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## The Principles of Contract in Donation Based Crowdfunding

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### Abstract

The creative economy is a new era of the global economy. It needs support from the government and the society in terms of intellectual property rights protection and funding, especially for creative business or creator which comes from small and medium business (SMB) sector. One of the ways other than formal funding from the bank is through the crowdfunding new system. Crowdfunding has four systems that are based on donation, reward, lending, and equity. Donation-based crowdfunding is the most common type applied and different from other crowdfunding types. This field has not been regulated in specific legislation so it needs to be analyzed in relation to BW and related existing regulation. This research is leading to answers some main topics. First, to analyze the legal relationship between the parties. Second, to determine what type of agreement that underlies the legal act. Third, reviewing the principles of contract law that must be applied to. In the article, it uses the type of research used in this research method is normative research so that it produces a legal review of the donation-based crowdfunding system issues more deeply.

**Keywords:** Donation; Crowdfunding; Creative Economy; Contract; Agreement; Legal Relationship.

### Introduction

The global economic system is constantly evolving as the times progress. The global economy era has been growing since the era of agriculture, industrial era,

the era of information technology until now the era of creative economy.<sup>1</sup> Today we are entering a phase of the creative economy where intellectuality and creativity are the main resources. Nowadays, economic success can only be obtained if the business is able to adapt to constantly changing market conditions, as economic developments are always tied to technological processes, future uncertainties, and so forth. Therefore, both countries, business people, and society are also required to adapt to the progress of the creative industry

Major support of the creative industry is intellectuality and creativity, other equally important supporters are funding, infrastructure and technology. Although the main capital of the creative industry begins with human ideas and creativity in some circumstances it takes funds to implement the idea to the real form, considering the creative industry players are dominated by small and medium business and even individuals. The need for funds is to produce works related to research in the field of science and technology, film production, recording albums, performing arts, crafts, culinary and so forth.

Both the government, creative industries actors and the society have tried to arrange various funding ways to support the creative economic progress, including the provision of bank credit with the use of Intellectual Property Rights (IPR) as credit guarantee and securitization of IPR. Both of these ways can only be done by creative industry players who have been established and obtain the results of his creative work, but cannot help the creative industry players who are still new and need the help of funds to realize creative ideas. On the other hand, the creative economy is a constantly growing field; it cannot be stopped or limited. The funding issue for the creative industry seems to be solved by a creative effort, which is through crowdfunding.

Conceptually, crowdfunding is a capitalist system based on fundraising from donors, either individually or in groups. Crowdfunding is able to create a new funding opportunity for small businesses; it can also serve as a market test outlet

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<sup>1</sup> John Howkins in Suryana, *Ekonomi Kreatif (Ekonomi Baru : Mengubah Ide Dan Menciptakan Peluang)* (Salemba Medika 2013).[35].

for more established companies. Through the Crowdfunding platform, they can test whether their product is widely anticipated by people, build branding or product imagery and use it as an asset to collect potential customers. Crowdfunding has several categories based on how each works. Here are some types of crowdfunding i.e. donation-based crowdfunding, reward-based crowdfunding, lending-based crowdfunding, dan equity-based crowdfunding.

Each type has a distinctive character and is bound by different types of agreements so it automatically generates a different kind of legal relationship between the parties involved. An agreement or contract is a legal relationship between a legal subject with another legal subject in the field of wealth, where the one subject has a right of achievement and the other subject also obliged to carry out their achievements according to agreement. Therefore, it is commonplace if in the agreement underlying the action of donation based crowdfunding applied the principles of contract law in it.

Donation-based crowdfunding based on donations is different from lending-based crowdfunding based on money lending and equity-based crowdfunding based on profit sharing in the form of equity. At this time, the regulations that specifically set the field of donation based crowdfunding is not available yet, but the basic principles can be reviewed and analyzed from other existing legal rules such as Kitab Undang – Undang Hukum Perdata (BW) or other regulations. This study focuses on donation based crowdfunding from legal perspective with due considerations because this type is the basis of the origin of the crowdfunding system, most commonly known by the public and most widely applied to crowdfunding sites. it is also still often misunderstood as an act of public fundraising for transactions and investments like a financial technology company that is now being the concern of the government and the Financial Services Authority.

Starting from the description above, the main issues The legal relationship between the parties in donation-based crowdfunding, form of agreement underlying the donation-based crowdfunding system and principles of contract law contained in the agreement underlying the donation-based crowdfunding system.

The type of research used in this research method is normative research. Normative research is a method used in the study of law literature which is done by examining the existing library materials. The approach used is the statutory approach, conceptual approach, and comparative approach. Statute approach is done by analyzing against legal provisions. The conceptual approach is done by analyzing and understanding the legal principles contained in donation-based crowdfunding. The comparative approach is conducted by reviewing the practice of donation-based crowdfunding in the United States.

