26.iss2.art8.

[15] Tiar Ramon, "Kriteria Keseimbangan Dalam Perjanjian Kredit Bank Untuk Mewujudkan Keadilan Komutatif," *Jurnal Hukum Ius Quia Iustum* 26, no. 2 (2019): 372–90, https://doi.org/10.20885/iustum.vol26.iss2.art8.

[16] Eni Suarti, "Asas Keseimbangan Para Pihak Dalam Kontrak Jual Beli Tanah," *Fakultas Hukum Universitas Muhammadiyah Palembang* 4, no. 1 (2019): 976–87, https://jurnal.um-palembang.ac.id/index.php/doktrinal/article/view/1865.

the perspective of Indonesian contract law. In addition, this study also examines the practice of the principle of balance as the basis for the annulment of the agreement by using a comparative approach to the Netherlands and the United Kingdom. Furthermore, the point that distinguishes this legal writing from previous studies is also evident in the submission of ideas to reform Indonesian contract law by stipulating the principle of balance into legislation based on various legal considerations. Based on the abovementioned matters, it can be understood that this research has an urgency to be carried out, considering that this research will be able to become an offer of legal ideas to create an equitable contract law.

2. Method

In conducting this research, the researcher used the doctrinal research approach. Doctrinal research is a legal research undertaken to examine primary literatures or secondary data as a basis for the research by searching relevant regulations and literatures related to the legal issue examined.[17] Statutory approach, conceptual approach, and comparative approach are also used in analyzing this research.[18] The statutory approach aims to analyze regulations related to the principle of balance as the basis for cancellation of agreement, such as the Indonesian Civil Code. The conceptual approach is used to analyze the concepts, theories, and opinions of legal experts related to the principle of balance as the basis for cancellation of agreement, such as the theory of the validity of agreement, the reasons for the cancellation of the agreement, etc. The

[17] Xavier Nugraha dan Ave Maria Frisa Katherina, "Tanggung Jawab Promotor Perseroan Terbatas Terhadap Kontrak Pra Inkorporasi Di Indonesia," *Media Iuris* 2, no. 1 (2019): 127–55, https://doi.org/10.20473/mi.v2i1.11814.

[18] Jonaedi Effendi dan Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris*, Cetakan ke (Jakarta: Kencana, 2020).

comparative approach aims to analyze the regulations related to the principle of balance regulated in the Netherlands, England, and the Uncitral Model Law.

This study uses secondary data, including primary, secondary, and tertiary legal materials. Primary legal materials include laws and regulations that apply in Indonesia, the Netherlands, England, Uncitral Model Law, and binding jurisprudence. The secondary legal materials used are books, journals, etc. In comparison, tertiary legal materials include *online news* and other materials. To analyze the secondary data, a literature study technique is used, after which a prescription will be made regarding the legal issues studied. Furthermore, data analysis is carried out through a deduction pattern to describe several regulatory norms related to the legal issues studied and to explain legal facts.[19]

3. Result & Discussion

A. The Essence of the Principle of Balance in the Agreement

From old maxim *ad recte docendum oportet primum inquirere nomina, quia rerum cognition a nominibus rerum dependet* (for the proper understanding of a thing, it is well first to inquire into the names, because knowledge of things depends upon their names), it can be understood that in order to fully understand a concept holistically, it is necessary to first understand the definition of the concept.[20] On this basis, to understand the nature of the principle of balance, it is necessary to first describe the definition of the principle of balance in an agreement. Rahma Firlli Febriani and Wiwin Yulianingsih define the principle of balance as a principle that requires the exchange of rights and obligations in proportion to the

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[19] Beby Suryani, "Pendekatan Integral Penal Policy Dan Non Penal Policy Dalam Penanggulangan Kejahatan Anak," *Doktrina: Journal of Law* 1, no. 2 (2018): 69–89, https://doi.org/https://doi.org/10.31289/doktrina.v1i2.1922.

