Freedom of Contract in the Digital Age: Perspectives on the Indonesian Civil Code and *Fiqh Muamalah*

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Abstract

This study examines the urgency of reconstructing the principle of freedom of contract in electronic contracts through a dialectical analysis between Article 1338 of the Indonesian Civil Code and the normative framework of fiqh muamalah. This reconstruction is crucial in the context of standard-form and digital contracts, which tend to place one party in a weaker bargaining position and expose it to unilateral clauses. The study aims to formulate a more equitable and ethically grounded conception of contractual freedom that can respond to contemporary commercial practices, particularly electronic and hybrid contracts. This article contributes to the development of contract law theory by integrating civil law rationality with Islamic legal values to address structural imbalances in contractual relations. Employing a doctrinal legal research method, this study applies statutory, conceptual, and comparative approaches, including an analysis of constitutional jurisprudence. The findings demonstrate that a formalistic application of the principle of freedom of contract often legitimizes inequality and weakens protections for disadvantaged parties, especially in standard-form contracts. These limitations are reinforced by Constitutional Court Decision No. 83/PUU-XXII/2024, which declared Article 251 of the Commercial Code (KUHD) on the unilateral termination of insurance contracts conditionally unconstitutional and affirmed that contract termination must be based on mutual consent or a court decision. Based on these findings, this study proposes a reconstructed model of freedom of contract encompassing substantive justice, an orientation toward maslahah (social welfare), and ethical contractual morality grounded in good faith and honesty. The study concludes that harmonizing the Indonesian Civil Code with fiqh muamalah, strengthened by constitutional justice, produces a more balanced, transparent, and welfare-oriented contractual framework without undermining contractual autonomy.

Keywords*: Digital Age, Fiqh muamalah, Freedom of Contract, Indonesian Civil Code*

Introduction

In Indonesian civil law, the principle of freedom of contract constitutes one of the fundamental pillars of contract law. Article 1338 of the *Burgerlijk Wetboek*, commonly referred to as the Indonesian Civil Code (KUHPerdata), stipulates that all

legally concluded agreements shall have the force of law between the parties. However, it must be understood that such freedom is not absolute, as it is limited by the principles of propriety, morality, and public order.[1] Similarly, in Islamic law, the concept of contractual freedom is also recognized through the principle of *al-hurriyyah*, which allows parties to freely enter into contracts (*akad*) as long as such contracts do not violate *sharia* prohibitions such as *riba* (usury), *gharar* (uncertainty), and *maysir* (gambling), and remain consistent with the objectives of *maqāṣid al-sharīʻah* (the higher purposes of Islamic law), such as public interest (*maṣlaḥah*), justice (*ʻadl*), and protection of the weaker party.[2]

In other words, *fiqh al-muʻāmalah* emphasizes the importance of mutual consent, clarity of terms and contract forms, as well as moral conduct in contractual relations. In practice, particularly in commercial agreements, standard contracts often raise concerns about the application of the freedom of contract principle. Such contracts are frequently used by a dominant party (for example, business actors) as a justification for imposing unilateral terms that disadvantage the weaker party.[3] This occurs due to an imbalance in bargaining positions (inequality of bargaining

[1] Herman et al., "Analisis Kritis Terhadap Daya Batas Asas Kebebasan Berkontrak Dalam Kitab Undang-Undang Hukum Perdata," *PAMALI: Pattimura Magister Law Review* 2, no. 1 (2022): 61–76, https://doi.org/https://doi.org/10.47268/pamali.v2i1.819. This provision is also consistent with the fourth requirement for the validity of a contract, namely a lawful cause (*causa*) or an objective that is not prohibited, as stipulated in Article 1320 of the Indonesian Civil Code (KUHPerdata). The interpretation of a lawful cause or a non-prohibited objective is further elaborated in Article 1337 of the Civil Code, which provides that a cause is deemed unlawful if it is prohibited by statute, or if it is contrary to morality or public order. This may be compared with Article 26 of the Compilation of Sharia Economic Law (*Kitab Hukum Ekonomi Syariah*), which states that a contract is void if it violates Islamic law, statutory regulations, public order, or morality.