### **The Legal Relationship Between the Parties in Donation Based Crowdfunding**

The crowdfunding system in various countries has been well received as part of the alternative funding system. The simplest crowdfunding system is a donation-based crowdfunding system. The next development of this system is a reward based crowdfunding system that is still based on donations but provides returns in the form of non-economic goods related to the identity of the project being funded. The most popular example of these two systems in the international sphere is [www.kickstarter.com](http://www.kickstarter.com).

Crowdfunding systems are classified into 4 types:

a. *Donation-based crowdfunding*

Donation-based crowdfunding is a mass fundraising activity where people give their money for activities offered by entertainment business actors or certain organizations. The main idea of donation-based crowdfunding is a voluntary joint without any compensation to help others. This form is the basic form of crowdfunding. This form has existed for centuries long before the term crowdfunding was born.<sup>2</sup>

b. *Reward-based crowdfunding*

Reward-based crowdfunding based on donations but has differences on the returns given to the donors. Reward is meant here is an item related to the creative

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<sup>2</sup> Wybrich Willems, 'What Characteristics of Crowdfunding Platforms Influence The Success Rate?' (Erasmus Universiteit Rotterdam 2013).[22].

work that is being funded as a form of gratitude for the funds provided, so the reward is not in the form of financial gain. The rewards may vary depending on the amount of money donated, it is also the method used to stimulate the funder to give a higher amount while performing market tests on the product.<sup>3</sup>

c. *Lending-based crowdfunding*

Lending-based crowdfunding is a fund-raising activity in which people lend money to individuals or companies with reciprocity in the form of interest and refunds upon the expiry of the terms agreed in the agreement. The minimum fund is not restricted but the maximum amount of loan acquisition of one proposer is limited according to the regulations of each country. This type of crowdfunding can be a good thing for both parties. This method provides an alternative financing for borrowers who are unable to pass the financing qualifications required by a conventional institution such as a bank.

d. *Equity-based crowdfunding*

Equity-based crowdfunding is a mechanism that allows a large group of investors to fund start-up companies and small firms with a share of equity. The investor gives the money to a project of a business entity and receives ownership of a small portion of the entity. If the business is successful then the value increases, in accordance with the value of the part the invested into the business/project.

Crowdfunding type which will be discussed in this research is *donation-based crowdfunding*. The donation-based crowdfunding system has started running in Indonesia. Donation-based crowdfunding sites in Indonesia today are ayopeduli.com, kitabisa.com, wujudkan.com and the newest one is crowdtivate.com. Crowdtivate.com is a crowdfunding site originating in Singapore and widening its reach into Indonesia. All sites are based on donations and rewards.

Even though there are still many people who are not familiar with crowdfunding terms and mechanisms, internet fundraising popularly known as crowdfunding has started to become a potential alternative to funding creative companies and has

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<sup>3</sup> *ibid.*

been studied by Kemenparekraf during the reign of President Susilo Bambang Yudhoyono.<sup>4</sup> Nowadays, Kemenparekraf has been splitdown into its own Ministry of Tourism and Badan Ekonomi Kreatif (BEKRAF).

Difficulty access to financing without collateral is still a problem for entrepreneurs in the creative industry. Crowdfunding, which allows fund-raising from the public without the need for collateral (unsecured/collateral), has proven to be beneficial to the digital creative industry business in Indonesia. However, the implementation of donation based crowdfunding in Indonesia is hindered by the lack of proper legal construction in formulating its regulation and supervision. Therefore, it is necessary to conduct a study that examines the types of legal relationships and agreements that are appropriate for the donation based crowdfunding system. The first step that needs to be investigated is about the legal relationship of the parties.

Examining the legal relationships of the parties in a system of donation based crowdfunding in Indonesia, means to be in accordance with applicable civil law in Indonesia, namely the Kitab Undang-Undang Hukum Perdata (BW). Legal relationships in donation-based crowdfunding should be examined from legal relationships between creative business actors and crowdfunding site managers, as well as the legal relationship between creative business actors and funders (the society). The donation-based crowdfunding project basically involves three main parties:

a. Creator

Another term that often used is the initiator, facilitator, creative entrepreneur or project owner. Creators are those who have projects or ideas that need funding, it can be individuals or groups.

b. The Funder

The funder is the one who supports the idea or is interested in the product to be generated from the project. This party is then streamed. For crowdfunding-based

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<sup>4</sup> Focus Group Discussion from Ministry of Tourism, 'Crowdfunding Sebagai Salah Satu Alternatif Pendanaan Bagi Para Pelaku Kreatif Bidang Digital', *Focus Group Discussion from Ministry of Tourism* (2014).

on donations and rewards the terms funder, backer, or supporters are often used to call the donor.

c. Crowdfunding site provider/crowdfunding site manager

Third, between the two parties was the manager of crowdfunding sites or intermediaries, or mediators. Crowdfunding site managers are organizations that perform intermediate functions and platforms that allow for a relationship between the two parties on a trust basis.