[20] Wisnu Indaryanto, "Kedaulatan Indonesia Di Antara Virus Corona Versus Asas Resiprositas Dan Asas Manfaat," *Jurnal Legalisasi Indonesia* 17, no. 2 (2020): 121–30, https://doi.org/https://doi.org/10.54629/jli.v17i2.654.

contracting parties.[21] Aryo Dwi Prasnowo and Siti Malikhatun Badriyah define the principle of balance as the occurrence of equality of position between the rights and obligations of the parties in an agreement with the same terms and conditions (*ceteris paribus*), and no party dominates or exerts pressure on the other party.[22] Ni Made Puspasutari Ujianti and Anak Agung Sagung Laksmi Dewi define the principle of balance as a condition where the parties involved in an agreement must have an equal position or stance, no one dominates, and also the parties have an equal bargaining position in terms of the position, interests, and rights and obligations of the parties.[23] From these 3 (three) definitions, a synthesis can be drawn that the definition of the principle of balance in an agreement is equality of position between the contracting parties, which leads to exchange of rights and obligations that are genuinely in accordance with the aims of the parties.

Herlien Budiono realizes that the principle of balance holds an essential position in an agreement, thus Herlien Budiono places it as one of the objectives of an agreement, which is to protect the expectations that arise from the agreement, preventing unlawful enrichment of oneself, and preventing certain kinds of harm.[24] The Author seconded the view that the principle of balance is very essential, to a point that it is placed as one of the objectives of an agreement. This is because without an equal position, parties of an agreement cannot

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[21] Rahma Firlli Febriani dan Wiwin Yulianingsih, "Implementasi Asas Keseimbangan Dalam Transaksi Jualbeli Di Giyomi Id Online Shop," *Simposium Hukum Indonesia* 1, no. 1 (2019): 378–84, https://journal.trunojoyo.ac.id/shi/article/view/6351.

[22] Prasnowo dan Badriyah, "Implementasi Asas Keseimbangan Bagi Para Pihak dalam Perjanjian Baku."

[23] Ni Made Puspasutari Ujianti dan Anak Agung Sagung Laksmi Dewi, "Tinjauan Yuridis Asas Keseimbangan Dalam Kontrak Pengadaan Barang / Jasa Pemerintah," *Kertha Wicaksana* 12, no. 2 (2018): 133–39, https://doi.org/http://dx.doi.org/10.22225/kw.12.2.724.133-139.

[24] Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia Hukum Perjanjian Berlandaskan Asas-Asas Wigati Indonesia* (Bandung: PT Citra Aditya Bakti, 2015).

stipulate the clauses based on their genuine interests. If there is one party that is more dominant and that party takes advantage of its position, then that party may impose clauses that are essentially undesirable by the other party whose position is weaker.[25] Therefore, there needs to be an arrangement related to the principle of balance in the law of agreements to create substantive *ad idem consensus*.

In order to test whether the principle of balance has been appropriately implemented or not, one shall test its workability.[26] According to Herlien Budiono, the test is done based on the following three essential aspects:[27]

1. The actions of the parties;
2. The content of the agreement; and
3. Implementation of what has been agreed.

Though not against Herlien Budiono's view above, the Author perceives that in determining the principle of balance, it is more appropriate to analyze it from the *tempus* of an agreement or contract:[28]

1. The pre-contract phase

   A balanced position of the parties must exist from the phase before an agreement is executed, for example, when concluding a Memorandum of Understanding (MoU), negotiations, and other preparatory works prior to concluding the contract.

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[25] Xavier Nugraha, John Eno Prasito Putra, dan Krishna Darari Hamonangan Putra, "Analisa Daluarsa Gugatan Pembatalan Perjanjian Akibat Adanya Penyalahgunaan Keadaan (Misbruik Van Omstandigheiden)," *Galuh Justisi* 8, no. 1 (2020): 54–72, https://doi.org/http://dx.doi.org/10.25157/justisi.v8i1.3242.

[26] Ujianti dan Dewi, "Tinjauan Yuridis Asas Keseimbangan Dalam Kontrak Pengadaan Barang / Jasa Pemerintah."

[27] Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia Hukum Perjanjian Berlandaskan Asas-Asas Wigati Indonesia*.

[28] Daniella, Putra, dan Widjaja, "Asas Itikad Baik Dalam Memorandum Of Understanding Sebagai Dasar Pembuatan Kontrak."

