

# Comparison Of The Principle Of Freedom Of Contract In Land Buying And Selling Between Indonesia And Malaysia

Erdhyana Afifah Salsabila<sup>1\*</sup>, Pujiyono Suwadi<sup>2</sup>, Arief Suryono<sup>3</sup>

<sup>1,2,3</sup>Faculty of Law, Universitas Sebelas Maret, Surakarta, Central Java, Indonesia

\*Corresponding Author:

Email: [erdhyanaafifah04@gmail.com](mailto:erdhyanaafifah04@gmail.com)

---

## Abstract.

*The transfer of land rights can occur through buying and selling, inheritance, gifting, or exchanging. The process of transferring rights, especially through buying and selling, according to the National Land Law in Indonesia, differs from other countries, such as Malaysia, because Indonesia fundamentally has a different concept of land law compared to Malaysia. The aim of this research is to analyze the comparison of the principle of freedom of contract in land buying and selling between Indonesia and Malaysia. This study employs normative legal research that examines the legal system. Systematic legal research is conducted on written laws or regulations related to the chosen topic. The author uses primary and secondary legal materials. The research results indicate that land buying and selling in Indonesia and Malaysia are in line with and not contrary to the principle of freedom of contract. This is because if an agreement meets the valid requirements, meaning it is made with the agreement of the involved parties, the subject of the agreement is capable of entering into an agreement, the object is clear, and the cause is not prohibited.*

**Keywords:** Comparison, freedom of contract, Land Buying and Selling, Indonesia, Malaysia..

---

## I. INTRODUCTION

Indonesia has the authority to regulate the designation and use of land throughout its territory. Individuals in need of land can apply for land rights to the state based on their requirements. If the desired land is already owned by someone else, the individual in need can undergo a transfer of rights, allowing the ownership status of the land to move from the first party to the second party and so forth. The increasing population, coupled with limited available land, has resulted in a high level of interest among the population towards land [1]. Thus, people are increasingly intensifying their efforts to acquire land to achieve their respective goals in utilizing the land [2]. The transfer of land rights can occur through buying and selling, inheritance, gifting, or exchanging. The process of transferring land rights, especially due to buying and selling, according to the National Land Law in Indonesia, differs from other countries, such as Malaysia. This is because Indonesia fundamentally has a different concept of land law compared to Malaysia. The variance in the conceptualization of land law between Indonesia and Malaysia inevitably leads to differences in the regulation of land law provisions in both countries, although there are also some similarities in land law regulations between Indonesia and Malaysia. Indonesia's National Land Law adopts a Communal-Religious Concept derived from the Customary Law, allowing private ownership of land with individual rights over the land, while also incorporating a sense of communal ownership [3].

Malaysia, as one of the Anglo-Saxon countries, employs the Feudal Land Law Concept. If, in the process of buying and selling land in Indonesia, the transfer of land rights is completed at the time of signing the deed of sale before the Land Deed Official, then according to land law in Malaysia, the sale occurs at the time of registration at the land registration office. This registration results in the buyer becoming the new titleholder. Freedom of contract remains a fundamental principle in the legal system of agreements, whether in civil law systems, common law systems, or other legal systems. This is because, first, the principle of freedom of contract is universally applicable across all countries in the world. Second, the principle of freedom of contract signifies the embodiment of the free will of the parties in an agreement, serving as a reflection of the recognition of human rights [4]. The freedom of contract, which is the "spirit" and "breath" of a contract or agreement, implicitly provides guidance that in a contract, the parties are assumed to have a balanced position.

Consequently, it is expected that a fair and equitable contract will emerge for all parties involved[5]. In its development, it turns out that the principle of freedom of contract can lead to injustice because this principle can only achieve its goal, which is to bring about prosperity as optimally as possible when the parties have a balanced bargaining power. If one party is weak, the stronger party with more bargaining power can impose its will to press the other party for its own benefit. Terms or provisions in such contracts may eventually violate fair and reasonable rules. In its development, this principle has caused disruptions in society, prompting the state to intervene and impose restrictions on the implementation of the freedom of contract principle to protect the weaker party[6]. Based on the background as described above, the author is interested in addressing and incorporating the issue into a journal article titled "**COMPARISON OF THE PRINCIPLE OF FREEDOM OF CONTRACT IN LAND BUYING AND SELLING BETWEEN INDONESIA AND MALAYSIA**".