The legal relationship between creative business entrepreneurs and crowdfunding site managers is a two-sided legal relationship (*tweezijdige rechtsbetrekkingen*), which creates rights and obligations for both. For example, creative industries entrepreneurs are entitled to receive funds from projects that have been loaded on the crowdfunding site managed by the site manager but they are also obligated to provide a certain percentage of services to the manager of the crowdfunding site. Similarly, vice versa, crowdfunding site managers are obliged to load creative projects that have passed the selection on the site page within the specified timeframe. Another much more important obligation is to provide the funds collected to the creative business actors concerned.

The donation-based crowdfunding site manager is not involved in the responsibility for the realization of the project. This is generally already listed on terms and conditions on each site. The role of a donation-based crowdfunding site manager as third parties, mediators, distributors, bridging between creative entrepreneurs and funders for example can be seen in one of donation-based crowdfunding website in the United States such as [kickstarter.com](http://kickstarter.com). The filmmakers, musicians, artists, and designers in Kickstarter have full control and responsibility for their projects. Kickstarter as a platform is not involved in the idea-making and development of the projects themselves. Kickstarter is also not involved in influencing or offering certain projects to the public.

Next, the legal relationship between creative business entrepreneurs and the funders from the society is a one-sided legal relationship. In a one-sided legal relationship, obligations arise on one side only, while others who are entitled to

one thing do not bear any obligation nor are bound to contribute to achievement. The funder provides the donation to the creative business entrepreneurs without having the right to request reciprocity in material matters. When the donor gives his donation then at that time he waives his right to the money. On the other hand, creative business entrepreneurs are entitled to receive donations collected from the public without the obligation to return them or to perform any achievement. The tasks carried by creative business actors are only from the moral side of using the funds according to the initial goal is to realize the proposed creative project, or in other words the moral burden to not misuse public funds.

### **Form of Agreement Underlying the Donation Based Crowdfunding System**

The legal relationship between creative business actors and funders in the donation based crowdfunding system can be associated with the act of grant law (schenking). The grant is stipulated in Article 1666 BW, stating that the grant is “a consent with the name of the recipient in his/her life free of charge and irrevocably, delivering an object for the purpose of the grantee receiving the surrender”. Grants are categorized into free agreements (omniet), achievement is only on one side while the other party does not give counter achievement as a worthy reward. Inheritance and wills are also included in the free agreement but will only valid or legal and applicable after the donor has passed away. The statement “at the time of his life” (the grantee) “aims to distinguish between grants and other forms of free agreement of inheritance and testament.

The funder’s right to the money he has donated to the creative business actor detached when he donates the money.<sup>5</sup> If the funder still demands to reign over the money either by requesting it back and giving it to the other party then it is merely the favor of the proceeds and certainly contrary to the basic concept of the grant. Furthermore, for the phrase “an object” referred to in the grant is not

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<sup>5</sup> Article 1668 BW states that: “the beneficiary shall not promise that he remains in power to sell or give to another person an object including in such grants only concerning the thing, shall be deemed void”



limited to objects of tangible goods only. Understanding objects in BW comes from two terms namely objects (*zaak*) and goods (*goed*). The definition of the object (*zaak*) in the legal perspective is stated in article 499 BW, as follows: “According to the laws, what is called material is the goods and each rights, which is controlled by property rights”.

BW discriminates objects in various ways:

1. Non-moving objects (*anroe rende zaken*) and moving objects (*roerendes zaken*), Article 504 BW;
2. Tangible objects (*luchamelijke zaken*) and intangible or altered objects (*onlichme Lijke Zaken*), Article 503 BW;
3. Objects which if used can be exhausted (*verbruikbaar*) and the objects used can not be exhausted (*onverbruikbaar*), article 505 BW;
4. Existing objects (*tegenwoordige zaken*) and new objects will exist (*taekomstige zaken*), article 1134 BW;
5. Objects in trade (*zaken in de handel*) and objects outside the trade (*zaken buiten de handel*), article 1332 BW;
6. Distributable objects (*deelbare zaken*) and objects that can not be shared (*ondeelbare zaken*), article 1163 BW;
7. Replaced objects (*vervangbare zaken*) and objects that can not be shared (*onvervange zaken*), article 1694 BW.

The next fundamental question is whether the money given by the community to creative business actors through the crowdfunding site can still be referred to as a grant because even though the process of giving is done free of charge but not accompanied by notarial deed, as well as donations in other fields which are free of charge without any deed. As Article 1682 BW states that, “No grant except as meant in Article 1687 can be done without notarial deed, the minute (original text) shall be deposited with a notary and if it is not done so the grant is not valid”. In this case it is worth remembering that grants on tangible mobile objects do not require a notarial deed and are valid if the grant is simply handed over to the grantee or to another person receiving the grant to be forwarded to the grantee (Article 1687 Civil Code). This means grants in the form of money classified as tangible moving objects can be delivered directly to the grantee.