2. Contract execution phase
   At the closing of this contract, the principle of balance can be seen from the drawing up of the clauses. If the substance of the clauses is very detrimental to one of the parties, then one may suspect an imbalance of the parties' position.
3. Contract implementation phase
   There is the potential for a change in circumstances in the implementation phase of the agreement to the extent that if the agreement was to be continued, it will cause an imbalance of benefit of the parties. Therefore, based on the old maxim *clause rebus sic stantibus*[29], there should be room for correction so that the parties' position remains balanced.

The principle of balance in agreement actually has juridical consequences, namely the principle of freedom of contract. The meaning of the principle of freedom of contract or known as the *beginsel van contractsvrijheid* is the freedom of the parties related to the agreement.[30] The forms of freedom of contract of the parties include:[31]

a) freedom to conclude or not to conclude an agreement;
b) freedom to choose contracting parties;
c) freedom to determine or choose the causes of an agreement;
d) freedom to determine the object of the agreement;
e) freedom to determine the form of an agreement;

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[29] Dubravka Klasiček dan Marija Ivatin, "Modification or Dissolution of Contracts Due To Changed Circumstances (Clausula Rebus Sic Stantibus)," *Pravni vjesnik* 34, no. 2 (2018): 27–55, https://doi.org/10.25234/pv/5686.

[30] M. Roesli, Sarbini, dan Bastianto Nugroho, "Kedudukan Perjanjian Baku Dalam Kaitannya Dengan Asas," *DIH: Jurnal Ilmu Hukum* 15, no. 1 (2019): 1–8, https://doi.org/https://doi.org/10.30996/dih.v15i1.2260.

[31] Fahdelika Mahendar dan Christiana Tri Budhayati, "Konsep Take It or Leave It Dalam Perjanjian Baku Sesuai Dengan Asas Kebebasan Berkontrak," *Jurnal Ilmu Hukum: ALETHEA* 2, no. 2 (2019): 97–114, https://doi.org/10.24246/alethea.vol2.no2.p97-114.

f) freedom to accept or deviate from the provision of prevailing laws and regulations that are optional in nature; and
g) freedom to determine the dispute settlement forum.

Thus, as long as an agreement does not conflict with laws and regulations, morality, and/or public order (for example, in Indonesia, it is regulated in Article 1337 of the Indonesian Civil Code), then freedom to contract applies.[32]

The freedom to contract from an agreement certainly has consequences, that the parties to the agreement should obey the agreement made. This is also known as the principle of consequentialism.[33] Regarding the principle of consensualism, for example, it can be seen in Article 1338 of the Indonesian Civil Code, that: "All agreements made in accordance with the law apply as law to those who make them. The agreement cannot be withdrawn other than through consensus of both parties or for reasons determined by law. Agreements must be carried out in good faith (underlined by the author)." The existence of the principle of consensualism is generally known as *pacta sunt servanda*, which, if freely translated, means that the agreement is binding to the parties as law.[34] It is called "binding to the parties as law" since, in philosophy, the agreement is made by the parties in a balanced state, thus making the parties free in determining the agreement, then, of course, it is natural that the agreement is genuinely binding on the parties. The following is a flow chart of the philosophy of an agreement's binding force.

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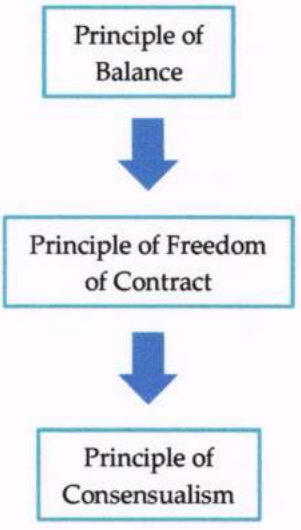
[32] M H Susanto, P N Angga, dan M H M Marwa, "Jual-Beli Satwa Burung Dilindungi Negara: Tinjauan Hukum Perjanjian Dan Penegakan Hukumnya," *Res Judicata* 4, no. 2 (2021): 133–49, https://doi.org/http://dx.doi.org/10.29406/rj.v4i2.3102.

[33] Ni Putu Ayu Bunga Sasmita dan I Wayan Novy Purwanto, "Penerapan Asas Konsesualisme Dalam Perjanjian Jual Beli Online," *Kertha Semaya : Journal Ilmu Hukum* 8, no. 8 (2020): 1138–47, https://doi.org/10.24843/KS.2020.v08.i08.p02.