[2] Mardiaton Mardiaton, Mukhsin Nyak Umar, and Nevi Hasnita, "Tinjauan Hukum Islam Terhadap Asas Kebebasan Berkontrak Dalam Akad Murabahah (Analisis Kontrak Perjanjian Murabahah Pada PT. Bank Aceh Syariah Cabang Pembantu UIN Ar-Raniry) Banda Aceh," *E-Mabis: Jurnal Ekonomi Manajemen Dan Bisnis* 25, no. 2 (December 2024): 147–61, https://doi.org/10.29103/e-mabis.v25i2.1412.

[3] Apriyodi Ali, Achmad Fitrian, and Putra Hutomo, "Kepastian Hukum Penerapan Asas Kebebasan Berkontrak Dalam Sebuah Perjanjian Baku Ditinjau Berdasarkan Pasal 1338 Kitab Undang-Undang Hukum Perdata," *SENTRI: Jurnal Riset Ilmiah* 1, no. 2 (2022): 270–78, https://doi.org/10.55681/sentri.v1i2.234.

power), as the weaker party is generally left with no choice but to accept or negotiate specific clauses.[4]

Several previous studies have examined the application of the principle of freedom of contract in business and standard-form contracts in Indonesia, primarily highlighting unequal bargaining power between contracting parties. Brampu, Aspan, and Dahlan emphasize that freedom of contract in business practice is often illusory because business actors dominate the drafting of standard agreements, necessitating state intervention to limit exculpatory clauses that disadvantage weaker parties.[5] Similar findings are reported by Anggriani et al., who argue that although freedom of contract may enhance efficiency and trust in business transactions, it also carries the risk of injustice when not framed by adequate legal protection, good faith, and the principle of reasonableness.[6] In the context of standard agreements, Harjono[7] as well as Prihandini and Priyono[8] demonstrate that, from a formal legal perspective, standard contracts do not violate the principle of freedom of contract under the Indonesian Civil Code, despite their substantive potential to generate inequality and injustice. Meanwhile, Lita et al., analyze the application of Islamic economic principles, including freedom of contract, within international trade law, underscoring the importance of justice and balance;

[4] Wiwin Widiyaningsih, "Kebebasan Berkontrak Terhadap Perjanjian Standar Baku Dalam Mencapai Keadilan Berkontrak," *Journal Presumption of Law* 2, no. 1 (2020): 72–115, https://doi.org/https://doi.org/10.31949/jpl.v2i1.340.
[5] Irmanto Brampu, Henry Aspan, and H. Dahlan, "Application Of The Principle Of Freedom Of Contract In Business Contracts In Indonesia," *International Journal of Law and Society* 1, no. 2 (April 2024): 91–101, https://doi.org/10.62951/ijls.v1i2.27.
[6] Reni Ayu Anggriani et al., "Implementation of the Principle of Freedom of Contract in Business Agreement Law and Its Implications for Justice," *INTERDISIPLIN: Journal of Qualitative and Quantitative Research* 1, no. 3 (May 2024): 86–101, https://doi.org/10.61166/interdisiplin.v1i3.25.
[7] Dhaniswara K Harjono, "Standard Agreements In The Concept Of Freedom Of Contract," *Russian Law Journal* 11, no. 3 (April 2023), https://doi.org/10.52783/rlj.v11i3.1254.
[8] Nadia Aurynnisa Prihandini and Ery Agus Priyono, "Justice for the Parties to the Standard Agreement Relating to the Freedom Contract Principle," *Alauddin Law Development Journal* 6, no. 1 (March 2024): 108–16, https://doi.org/10.24252/aldev.v6i1.45452.

however, their study remains confined to the international context and does not address the dialectical relationship with Indonesian civil law.[9]