Grant giving in the form of money from creative agency funders who are bridged and organized by the crowdfunding site manager including the settlement of

money and or goods from the public. The collection of money and goods is a thing that has long existed in Indonesia and is under the provisions of Act No 9 of 1961 on the Collection of Money or Goods (hereinafter referred to as Act No 9 of 1961).

Act No 9 of 1961 is a proof of the Government's concern to protect the interests of the community even for donation activities in the form of money or goods that are carried out voluntarily without expecting any reward. Elucidation of Article 2 Paragraph 1 of Law Number 9 Year 1961 describes the purpose of legal protection contained in this Act, "the granting of licenses is intended primarily to safeguard and maintain the safety and tranquility of the people, either preventively or repressively from the actions of the people the less responsible".

Further review of the collection of money or goods should also be applied to the implementing regulations of Act No 9 of 1961 namely Government Regulation No. 29 of 1980 about Implementation of the Collection of Donations. Article 5 of Government Regulation Number 29 Year 1980 states the ways of organizing donation collection activities by an organization, states that:

"The collection of donations can be organized by:

1. Performing;
2. Holding a bazaar;
3. Sale of goods by auction;
4. Sales of invitation cards attend a show;
5. Sale of charity stamps;
6. The circulation of the list (les) derma;
7. Sale of donation coupons;
8. Placement of donation boxes in public places;
9. Sale of goods/materials or services at a price or payment exceeding the actual price;
10. Delivery of a money order post to request a donation;
11. A request directly to the concerned in written or verbal".

From the above activities, the donation based crowdfunding cannot be included in the formulation of one of these forms. Article 5 paragraph 2 of Government Regulation Number 29 of 1980 further states that "the type of donation collection method other than those mentioned in paragraph 1 is stipulated by the Minister". Elucidation of Article 5 paragraph 2 of Government Regulation No 29 of 1980 explains that "the provisions of this paragraph are intended to not close the possibility of other ways of collecting donations, in accordance with

the development of society in the future”. Therefore, for crowdfunding system which in fact is a new way outside the eleventh form above, should be arranged first into the Ministerial Decree, namely Minister of Social Affairs of the Republic of Indonesia.

Donation-based crowdfunding is certainly different from equity-based crowdfunding and lending-based crowdfunding. Lending-based crowdfunding involves a borrowing process of borrowing money and equity-based crowdfunding involves income-sharing investments derived from public funds, so that the two types of crowdfunding go into the realm of regulation on financial technology. The Financial Services Authority (FSA) refers to it as an information technology-based lending and borrowing service and is regulated in FSA Rule Number 77/POJK.01/2016. Donation-based crowdfunding as described earlier, is based on charity/donation so it does not fall into the Fintech category and does not become the authority of FSA. Donation-based crowdfunding as well as charitable activities or other donations become the supervisory authority of the Ministry of Social Affairs. Donations from donors to be distributed by site organizers to creators/recipients of funds shall be deposited in advance through an escort account either on behalf of the organizing body which in this case is usually in the form of an incorporation of legal entities.

In the United States of America (USA), as a comparison in this study, crowdfunding has grown with great progress. Donation sites crowdfunding in the United States for example [gofundme.com](http://gofundme.com), [kickstarter.com](http://kickstarter.com), [indiegogo.com](http://indiegogo.com). Indiegogo was born in 2008 as one of the pioneers of the donation based crowdfunding site. Up to now, millions of contributors have helped and funded hundreds of thousands of inventors, musicians, filmmakers and games through [indiegogo.com](http://indiegogo.com). [Kickstarter.com](http://kickstarter.com) is a donation based crowdfunding site that focuses on creative industries only. Since 2009 until now, [kickstarter](http://kickstarter.com) has managed to make 7.7 million people to donate up to 1 billion U.S. dollars for 77,000 creative projects. [Gofundme.com](http://gofundme.com), another pioneer for donation-based crowdfunding sites in the United States was born in 2010 and is not only

engaged in creative industry but also penetrated into health, education, religious and social donations.

In the USA, a donation-based crowdfunding system is equated with the donation (donation) and belongs to charity. The donation-based crowdfunding system is not governed by specific legislation that applies nationally but is subject to the provisions of each state. Each state has its own act to regulate fundraising for charitable purposes. State regulations generally require donor-collecting organizations to register themselves with the state government before being allowed to raise public money for the purpose of continuing social contributions. The organization is also required to submit periodic financial reports and annual reports.