[34] M F Gayo dan H Sugiyono, "Penerapan Asas Pacta Sunt Servanda Dalam Perjanjian Sewa Menyewa Ruang Usaha," *JUSTITIA: Jurnal Ilmu Hukum dan Humaniora* 8, no. 3 (2021): 245–54, https://doi.org/10.31604/justitia.v8i3.245-254.

Diagram 1. Philosophy of the Binding



Source: Author's result of analysis

According to the author, it would be unfair if an agreement that was concluded in a balanced state, thus making the parties free to determine the agreement, and then not having a strong binding force. Without binding force, the consensus of the parties in an agreement seems to have no value because the parties can easily deviate or choose not to implement the agreement. This caused the consensus in the agreement rendered useless. This condition certainly contradicts the old maxim *lex neminem cogit ad vana seu inutilia peragenda* (the law will not force anyone to do a thing which is vain and fruitless).

The existence of the principle of freedom of contract, which has consequences to the principle of consensualism, has been misused over time, especially by parties who have a stronger or dominant position. The dominant or stronger party forces or deceives the weaker party into concluding an agreement with clauses that are detrimental to the weaker party, even though the weaker

party knows such a condition, it is not uncommon for the weaker party to have no choice but to conclude the agreement. In its development, the term "take it or leave it" appears in an agreement, making the parties have no freedom to stipulate clauses of an agreement.[35] The principle of freedom of contract, which Agus Yudha Hernoko referred to as the principle that leads to the existence of a "partner/contracting partner"[36] can actually be said to have turned into the principle underlying the occurrence of a "contracting opponent."

The argument that freedom of contract is actually being misused by the stronger party so that the agreement is considered binding on the parties is a manifestation of a misconception that assumes the main aspect in an agreement is the principle of freedom of contract. However, it must be understood that above the principle of freedom of contract there is a principle of balance that must exist in agreement. **Without the principle of balance, there is undoubtedly no substantive freedom of contract and indeed no principle of consensualism**. The existence of a misconception that considers the principle of freedom of contract so that it is deemed to create a consensualism can be called *ex falso quo libet* (misconceptions lead to wrong conclusions).[37] To facilitate understanding the construction of legal consequences regarding the absence of the principle of balance in the agreement is as described in the flowchart below.

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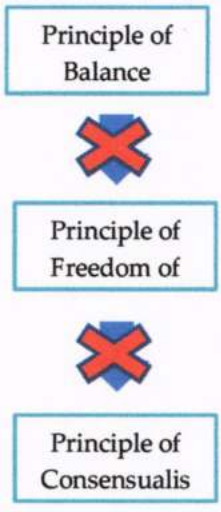
[35] Anyi Ma, Yu Yang, dan Krishna Savani, "'Take it or leave it!' A choice mindset leads to greater persistence and better outcomes in negotiations," *Organizational Behavior and Human Decision Processes* 153 (2019): 1–12, https://doi.org/10.1016/J.OBHDP.2019.05.003.

[36] Agus Yudha Hernoko, *Hukum Perjanjian : Asas Proposionalitas Dalam Kontrak Komersial, Penjelasan Hukum Tentang Kebatalan Perjanjian*, Cetakan ke (Jakarta: Kencana Prenada Media Group, 2014).

[37] Guram Bezhanishvili dan Wesley H. Holliday, "A Semantic Hierarchy For Intuitionistic Logic," *Indagationes Mathematicae* 30, no. 3 (2019): 403–69, https://doi.org/https://doi.org/10.1016/j.indag.2019.01.001.

Digaram 2. A Construction of the Absence of the Principle of Balance in an Agreement



Source: Author's result of

The existence of the principle of balance in an agreement can be regarded as one of the manifestations of the existence of a balanced law. Absent the principle of balance in an agreement, it is certain that an agreement concluded between parties whose positions are not balanced will not reflect the existence of contractual justice. Therefore, for the existing law to truly reflect substantive balance, it is necessary to have constructive legal arrangements related to the principle of balance. There needs to be legal consequences against agreement that do not reflect the principle of balance so that the law is not only *lex imperfecta* (rules that contain obligations without legal sanctions when not implemented).[38]

B. Principle of Balance as a Basis for Annulment of Agreement in Indonesia

[38] Mark Priestley, "How Useful Are Equality Indicators? The expressive function of 'stat imperfecta' in disability rights Advocacy," *Evidence and Policy* 17, no. 2 (2021): 209–26, https://doi.org/10.1332/174426421X16141001670976.