Despite the consistent identification of structural imbalances in commercial contracts, a significant research gap remains, namely the absence of an integrative approach that systematically dialogues the principle of freedom of contract under the Indonesian Civil Code with the normative values of *fiqh muamalah*, particularly within the domestic Indonesian context and in response to increasingly complex commercial practices, including digital and hybrid contracts. This study offers a distinct novelty by proposing a reconstructed model of the freedom of contract through a dialectical approach that harmonizes the rationality of civil law with Islamic legal values. The novelty lies in the formulation of three reconstructed pillars of contractual freedom: freedom of contract grounded in substantive justice, oriented toward *maslahah* and social responsibility, and based on contractual ethics that treat good faith and honesty as binding normative elements. Accordingly, this research moves beyond a purely formalistic understanding of contractual freedom and offers an original, ethical, and balanced contractual framework responsive to contemporary commercial realities, thereby enriching the development of national contract law and comparative legal discourse.

In line with the above discussion, the rapid technological development has contributed to the increasing complexity of modern commercial contracts. This is evident in the rise of digital transactions, including *fintech*, e-commerce, automated contracts, and hybrid contracts. The rise of digital transactions accompanied by digital contractual mechanisms has introduced new challenges, particularly because such agreements are executed without face-to-face interaction between the parties. Consequently, the principle of freedom of contract must be adapted to ensure continued relevance, fairness, and compliance with *Sharia* principles (especially in

[9] Helza Nova Lita, Norazlina Abdul Azis, and Adnan Mahmutovic, "Legal Analysis of The Application of Islamic Economic Principles in International Trade Law to Realize Fair World Economic Development," *Fiat Justisia: Jurnal Ilmu Hukum* 19, no. 2 (May 2025): 131–52, https://doi.org/10.25041/fiatjustisia.v19no2.3938.

the context of Islamic commercial contracts). In this regard, a critical issue arises from the absence of specific regulations governing the design of *sharia*-compliant contracts in modern commercial contexts, particularly concerning digital or hybrid contracts. As highlighted by Mukhtar et al., hybrid contracts (which combine digital and Sharia aspects) still face significant challenges related to the transparency of terms and risks, legal certainty, and Sharia compliance.[10] The issue of legal certainty is especially important, as commercial contracts should ensure clarity about contractual terms and the consequences of breach (*wanprestasi*). However, in practice, standard *sharia* contracts often lack explicit provisions regarding penalties, customer rights, hidden costs, and dispute resolution procedures. Such ambiguities contravene both legal systems, violating the principle of legal certainty under the *KUHPerdata* and the requirement of contractual clarity (*gharar*) under *fiqh al-muʻāmalah*.

Despite extensive scholarship addressing freedom of contract and unequal bargaining power in standard-form agreements, a critical legal gap persists in Indonesian contract law. Existing studies largely examine the principle of freedom of contract either from the perspective of the Indonesian Civil Code or within the normative framework of fiqh muamalah, yet fail to offer a systematic and integrative reconstruction that dialogues both legal traditions within the domestic Indonesian context, particularly in response to digital and hybrid contractual practices.[11] This gap has tangible doctrinal and practical consequences: it leaves judges without a coherent normative framework to guide judicial reasoning beyond formal legality, perpetuates contract-drafting practices that legitimize unilateral and non-negotiable clauses, and undermines constitutional compliance by allowing contractual autonomy to operate in tension with principles of substantive justice

[10] Mukhtar Adinugroho, Zujajatul Ilm, and Reizano Amri Rasyid, "Implementasi Hybrid Contract Pada Perbankan Syariah Di Indonesia (Perspektif Fiqih)," *Jurnal Ilmiah Ekonomi Islam* 11, no. 1 (2025): 45–53.
[11] Fadhel Arjuna Adinda et al., "The Challenge of Admitting Electronic Evidence in Civil Procedure Law," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 3 (December 2025): 656–80, https://doi.org/10.29303/ius.v13i3.1873.

and the protection of rights.[12] These concerns have become increasingly salient following Constitutional Court Decisiyon No. 83/PUU-XXII/2024, which reaffirmed that freedom of contract must be subordinate to constitutional justice rather than unilateral will. This study offers a distinct novelty by proposing a reconstructed model of freedom of contract through a dialectical approach that harmonizes the rationality of civil law with Islamic legal values.