This report contains information confirming location, leadership structure and other details about the organization, as well as requiring the attachment of the “information return” form known as IRS Form 990.<sup>6</sup> The arrangement of the submission fee and other related costs depends on the requirements of each state. The donation has been regulated in Act whose authority is granted to each state government, this refers to the form of a United States state as a federated state with 50 states.

The USA is a common law state and runs the concept of a night state *nachtwachter staat*, unlike Indonesia which runs the civil law and welfare state systems. However, this does not mean that the United States does not care about the issue of protection of its citizens for their voluntary donation through charity. Legal protection is necessary to protect the interests of citizens, prevent fraud, misuse of funds, or misuse of charitable activities that may refer to money laundering. Donation arrangements go into the scope of charity solicitation (charity collection). The concept of charity solicitation for setting up a donation based crowdfunding system in the United States is not unlike the concept of a grant

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<sup>6</sup> Putnam Barber, ‘Regulation of Charitable Solicitations in the United States of America’, *9th International Conference of the International Society for Third Sector Research, July 7 – 10, 2010* (2010).

in BW for setting up a donation based crowdfunding system in Indonesia where the collection process is subject Act No 9 of 1961 and Government Regulation No 29 of 1980.

### **Principles of Contract Law Contained in the Agreement Underlying the Donation Based Crowdfunding System**

According to Lawrence M. Friedman, contract law is a legal instrument that regulates certain aspects of the market and regulates types of agreements. Market aspect is very identical with business activities that live and thrive in various forms of market that will lead to various contracts.<sup>7</sup> Another notion of contract according to Charles L. Knapp is: “Contract is an agreement between two or more persons not merely a share belief, but common understanding as to something that is to be done in the future by one or both of them”. It means that the contract is an agreement between two or more people, not only giving trust but mutual understanding to do something in the future by someone or both of them.<sup>8</sup>

According to Munir Fuady, contract is an agreement or a series of agreements in which the law provides for compensation for the breach of the contract, and by law, the execution of the contract is considered as an obligation to be carried out. In BW, a common term used to refer to a contract is an agreement. Article 1313 of the BW states that “the covenant is an act by which one or more parties commit themselves to one or more persons”. Abdulkadir Muhammad formulates the definition of the treaty as an agreement with two or more persons bind themselves to carrying out a matter in the field of wealth.<sup>9</sup> For the establishment of contracts, it must meet the requirements of contract validity as referred to in Article 1320 BW namely the existence of the agreement between the parties, the ability to

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<sup>7</sup> Lawrence M Friedman in Salim H.S, *Hukum Kontrak: Teori Dan Penyusunan Kontrak* (Sinar Grafika 2003).[3].

<sup>8</sup> Charles L. Knapp and Nathan M. Crystal, *Problems in Contract Law Cases and Materials* (Little Brown and Company 1993).[2]

<sup>9</sup> Munir Fuady, *Hukum Kontrak Dari Sudut Pandang Hukum Bisnis* (PT Citra Aditya Bakti 2001).[2].

make an engagement, a certain matter and a lawful cause.<sup>10</sup>

The terms contract or agreement is a translation of foreign terms i.e. contract in English, contract in french, and overeenkomst in the Dutch language. In English, the word “agreement” is not always mean the same as contract. The law literature in English indicates that the term contract is used in the civil and international civil sphere. While the word “agreement” in English is often called a treaty or covenant in the realm of public international law. In light of the duality of this term, Peter Mahmud Marzuki mediate dissent by stating that the term contract is more indicative of the business or commercial nuances in the established legal relationships whereas the scope of the deal is wider.<sup>11</sup>

In contract law, there are several principles that hold and have an important function in the legal system. There is no legal system that does not possess or enforce legal principles. Principles of contract law can be reviewed from UNIDROIT. The principle of Unidroit as an institution that does not involve the approval of the governments of the nation states is not a binding instrument, and therefore its binding power depends on the persuasive powers existing in those countries.<sup>12</sup> Principles in commercial contracts by UNIDROIT are:<sup>13</sup>

- a. The principle of freedom of contract;
- b. The principle of good faith and honest transactions;
- c. The principle of recognizing the custom of business transactions in the local country;
- d. The principle of agreement through bidding and receiving;
- e. The principle of prohibition is negotiating in bad faith;
- f. The principle of the obligation to maintain confidentiality;
- g. The principle of protection of the weak from the standard conditions;
- h. The principle of valid terms of contract;
- i. The principle of contract cancellation if it contains big difference;
- j. The principle of contra proferentem in the interpretation of the standard contract;

<sup>10</sup> Reifon Cristabella Eventia, ‘Legal Principles in Function and Performance of Bot Contract’ (2017) 32 *Yuridika* <<https://e-journal.unair.ac.id/YDK/article/view/4798>>.[524].

<sup>11</sup> Peter Mahmud Marzuki, ‘Batas-Batas Kebebasan Berkontrak’ (2003) 18 *Yuridika*. [196].