In the present civil law system in Indonesia, the existence of the principle of balance as the basis for the annulment of an agreement still creates problems. Such a condition happens because the principle of balance is not explicitly specified as a basis for the annulment of agreement. As explained previously, principally, the concept of the validity of an agreement in Indonesia is determined by whether or not the conditions for the validity of the agreement are fulfilled.[39] When the conditions for the validity of the agreement is re-examined, it can be dichotomized into two conditions, namely the fulfilment of subjective elements, which refers to legal competence and the willingness to be bound; and also the fulfilment of objective element, which means there exists a particular object and a lawful cause (see Article 1320 of the Indonesian Civil Code).[40] In its theoretical framework, the non-fulfilment of the subjective elements of an agreement will lead to juridical consequences in the form of the potential annulment of the agreement (*verniegbaar*). Meanwhile, if the objective elements are not fulfilled, the legal consequence is that the agreement is considered to have never happened or is null and void (*nietigheid van rechtswege*).[41]

From the said understanding, the principle of balance as the basis for the annulment of an agreement is unclear (because it is included as neither the **subjective** nor the **objective condition** as set out in Article 1320 of the

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[39] Purnama Trisnamansyah, "Syarat Subjektif dan Objektif Sahnya Perjanjian dalam Kaitannya dengan Perjanjian Kerja," *Syiar Hukum : Jurnal Ilmu Hukum* 15, no. 2 (2018): 158–83, https://doi.org/10.29313/sh.v15i2.2373.

[40] Devi Kumalasari dan Dwi Wachidiyah Ningsih, "Syarat Sahnya Perjanjian Tentang Cakap Bertindak Dalam Hukum Menurut Pasal 1320 Ayat (2) KUH Perdata," *Jurnal Pro Hukum : Jurnal Penelitian Bidang Hukum Universitas Gresik* 7, no. 2 (2018): 1–10, https://doi.org/10.55129/jph.v7i2.725.

[41] Dian Samudra dan Ujang Hibar, "Studi Komparasi Sahnya Perjanjian Antara Pasal 1320 KUH Perdata Dengan Pasal 52 Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan," *Res Justitia: Jurnal Ilmu Hukum* 1, no. 1 (2021): 26–38, https://doi.org/10.46306/rj.v1i1.9.

Indonesian Civil Code). In another perspective, the existence of the principle of balance is commonly known in several countries. First, the Netherlands, which has a close legal tie with Indonesia, has recognized the principle of balance in its national law. Furthermore, the United Kingdom, a country that uses the common law system, has also adopted the principle of balance as one of the principles that must be fulfilled in contract law.

Furthermore, in the perspective of international law, the United Nations Commission on International Trade Law (UNCITRAL) has also manifested the principle of balance in the arbitration dispute resolution process. The complete comparison of the manifestation of the principle of balance as the basis for the annulment of an agreement in the Netherlands, the United Kingdom, and UNCITRAL is explained in the following table:

TABLE 1. The Comparison of the Manifestation of the Principle of Balance as the Basis for the Annulment of an Agreement in the Netherlands, the United Kingdom, and UNCITRAL

No.	Object of Comparison	Reasons for Choosing the Object of Comparison	Basic Arrangements	Forms of Arrangements Related to the Principle of Balance
1	Netherlands	The historical aspect is one of the main reasons the Netherlands must be used as an object of	Book III Article 3: 44 lid 1 *conjunction* 4 Nederland Burgerlijk Wetboek (NBW)	The principle of balance in Dutch is known as *"evenwitchevenwichti"* which means lexically "same,