## II. METHODS

Normative legal research is also referred to as doctrinal legal research, as this type of research is conducted or focused solely on written regulations or other legal materials. [7]. In this journal article, the author utilizes normative legal research that examines the legal system. Systematic legal research is conducted on written regulations or laws relevant to the chosen topic. To address legal issues in this journal, the author relies on primary and secondary legal materials. All legal materials are obtained through literature review, and these materials are organized and used to support finding answers to the legal issues. As the aim of this paper is to assess the quality of legal substance or norms, the nature of the analysis used is qualitative. Qualitative analysis in legal research means that justifications are based on the quality of opinions from legal experts, doctrines, theories, and formulations of legal norms themselves[7].

## III. RESULT AND DISCUSSION

Comparison of the Freedom of Contract Principle in Land Buying and Selling Between Indonesia and Malaysia

**Tabel 1.**

Elements	Indonesia	Malaysia
Regulatory	Civil Code (KUH Perdata), Basic Agrarian Law (Undang-Undang Pokok Agraria - UUPA), Law Number 1 of 2022 Concerning Financial Relations between the Central Government and Regional Governments, Government Regulation of the Republic of Indonesia Number 18 of 2021 concerning Management Rights, Land Rights, Condominium Units, and Land Registration, Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 16 of 2022 on Delegation of Authority for Determination of Land Rights and Land Registration Activities.	National Land Code Malaysia (Act 56/1965), which came into effect in 1965 and regulates land matters in general, The Housing Development (Control and Licensing) Act 1966, which provides protection not only for Malaysian citizens but also for foreign citizens wishing to purchase property in Malaysia, Contract Act 1950.
Pra Production	In land transactions based on customary law, the following principles must be fulfilled: : <ol style="list-style-type: none"> <li>1. Cash</li> <li>2. Clear</li> <li>3. Real</li> </ol> The preparations made in the process of buying and selling land include: <ol style="list-style-type: none"> <li>1. Conducting research on documents related to the land that will be the subject of the transaction.</li> <li>2. Reaching an agreement on the land and its price.</li> <li>3. Executing the transfer of land rights through a deed of sale, conducted in the presence of a PPAT (Land Deed Official).</li> <li>4. Registering the rights to obtain a certificate and involving the relevant authorized officials.</li> </ol>	The three categories of land use specified in the National Land Code 1965 (Kanun Tanah Negara - KTN) are Buildings, Agriculture, and Industry[8].  Based on the provisions of Article 5 of the National Land Code Malaysia (Act 56/1965), Malaysian Land Law applies the Accession Principle or Attachment Principle. This principle states that buildings and plants on the land are considered as a unit with the land. Therefore, the right to the land automatically includes ownership of the buildings or plants on it. However, there is an exception if there is an agreement with the party who constructs or plants them. In other words, although generally buildings and plants are attached to the land, the ownership rights can be regulated through an agreement between the landowner and the party responsible for constructing or planting them.
The	The transfer of land rights in the land buying and selling	According to land law in Malaysia, a property

Implementation	process in Indonesia is completed upon the signing of the deed of sale in the presence of the Land Deed Official (Pejabat Pembuat Akta Tanah or PPAT).	transaction is considered to occur at the time of its registration at the land registration office. Consequently, the registration results in the buyer becoming the new titleholder. The land registration system plays a crucial role in determining ownership rights, and the registration creates a legal basis for the legitimate transfer of land ownership from the seller to the buyer.
The Legal Consequences	Article 1320 Civil Code and Article 1338 paragraph (1) Civil Code.	Article 10 <i>Contracts Act</i> 1950.