<sup>12</sup> Bayu Seto Hardjowahono, *Kontrak-Kontrak Bisnis Transnasional Dan UNIDROIT Principles of International Commercial Contracts (Sebuah Pembuka Wawasan)* (Faculty of Law, Parahyangan Catholic University 2006). [13].

<sup>13</sup> UNIDROIT, *Principles of International Comercial Contracts* (International Institute for The Unification of Private Law 1994).

- k. The principle of honoring contracts when trouble occurs;
- l. The principle of release of responsibility under coercive circumstances.

From a number of principles of contract law above, can be summarized four principles that are considered as the principal principle of contract law, namely:<sup>14</sup>

- a. The principle of freedom of contract;
- b. The principle of consensualism;
- c. Pacta Sunt Servanda;
- d. The principle of good faith.

#### Ad. a. Freedom of Contract

The background of freedom of contract principle is from the notion of individualism born in the Greek era. This idea was continued by the Epicurists and thrived in the Renaissance, among others through the teachings of Hugo de Grecht, Thomas Hobbes, John Locke and J.J. Rosseau. According to individualism, everyone is free to get whatever he wants.<sup>15</sup> In contract law, this is manifested in the principle of “freedom of contract”. The principle of freedom of contract in a foreign language has various terms ie contract vrijheid, contracteer vrijheid atau partij autonomie, freedom of contract, laissez faire.

The principle of freedom of contract contained in Article 1 paragraph 1 UNIDROIT. This Article affirms that the parties have the freedom to make contracts, including the freedom to decide what they agreed on. This Article states that “The parties are free to enter into a contract and to determine its content”. The principle of freedom of contract is realized in 5 (five) forms of legal principle, namely:<sup>16</sup>

1. Freedom to determine the contents of the contract;
2. Freedom to determine the form of contract;
3. Contracts are legally binding as an Act;
4. Mandatory rules as exceptions;
5. The purpose of UNIDROIT principles that must be considered in contract interpretation.

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<sup>14</sup> Agus Yudha Hernoko, ‘Asas Proporsionalitas Dalam Kontrak Komersial’, (Airlangga University 2007).[112]

<sup>15</sup> Mariam Darus Badruzaman, *Pembentukan Hukum Nasional Dan Permasalahannya* (Alumni 1981).[118-199].

<sup>16</sup> Taryana Soenandar, *Prinsip-Prinsip Unidroit Sebagai Sumber Hukum Kontrak Dan Penyelesaian Sengketa Bisnis Internasional* (Sinar Grafika 2006).[22]

Freedom of Contract in common law system, for example in the USA, is a free will to make or not create a binding engagement on one's private affairs.<sup>17</sup> In Indonesia, this principle is implicitly implied in BW. Book III BW embraces an open system that gives the parties the flexibility to govern their own patterns of legal relationships in the agreements they form. Book III BW is just set and complement it.<sup>18</sup> The open system of Book III BW is reflected from Article 1338 (1) of BW stating that "all legally-made agreements shall be valid as laws for those who make them". The way to conclude this principle of freedom of contract is to emphasize the word "all" at the beginning before the word "covenant". This means that we are allowed to make any agreement in terms of format and content, outside of which is set out in book III BW and that agreement shall be binding on both parties provided that it is made legally.<sup>19</sup>

Through the existence of this principle of freedom of contract, an agreement is not bound to certain forms. The parties may freely determine the desired form of agreement in accordance with the principle of freedom of contract. Forms that can be elected by the parties in the form of verbal or written. In practice, written agreements are preferred more often because they have stronger proof power than verbal form in the event of a dispute.

The principle of law has an important role in the legal system where legal principles will influence the positive legal system and incarnate in the established system, therefore there is no system without principles in it.<sup>20</sup> The principle of freedom of contract underlies the agreement in the crowdfunding system. The principle of freedom of contract does not mean justifying for the parties to deny the contract that has already occurred; the true meaning is the parties can be free to enter into contracts as required. The principle of freedom of contract is a

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<sup>17</sup> Jimly Asshiddiqie, *Gagasan Kedaulatan Rakyat Dalam Konstitusi Dan Pelaksanaannya Di Indonesia* (PT Ichtiar Baru Van Hoeve 1994).[155].

<sup>18</sup> Agus Yudha Hernoko (n 13).*Op.Cit.*[113].

<sup>19</sup> *ibid.*[114].