comparison in examining the principle of balance as the basis for the annulment of agreement in Indonesia. It is important to note that the current Indonesian Civil Code is a Dutch colonial legacy. Hence, by making the Netherlands the object of comparison, it will be easier to see the problem of progressivity in the development of contract law in Indonesia.	states: *"Een rechtshandeling is vernietigbaar, wanneer zij door bedreiging, door bedrog of door misbruik van omstandigheden is tot stand gekomen door bedrog of door misbruik van omstandigheden is tot stand gekomen"* (which essentially stipulates that the agreement can be annulled when there is a threat, fraud, and abuse of circumstances)" *jo* *"Misbruik van omstandigheden is aanwezig, wanneer*	comparable" by referring to an understanding of circumstances, positions, degrees, weights, and other aspects. Examining Article 3: 44 lid 1 in *conjunction* 4 NBW, the principle of balance can be understood as part of *misbruik van omstandigheden* (abuse of circumstances) which is included in the violation of the terms of the validity of an agreement. This is because the provision of the *a quo* article is unlimited. Hence,

	iemand die weet of moet begrijpen dat een ander door bijzondere omstandigheden, zoals noodtoestand, afhankelijkheid, lichtzinnigheid, abnormale geestestoestand of onervarenheid, bewogen wordt tot het verrichten van een rechtshandeling, het tot stand komen van die rechtshandeling bevordert, ofschoon hetgeen hij weet of moet begrijpen hem daarvan zou behoren te weerhouden" (Abuse of legal circumstances exists when someone who	it is possible to interpret the principle of balance as a form of abuse of circumstances.

knows or should have known that others might be persuaded to take legal action due to being under the influence of certain circumstances, such as an emergency, dependence, recklessness, addiction, abnormal mental state, or lack of experience, however, has prompted another person to take this legal action even though what that person knows or should know, should have restrained him not to do so).

2	United Kingdom	The selection of the United Kingdom as one of the objects of comparison in examining issues related to the principle of balance as a basis of the annulment of agreement is based on a desire to provide a broader understanding in analyzing the existence of the principle of balance in an agreement, by not only looking from the perspective of civil law States but also from common law States. In addition, the United Kingdom	After the decision of the Case *of Bank of Credit & Commerce International v Aboody (1990)*, the notion of undue influence gained traction in British law.	The principle of balance is found in the British legal system in the form of undue influence. Theoretically, undue influence emphasizes the existence of "circumstances" that influence the person in determining his will in concluding an agreement. In other words, undue influence emerges when there is a relationship between parties that have been unfairly exploited. Therefore, if an agreement does not consider the

		is also listed as the first country to apply the doctrine of undue influence which relates to the principle of balance.		circumstances and the value of justice for the parties, it can be annulled.
3	UNCITRAL	Indonesia is currently listed as a permanent member of UNCITRAL. It is necessary to understand that the existence of UNCITRAL plays an important role in the process of forming various international legal products in the trade sector. Based on these reasons, it is essential to make UNCITRAL an	Article 18, Chapter V, Model Law on International Commercial Arbitration, states that *"The parties shall be treated with equality and each party shall be given a full opportunity of presenting their case."*	The *a quo* provision explicitly guarantees an equal opportunity for the parties to apply for dispute resolution in arbitration. This can be interpreted broadly as a form of the principle of balance, considering that the principle of balance emphasizes a state of rights and obligations of the

	object of comparison to examine the principle of balance in contract law.	parties that are "balanced or equal", thus it also includes the balance of opportunities to apply for dispute resolution.

Based on the description in the table above, it can be understood that the principle of balance in the Netherlands and the United Kingdom is interpreted as part of the abuse of circumstances. Thus, it is possible to be used as a basis for the annulment of an agreement. Furthermore, at UNCITRAL, the principle of balance is manifested in the context of providing equal opportunities for parties bound to an agreement to submit dispute resolutions to arbitration. In this case, the principle of balance is interpreted as a principle that seeks "balance or equality" over the rights of the parties in order to have the opportunity to submit a request for dispute resolution through arbitration.

Further, the study of the principle of balance as the basis for the annulment of agreement in Indonesia can be analyzed by referring to the Supreme Court Decision Number 1369 K/Pdt/2017, dated August 14, 2017. In that Case, the plaintiff is PT. Donindo Menara Utama while the defendant is PT. Pos Indonesia (Persero). The main object of the claim is related to the provisions for payment of additional contribution fees and fines as stipulated in the Cooperation Agreement on the Utilization of Land owned by PT. Pos Indonesia (Persero) at Lambung Mangkurat No. 19 Street, Banjarmasin. The Judge ultimately decided to:

1. Reject the appeal from the Cassation Petitioner, being PT. POS Indonesia (Persero)
2. Revise the decision of the Banjarmasin High Court Number 23/PDT/20165/PT BJM dated March 16, 2016, which confirmed the Banjarmasin District Court Decision Number 50/Pst.G/2015/PN Bjm dated December 2, 2015.