An agreement is a legal act where one person promises to another, or where two or more people have mutually promised to undertake a certain matter. The form of the agreement to be made cannot be separated from the conditions of the agreement as stipulated by Article 1320 of the Indonesian Civil Code (KUHPerdata), namely there must be an agreement, legal capacity, a specific subject matter, and a legal cause. These four conditions are an integral unit, meaning that in an agreement, none of these conditions can be disregarded, as it could result in the agreement being voidable or even legally void. Therefore, in the making of an agreement, one must always carefully consider the valid conditions of an agreement. In addition to the conditions of an agreement, on the other hand, there are several fundamental principles in contract law that are equally important to be considered by the parties in formulating an agreement. One of the most important principles (among others) is the Principle of Freedom of Contract. In Indonesia, the law of agreements adheres to an open system. This can be defined as the law providing freedom to make agreements as desired, as long as they do not contradict the law, public order, and morality. With the establishment of this open system, the law of agreements implies the principle of freedom of contract, which can be inferred from Article 1338 (1) of the Indonesian Civil Code. It states, "All agreements made validly apply as laws for those who make them"[10].

According to Salim HS, the principle of freedom of contract is a principle that grants freedom to the parties to:

- a. Creating or not creating an agreement involves
- b. Entering into an Agreement with Anyone
- c. Establishing the Content, Implementation, and Terms of the Agreement
- d. Determining the Form of the Agreement [11].

Ahmadi Miru states that "freedom to contract provides assurance to anyone: free to decide whether to enter into an agreement or not, free to determine with whom to enter into an agreement, free to determine the content or clauses of the agreement, free to determine the form of the agreement, and other freedoms that do not contradict legal regulations"[12]. Another opinion is presented by Sutan Remy Sjahdeini, stating that the principle of freedom of contract according to Indonesian contract law includes the following scope:

- a. Freedom to make or not make an agreement.
- b. Freedom to choose the party with whom one wants to make an agreement.
- c. Freedom to determine or choose the cause (causa) of the agreement to be made.
- d. Freedom to determine the object of the agreement.
- e. Freedom to determine the form of an agreement.
- f. Freedom to accept or deviate from optional legal provisions[6].

Therefore, the principle of consensualism found in Article 1320 of the Civil Code implies the "will" of the parties to bind themselves mutually. Thus, the principle of consensualism has a very close relationship with the principle of freedom of contract. If an agreement meets the valid requirements, meaning it is made with the agreement of the parties involved, the subject of the agreement is capable of entering into an agreement, the object is clear, and the cause is not prohibited, then the agreement can be considered in line and not contradictory to the principle of freedom of contract. With the issuance of Government Regulation No. 24 of 1997 concerning Land Registration, along with the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1997 regarding the Implementation of Government Regulation No. 24 of 1997, Article 37 stipulates that the transfer of land rights and ownership rights of condominium units through buying and selling, exchanging, gifting, inclusion in a company, and other legal

transfers, except for transfers through auction, can only be registered if proven by a deed made by a PPAT (Land Deed Official) authorized according to the applicable laws and regulations.

Freedom of contract is a crucial principle in an agreement because it represents the manifestation of free will, an expression of human rights. However, this freedom is not absolute as it has limitations, namely it must not contradict the law, public order, and morality [13]. In its development, the application of freedom of contract has encountered limitations, particularly due to the negative consequences it may cause, namely injustice in contracting. With its authority, the state, through legislation and court decisions, imposes restrictions on the application of the principle of freedom of contract. Contract law has evolved to become more public, transforming the nuances of private interests into societal interests. One can observe a reduction in elements of private law and, conversely, an increase in elements of public law. The tangible consequence of this development is the diminishing freedom of individuals [14]. However, as also stated by Friedmann, freedom of contract is still regarded as an essential aspect of individual freedom, but it no longer has the absolute value attributed to it a century ago [15].

In Indonesia, the UUPA (Undang-Undang Pokok Agraria) regulates the procedure for registering the transfer of rights over certified land as follows.