<sup>20</sup> Sang Ayu Putu Rahayu, 'Prinsip Hukum Dalam Kontrak Kerjasama Kegiatan Usaha Hulu Minyak Dan Gas Bumi' (2017) 32 *Yuridika* <<https://e-journal.unair.ac.id/YDK/article/view/4774>>.[339].



reflection of the open system of the contract law. The legal basis of this principle is Article 1338 paragraph 1 of BW. All legally-made agreements act as laws for those who create them. Based on this principle of freedom of contract, in practice emerged types of agreements that were not originally regulated in the Civil Code, for example crowdfunding. Donation-based crowdfunding is a new type of agreement that is not written in Book III of BW but it's similar to the grant agreement, so it can be said that the donation-based crowdfunding is the latest development of the grant agreement. This Agreement is valid as long as the parties comply with the terms of the validity of agreement that generally contained in Article 1320 BW and based on the principles of contract law.

#### Ad. b. The principle of consensualism

The principle of consensualism can be concluded through Article 1320 paragraph 1 BW stating that one of the requirements of the validity of the agreement is the agreement of both parties. As a general principle, contracts are created when there is an encounter of will. This encounter of will is also called the consensual principle underlying the agreement.<sup>21</sup> The Agreement creates rights and obligations for the parties to abide by and execute the agreement.

According to Salim H.S.,<sup>22</sup> an agreement is the conformity of a will statement between one or more persons with the other. The core of conformity lies in the statement of both parties, because the will is a thing that cannot be measured by the naked eye. In the legal system of contracts in USA, the agreement is the appointment of a promise or set of appointments. This can be seen from Article 1 Restatement which states that "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty". The pledge that is exchanged contains an obligation that must be done by the parties that if

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<sup>21</sup> Rosa Agustina, *Hukum Perikatan (Law of Obligations)* (Pustaka Larasan 2012).[80].

<sup>22</sup> Salim H.S. and Erlies Septiana Nurbaeni, *Perbandingan Hukum Perdata* (Raja Grafindo Persada 2014).[255].

violated can lead to sanctions. According to Yohanes Sogar Simamora,<sup>23</sup> examine from the boundaries between the rules of the common law system and the civil law system it appears that the differences between the two legal systems are not very basic.

For example, in the United States as the common law system, Article 22 paragraph 1 of the Restatement states that “the manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party is followed by an acceptance by the other party or parties “. That is, the embodiment of the consent (between the two parties) to exchange is usually in the form of an offer or proposal from one party followed by acceptance from other parties or parties. Therefore, they are familiar with the concept of acceptance and offer. Charles Fried reveals that, “acceptance offers a further point of correspondence between the moral institution of promise and the legal institution of contract”. Acceptance offers an advanced point of correspondence between the moral order of a promise and the legal order of a contract.<sup>24</sup>

In its development, civil law countries such as the Netherlands began to adopt the concept of acceptance and supply within the NBW. Article 6: 217 NBW Perdata states that:

- (1) A contract is formed by an offer and its acceptance
- (2) Articles 219-225 apply unless the offer; another juridical act or usage produce a different result.

According to Yohanes Sogar Simamora,<sup>25</sup> offer is a legal act (juridical act). It is widely understood that offer is a declaration of intent which contains the intention to make the contract. The offer thus is a proposal or solicitation to enter into an agreement. However, not every proposal can be considered as an offer. In the offering process, it shall be presented a central element of the treaty which

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<sup>23</sup> Yohanes Sogar Simamora, ‘Prinsip Hukum Kontrak Dalam Pengadaan Barang Dan Jasa Oleh Pemerintah’ (Airlangga University 2007).[26].

<sup>24</sup> Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press 1981).[43].

<sup>25</sup> Yohanes Sogar Simamora, ‘Catatan Singkat Tentang Konvensi PBB Tentang Penggunaan Komunikasi Elektronik Dalam Kontrak Internasional’ (2012) 23 Yuridika.[5].

is commonly called the essential element. Offer and acceptance between the two parties can result in an outward form of a contract but does not necessarily mean that the contract is valid unless it meets the meeting of minds, that is the willingness of the parties to agree on the object of the contract. In a common law, a meeting of minds should be done honestly and should not be made on contracts containing:

1. Fraud, in Restatement Chapter 5 on “the statute of frauds”;
2. Mistake (mistake), on Restatement Chapter 6 on “mistake”;
3. Coercion (duress), on Restatement Chapter 7 on “misrepresentation, duress and undue influence”;
4. Undue influence, on Restatement Chapter 7 on “misrepresentation, duress and undue influence”.

The four things that rule out the legitimacy of the conformity of the will to the Restatement are the same as those which overturn the legitimacy of the consensus in Indonesia embracing the civil law system. This can be seen in Article 1321 BW stating that no agreement has power if it is given by mistake, coercion or fraud. From the explanation of the principle of consensualism between the civil law system and the common law system above, there appears to be a common element of obstruction to the agreement.