Examining the legal considerations in the Court Decision *a quo*, the Judge *expressis verbis* stated that even though an agreement had fulfilled the conditions for a valid agreement and therefore is binding on the parties based on Article 1320 *jo.* Article 1338 of the Indonesian Civil Code, it is still possible to annul the agreement, as follows:

> "The reasons for the cassation cannot be justified, as *Judex Facti* has not misapplied the law, even though in essence what has been agreed upon by both parties is binding as law/*pacta sunt servanda* Article 1320 *jo.* Article 1338 of the Indonesian Civil Code;"

Furthermore, the Judge also explained that the justifiable reasons for nullifying an agreement that had fulfilled Article 1320 *jo.* 1338 of the Indonesian Civil Code were as follows:

> "That in the Case *a quo* there has been an unavoidable situation where if the contract is continued, the purpose of the agreement will not be fulfilled, therefore, based on the principle of balance, propriety, and the benefits of both parties, the agreement must be amended according to the *Judex Facti*, but the Decision by the *Judex Facti* must be changed to eliminate the fines (*dwangsom*)."

In its theoretical framework, the *ratio decidendi* of the *a quo* Decision, which legitimizes the use of the principle of balance as one of the basis for the annulment of an agreement, creates a new perception in viewing the relationship between the principle of balance and the validity of an agreement. In line with

this, a legal maxim reads, " *Cum duo inter se pugnantia reperiuntur in testamentis ultimum ratum est* ", which means that if there is a difference in substance, it is clear that there exists two different perceptions. The logical-juridical consequences of the vacuum of law on the principle of balance as the basis for the annulment of an agreement as well as the emergence of several jurisprudences which mention the principle of balance in the issue of the validity of an agreement in Indonesia, rise multiple interpretations of the principle of balance: **First**, the principle of balance cannot be used as a basis for the annulment of an agreement, **Second**, it can be a reason for the annulment of an agreement, and **Third**, it can be used as a basis for the annulment of an agreement but based on the notion of abuse of circumstances.

In relation to the efforts to ensure equitable development of contract law in Indonesia, it is important to formulate the principle of balance to become the reason or basis for the annulment of an unfair agreement. The formulation of the embodiment of the principle of balance as the basis for the agreement nullification in Indonesia should be interpreted as a form of abuse of circumstances and set forth in a legal norm. The rationale for this idea is based on the criteria for abuse circumstances which conceptually can include the principle of balance.

As Setiawan stated that "we are talking about *misbruik van omstandigheden*, if someone who knows or should have known that another person is influenced to carry out a legal action because of certain circumstances such as *noodtoestand*, *afhankelijkheid*, *lichtzinnigheid*, *abnormale geestestoestand*, or *onervarendheid* (being under forced circumstances, dependence, lack of consideration, abnormal mental condition or lack of experience) continues to seek the occurrence of the legal

action, while he knows or should have known that he should not do it".[42] For instance, in the *a quo* case, PT. Donindo Menara Utama acknowledged that there was a mistake in properly calculating the operational costs that must be paid and the income obtained from the rental business carried out. In the end, it made PT. Donindo Menara Utama experienced difficulties in fulfilling the cooperation agreement with PT. Pos Indonesia (Persero). On the other hand, although PT. Pos Indonesia (Persero) has known the difficulties faced by PT. Donindo Menara Utama to fulfill the terms of the agreement, PT. Pos Indonesia (Persero) apparently did not have good intentions and forced PT. Donindo Menara Utama to continue to fulfill the terms of the agreed cooperation agreement.

Based on the examined Case, it can be seen that the principle of balance has actually met the criteria for the abuse of the circumstances, including "there is a lack of consideration and a state of compulsion", even the Judge in the *a quo* Case has implicitly interpreted that the principle of balance and abuse of circumstances are two things, however closely related. The principle of balance emphasizes the existence of a condition where the agreement entered into has been desired by the parties by emphasizing the rights and obligations of the parties fairly by not imposing undue burden to one party.[43]

In the event of an error by one of the parties in considering the implementation of the agreement (as in the case described), there will be an imbalance of rights and obligations, or it can be said that the implementation of the agreement will burden one of the parties.[44] Therefore, the absence of good

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[42] Dwi Fidhayanti, "Penyalahgunaan Keadaaan (Misbruik Van Omstandigheden) Sebagai Larangan Dalam Perjanjian Syariah," *Jurisdictie: Jurnal Hukum dan Syariah* 9, no. 2 (2018): 165–83, https://doi.org/10.18860/j.v9i2.5076.