- a. First, the parties appear before the PPAT (Pejabat Pembuat Akta Tanah or Land Deed Official) and declare their intention to conduct the sale and purchase of land.
- b. Second, the Notary and/or PPAT (Land Deed Official) examine and ensure that:
  - The land to be bought and sold is truly owned by the person with land rights. For sellers who are married, the family members holding the land rights (spouse if still alive), and children in case one of the owners has passed away, are required to appear before the PPAT and/or provide a power of attorney signed on a stamp, which is a valid and written proof stating that the spouse or children approve the sale of the land.
  - The buyer is a person entitled to have rights over the purchased land. This depends on the legal subject and object. The legal subject is the legal status of the person who will purchase it, while the legal object is the right that exists on the land. For example, according to the Basic Agrarian Law, individuals who can have Ownership Rights over land are Indonesian citizens and legal entities determined by the government.
  - The land being the object of the transaction is either freely transferable or not in dispute. The types of land rights that can be bought and sold include Ownership Rights, Right to Cultivate, Right to Build, and Right to Use. The Notary/PPAT then requests the land certificate for the sale, proof of identity, and other necessary documents from the parties involved. If the sale is made through a private power of attorney without a date and signature, the power of attorney is then legalized by the relevant Land Deed Official (PPAT), and the original is attached to the related deed of sale.
- c. Third, after the checks are completed, the PPAT verifies the authenticity and status of the certificate, ensuring it is free from encumbrances, not in dispute, and not under any debt obligation at the Agrarian and Spatial Planning Office.
- d. Fourth, if the certificate is genuine and free from encumbrances, not in dispute, and not under any debt obligation, and after all requirements are fulfilled, including the obligation to pay taxes (BPHTB and PPn), the PPAT prepares the deed of sale attended by the parties involved in the legal act and witnessed by at least 2 (two) eligible witnesses for such legal acts [16].

Based on the above explanation, the freedom of contract is not absolute. Contracts or agreements are one of the sources of obligations. According to Article 1337 of the Indonesian Civil Code, "a cause is considered forbidden if it is prohibited by law or contrary to good morals or public order." Parties are generally free to make all kinds of contracts as the principle of freedom of contract allows, as long as it does not violate the law. Therefore, it can be said that in the buying and selling of land in Indonesia, it is in harmony and not in conflict with the principle of freedom of contract. This is because if an agreement meets the requirements for a valid contract, in other words, the agreement is made with the consent of the parties involved, the subject of the agreement is capable of entering into a contract, the object is clear, and the cause is not prohibited. Regarding the principle of freedom of contract, there is an exception, namely that this

freedom is not absolute because there are limitations, namely it must not be contrary to the law, public order, and morality. Based on the explanation above, the agreement on land and price reflects the principle of freedom of contract. According to Article 1320 paragraph (1) and Article 1338 paragraph (1) of the Civil Code, Article 1320 paragraph (1) states that one of the conditions for the validity of an agreement requires the "agreement of those who bind themselves." Article 1338 paragraph (1) determines that "all agreements made legally are binding as law for those who make them." Based on these two articles in the Civil Code, it can be said that the principle of consensualism applies in contract law, establishing the principle of freedom of contract.

Without "agreement" from one of the parties making the agreement, the agreement is not valid and can be canceled. Buying and selling land is a common practice in Malaysian society [17]. The land buying and selling process in Malaysia is not regulated by specific legislation like in Indonesia. The land transaction process in Malaysia generally refers to the National Land Code Malaysia (Act 56/1965), while the creation of the land sale and purchase agreement is based on the provisions within The Contracts Act 1950 and The Specific Relief Act 1950. In contrast to the land transfer process in Indonesia, where the transfer of land rights is completed upon the signing of the deed of sale in the presence of the Land Deed Official, in Malaysia, the legal transfer occurs during the registration of the sale at the land registration office. This registration results in the buyer becoming the new titleholder. In the implementation of information and communication technology, land registration affairs in the computerized system are designated in the fourteenth schedule, section 5A of the National Land Code. In 1990, the government introduced the Computerized Land Registration System (SPTB) to replace the manual Land Registration System that was previously in place [18].