#### Ad. c. Pacta Sunt Servanda

Pacta sunt servanda is a principle relating to the effect of the agreement. Pacta sunt servanda is the principle that a judge or third party must respect the substance of the contract made by the parties, as appropriate by a law.<sup>26</sup> They shall not intervene in the substance of the contract made by the parties. Pacta sunt servanda is based on Article 1338 paragraph 1 BW which affirms “agreements made legally valid as a law”. Basically, the promise is binding so it needs to be given power for its validity. To give the power of binding, then contracts that made legally binding and qualified shall have binding strength equivalent to the

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<sup>26</sup> Dwi Mariyati, ‘Prinsip Hukum Dalam Penyusunan Dan Pelaksanaan Kontrak Engineering Procurement Construction (Kontrak “EPC”)’ (2018) 33 Yuridika <<https://e-journal.unair.ac.id/YDK/article/view/7412>>.[194].

applicable force and binding of the law.<sup>27</sup>

Each agreement contains provisions that are compiled and agreed upon by the parties due regard to freedom of contract. In the process of making the agreement is also reflected the principle of *pacta sunt servanda*, because in the provisions are contained rights and obligations that must be obeyed and fulfilled by the parties. This principle of “binding force of consent” affirms that the parties must fulfill what has been promised so it is bind to each other.<sup>28</sup>

Ad. d. The principle of good faith

This principle has different meanings in the civil law and common law legal system. Goodwill can be seen in two kinds, that is, at the time of the enactment of legal relations, or at the time of execution of the rights and obligations which is embodied in the legal relationship.<sup>29</sup> In the civil law system, the approach to this principle is based on the philosophy of contracts that focuses on the relationships of the parties. This relationship requires a good faith not only when the contract is signed, but also before the contract is closed. The principle of goodwill in the civil law system is valid from the negotiation or pre-contract stage.<sup>30</sup> The general meaning of good intentions here refers to reasonable standards of conduct which imply that one must abide by the promise or the word in all circumstances. This Article was adopted by the Dutch in the NBW and was later adopted by Indonesia in BW.

In Indonesia, the provisions on the principle of good faith are stipulated in Article 1338 paragraph 3 BW which affirms “the agreement must be carried out in good faith”. The obligation of good faith in Article 1338 paragraph 3 BW is then continued by Article 1339 BW stating that the contract is not only binding on

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<sup>27</sup> Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas Dalam Kontrak Komersial* (Kencana 2010).[124].

<sup>28</sup> P. Lindawaty S. Sewu, *Aspek Hukum Perjanjian Bakudan Posisi Berimbang Para Pihak Dalam Perjanjian Waralaba* (Universitas Katholik Parahyangan 2007).[70].

<sup>29</sup> R. Wirjono Prodjodikoro, *Asas-Asas Hukum Perdata* (Sumur 1983).[56].

<sup>30</sup> Grace Xavier, ‘Global Harmonization of Contract Laws Fact, or Fiction?’ (2004) 20 Construction Law.[13].

what is expressly stated therein, but also to everything that, by contract nature, is required by propriety, custom, or Constitution. The term good faith is not explained explicitly in legislation. When viewed in a grammatical manner, good faith is a belief, a firm belief, a purpose, and a good will.

Agus Yudha Hernoko argues that the principle of good faith should not be interpreted grammatically and not only arising at the time of the contract implementation phase. Good faith must be interpreted in the entire contractual process underlying the relations of the parties at the pre-contractual, contractual and contractual stages.<sup>31</sup> In the common law system, the meaning of good faith is none other than honesty in behavior or honesty in trade transactions including in it honesty in fact and respect for fair trade standards and honest trading transactions. The common law system states that good faith is valid since the fulfillment of the terms of the validity of the agreement in writing.

## Conclusion

The legal relationship between the creator and the funder in the donation-based crowdfunding system can be associated with the act of grant law (schenking). The grant is regulated in Article 1666 BW. The underlying agreement of grant law between the creator and the funder is a grant agreement. Grant Agreement in this case is a moving object ie money given by the grantor (community/donor) to the grantee (*creator*) through the services of the crowdfunding site manager. The implementation of a donation-based crowdfunding system must be in line with the principal principles of contract law such as the principle of freedom of contract, the principle of consensualism, the *pacta sunt servanda*, and the principle of good faith, so that the legal act of donation is carried out in accordance with the law.

For the society as donors in donation-based crowdfunding system, in order to avoid fraud under the guise of donation fund collection, should choose a crowdfunding site manager who already has a business license For creators

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<sup>31</sup> Agus Yudha Hernoko (n 24).*Op.Cit.*[139].

as potential donors in a donation based crowdfunding system, should first sign a written agreement or an electronic agreement between the creator and the crowdfunding site manager prior to the start of an online fundraising campaign. Revision of Government Regulation No. 29 of 1980 on the Implementation of a Contribution of Funds so that donation based crowdfunding can be recognized as the most recent fund-raising activity in accordance with legislation, or publish the regulation from Social Minister on donation-based crowdfunding as the party authorized to oversee the collection of money and goods in the framework of donations in Indonesia.

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