[43] Sinaga, "Peranan Asas-Asas Hukum Perjanjian Dalam Mewujudkan Tujuan Perjanjian."

[44] Dewi Astutty Mochtar, "Asas Keseimbangan dalam Pelaksanaan Perjanjian Anjak Piutang (Factoring)," *Jurnal Cakrawala Hukum* 10, no. 2 (2019): 146–55, https://doi.org/10.26905/idjch.v10i2.3558.

faith from the other party to undertake the request for changes to the previously agreed terms of the agreement can be interpreted as a form of coercion of will for the other party who has experienced an error or mistake in agreeing on an agreement. From this understanding, the formulation of the principle of balance in abuse of circumstances will at least be able to ensure that a process of concluding and implementing an agreement will be based on good faith of the parties by taking into account the rights and obligations as well as the circumstances of the parties in concluding and implementing the agreement. In another perspective, the effort to formulate the principle of balance also provides legal certainty to use the principle of balance as the basis to annul an agreement in Indonesia.

4. Conclusion

Based on the analysis of the study, it can be concluded that the essence of the principle of balance in the agreement is the existence of a condition of the parties being equal or balanced in their rights and obligations. The principle of balance can be used as the legal reason for the cancellation of an agreement as long it is interpreted in the form of abuse of circumstances. Nevertheless, it is still needed an effort to formulate the principle of balance into Indonesian civil law, namely through the formation of a legal product of the Supreme Court Regulation as a short-term solution and revision of the Civil Code as a long-term solution.

5. Declaration of Conflicting Interests

The authors state that there is no conflict of interest in the publication of this article.

6. Funding Information

None

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Commented [CH4]: Referensi Ok

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3. BUKTI REVIEW II / KONFIRMASI REVIEWARTIKEL (09 Juni 2022)

Gmail

Faizal Kurniawan <faizal@fh.unair.ac.id>

[LeSRev] Editor Decision

Editor Lex Scientia Law Review <lesrev@mail.unnes.ac.id> Thu, 9 Jun 2022 at 20:22
To: Faizal Kurniawan <faizal@fh.unair.ac.id>, Xavier Nugraha <nugrahaxavier72@gmail.com>, Gio Arjuna Putra <gioarjunap@gmail.com>, Vicko Taniady <190710101184@mail.unej.ac.id>, Bart Jansen <B.Jansen@nyenrode.nl>

Faizal Kurniawan, Xavier Nugraha, Gio Arjuna Putra, Vicko Taniady, Bart Jansen:

We have reached a decision regarding your submission to Lex Scientia Law Review, "The Principle of Balance Formulation as the Basis for Cancellation of Agreement: An Effort to Create Equitable Law in Indonesia".

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LETTER OF ACCEPTANCE

No: 06/LSLR/VI/6/1/2022

Dear Author(s)

We are pleased to inform you that Lex Scientia Law Review would like to publish your manuscript entitled "The Principle of Balance Formulation as the Basis for Cancellation of Agreement: An Effort to Create Equitable Law in Indonesia" **(with some refinements)** in our next issue (Volume 6 Issue 1, June 2022). We are also attaching a detail payment information and with some basic required edits that need to be applied to your manuscript before it's published (*see the last page of this document*).

Once your manuscript is moved to publishing, our production editor will keep you informed of your article's progress in the production process. You will also receive a proof of your manuscript for final review.

We're excited to move forward with your submission. Please feel free to email me with any questions.

Sincerely,

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The Principle of Balance Formulation as the Basis for Cancellation of Agreement: An Effort to Create Equitable Law in Ind

Published by Lex Scientia Law Review, Volume 6 Issue 1, June 2022
pp 121-156 DOI 10.15294/lesrev.v6i1.55468

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ISSN Print 2598-9677 ISSN Online 2598-9685