The processes of buying and selling land in Malaysia are as follows [19]:

a. Verification of the Validity of Land Ownership Documents and the Land:

Before signing the Sale and Purchase Agreement (SPA), the buyer needs to ensure that the seller is the rightful person to transfer the land. The land transaction process in Malaysia can only proceed if the land is registered under the seller's name, confirming the seller's rightful authority to sell the land. The buyer must check the ownership details at the Land Registry Office. After the check, the buyer pays a 3% earnest deposit of the purchase price to the seller's lawyer or real estate agent. If the buyer is purchasing directly from a developer, the earnest deposit amount will be determined by the developer. It is advisable to make this payment after reaching an agreement on the terms of the upcoming SPA.

b. Signing the Sale and Purchase Agreement (SPA):

Both the seller and buyer are represented by their respective lawyers in drafting the Sale and Purchase Agreement for the land. The seller's lawyer sends the draft agreement to the buyer's lawyer, and vice versa. The SPA includes information about both parties, a description of the property, the transaction price, payment methods, and procedures related to the transfer of ownership. Once agreed upon, the SPA is signed by both the seller and buyer. At this stage, the buyer pays a 7% fee of the total purchase price. The remaining 90% of the payment is made by the buyer within 90 days after signing the SPA, and it is registered at the land registry office. If, for any reason, the land registry office does not approve the transfer, the 10% earnest deposit will be refunded to the buyer. In case of a party's inability to fulfill obligations or breach of any part or the entire SPA, under Section 40 of The Contracts Act 1950, the aggrieved party can terminate the SPA, and according to Section 76 of The Contracts Act 1950, the aggrieved party can seek compensation from the party in breach.

c. Juridical Handover (Levering Yuridische)

After signing the Sale and Purchase Agreement, confirming the seller's rightful authority, and verifying the property, a deed of conveyance is made to transfer the rights from the seller to the buyer. At this stage, the buyer must have fully paid the purchase price to the seller.

d. Subsequent Stage: Registration of Transfer:

The next step is the registration of the transfer at the land registry office. With this registration, the buyer officially becomes the new titleholder of the land, and the land registry office records the date of the property purchase.

According to Section 5 of the National Land Code (KTN), it establishes three essential elements that must be present in any transaction, namely (1) the existence of a transaction; (2) involving land ownership; and (3) the transaction must be different from a caveat[9]. Therefore, it can be said that in land transactions in Malaysia, it is in harmony and not in conflict with the principle of freedom of contract. Land acquisition for development for public interest is an unavoidable demand by any government. As society advances, more land is needed for public purposes. As a consequence of living in a governed and communal society, if individual (private) property rights clash with public interests, public interests must take precedence[20]. Article 10 of the Contracts Act 1950 states that "All agreements are contracts if they are made with the free consent of the parties competent to contract, for a lawful consideration, with a lawful object, and are not expressly declared to be void." This article reflects the principle of freedom of contract. An agreement is considered a contract if it meets requirements such as free consent, competency of the contracting parties, lawful consideration, and a lawful object. The freedom of contract arises from free consent and is not explicitly declared void unless regulated by law. Additional principles can be found in other articles, such as Article 14 which discusses valid agreements, and Article 24 which relates to the freedom to stipulate contract terms.

#### IV. CONCLUSION

Therefore, it can be said that in the buying and selling of land in Indonesia and Malaysia, it is in harmony and not in conflict with the principle of freedom of contract. This is because if an agreement meets the requirements for a valid contract, in other words, the agreement is made with the consent of the parties involved, the subject of the agreement is capable of entering into a contract, the object is clear, and the cause is not prohibited.

#### V. ACKNOWLEDGMENTS

Thank you, the Author expresses gratitude to the International Journal of Educational Research & Social Sciences for facilitating the publication of this research. May the effort contribute to charity, and all assistance be counted as continuous rewards in this world and the hereafter.

#### REFERENCES

- [1] A. A. Hussin, *Undang-Undang Tanah Lesen Pendudukan Sementara dan Permit*, Ctk.1. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1996.
- [2] M. Zakie, "Pengadaan Tanah Untuk Kepentingan Umum (Perbandingan antara Malaysia dan Indonesia)," *J. Huk.*, vol. 18, no. 10, pp. 187–206, 2011.
- [3] H. A. I. S. P. U.-U. P. A. I. dan Pelaksanaannya, *Boedi Harsono*. Jakarta: Universitas Trisakti, 2013.
- [4] R. Khairandi, *Itikad Baik dalam Kebebasan Berkontrak*. Universitas Indonesia: Pascasarjana, 2003.
- [5] A. Y. Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, Cetakan II. Jakarta: Kencana, 2012.
- [6] S. R. Sjahdeini, *Kebebasan Berkontrak dan Perlindungan yang Seimbang Bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*. Jakarta: Institut Bankir Indonesia, 1993.
- [7] B. Waluyo, *Penelitian Hukum dalam Praktek*. Sinar Grafika, 2008.
- [8] M. M. bin Taha, A. bin Awang, J. bin Sulong, M. B. bin Awang, and R. bin Suhaimi, "Konsep Lot Lidi dan Realitanya di Malaysia," *J. Islam. Soc. Econ. Dev.*, vol. 7, no. 47, pp. 582–596, 2022.
- [9] N. Harun, N. 'Ashikin Hamid, A. Bidin, and K. Salleh, "Penipuan dalam Urus Niaga Tanah di Malaysia: Satu Kajian (Fraud in Land Dealings in Malaysia: A Study)," *Kanun J. Undang. Malaysia*, vol. 34, no. 1, pp. 97–112, 2022.
- [10] A. Q. S. Meliala, *Pokok-Pokok Hukum Perjanjian Beserta Perkembangannya*. Yogyakarta: Liberty, 2004.
- [11] H. Salim, *Pengantar Hukum Perdata Tertulis (BW)*. Jakarta: Sinar Grafika, 2003.
- [12] A. Miru, *Hukum Kontrak dan Perancangan Kontrak*. Jakarta: Raja Grafindo Persada, 2007.
- [13] S. Bintang and Dahlan, *Pokok-Pokok Hukum Ekonomi dan Bisnis*. Bandung: PT Citra Aditya Bakti, 2000.

- [14] H. Budiono, *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia, Hukum Perjanjian Berlandaskan Asas-Asas Wigati Indonesia*. Bandung: Citra Aditya Bakti, 2006.
- [15] W. Friedmann, *Legal Theory*, Fourth Edi. London: Stevens & Sons Limited, 1960.
- [16] H. Budiono, *Ajaran Umum Hukum Perjanjian*. Bandung: PT Citra Aditya Bakti, 2005.
- [17] R. bin Suhaimi, M. M. bin Taha, J. bin Sulong, M. B. bin Awang, and N. binti Ismail, "Hukum Fiqh Dalam Jual Beli Tanah Lot Lidi: Satu Analisis Awal," *J. Islam. Soc. Econ. Dev.*, vol. 8, no. 52, pp. 180–189, 2023.
- [18] N. Harun, A. Bidin, N. 'Ashikin Hamid, K. Salleh, and N. Ismail, "Isu Keselamatan Sistem Pendaftaran Tanah Berkomputer Di Malaysia: SATU TINJAUAN(Security Issues on Computerised Land Registration System in Malaysia: An Overview)," *Kanun J. Undang. Malaysia*, vol. 31, no. 2, pp. 238–250, 2019.
- [19] T. W. Ming, *Investing in Property in Malaysia-The Legal Pitfalls*. Butterworths, 1995.
- [20] M. M. MD, *Membangun Politik Hukum, Menegakkan Konstitusi*. Jakarta: LP3ES, 2006.