Given these issues, there is an urgent need to reconstruct the principle of freedom of contract in the context of electronic contracts in Indonesia to ensure normative harmony between the *KUHPerdata* and *fiqh al-mu'āmalah*. Accordingly, this research aims to conduct a comprehensive analysis and exploration of how the reconstruction of the freedom-of-contract principle in electronic contracts can achieve such harmony.

Methods

This study employs a normative (doctrinal) legal research method to analyze positive legal norms and legal doctrines in statutory regulations and scholarly literature.[13] The approaches applied in this research include: 1) Statute Approach, which is used to examine the statutory regulations governing contracts and the principle of freedom of contract; 2) Conceptual Approach, which is utilized to understand the concept and principle of freedom of contract within two different legal systems namely, the *Indonesian Civil Code* and *fiqh al-mu'āmalah* and to reconstruct the concept so that it remains relevant to the development of modern contractual practices; and 3) The comparative approach is used to compare the principles, values, and norms embodied in Western law (the Civil Code) and Islamic

[12] Souad Ezzerouali, "Expanding the Authority of Muhtasib to Protect Consumers: A Comparison between Moroccan Law and Islamic Qanun of Aceh," *Trunojoyo Law Review* 7, no. 2 (2025): 161–91, https://doi.org/10.21107/tlr.v7i2.29151.

[13] I Nyoman Widiarta, I Gusti Agung Mas Rwa Jayantiari, and Luh Nyoman Alit Aryani, "Harmonization of Regulations in Realizing Legal Certainty for the Protection of Medical Records and Personal Data," *Journal of Law, Politic and Humanities* 5, no. 6 (August 2025): 4463–70, https://doi.org/10.38035/jlph.v5i6.2162.

law (*fiqh al-muʿāmalah*) in interpreting the concept of freedom of contract, as well as to compare the Civil Code of the Dutch (NBW) with the Civil Code of Indonesia.

Discussion

Problems in Commercial Contracts in Indonesia

The development of contract law in Indonesia cannot be separated from the influence of the *Indonesian Civil Code*, which was adopted from Dutch civil law during the colonial period. In practice, Indonesian contract law has evolved significantly in line with the growth of economic and trade activities and technological advancements. According to Subekti, contract law is essential to ensure legal certainty in civil relations. However, the parties' flexibility and freedom in making agreements often lead to inequality in contractual relations, particularly in modern commercial contracts.[14]

One of Indonesia's most prominent forms of commercial agreements is *the standard form contract (hereinafter referred to as a standard contract*). According to Salim HS, a standard contract is an agreement whose terms and conditions are unilaterally determined by one party, usually the business actor, while the other party is only allowed to accept or reject the agreement without the opportunity to negotiate. Similarly, Sri Rejeki defines a standard contract as an agreement whose clauses are predetermined by one party and must be accepted by the other on a "take it or leave it" basis.[15]Such contracts are widely used in business transactions, including in the banking, transportation, telecommunications, and insurance sectors. In these standard contracts, consumers cannot generally modify or

[14] Dwi Atmoko and Lindri Purbowati, "Analisis Perjanjian Dalam Mencapai Kepastian Hukum Berbasis Nilai Keadilan," *Journal of Mandalika Literature* 5, no. 4 (2024): 1031–38, https://doi.org/https://doi.org/10.36312/jml.v5i4.3623.

[15] Fahdelika Mahendar and 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.

negotiate the terms, resulting in an unequal bargaining position between the parties.[16]

Along with the rapid advancement of the digital era, the forms and mechanisms of contracts have undergone significant transformation. One notable development is the emergence of *electronic contracts* (hereinafter referred to as *e-contracts*). As a key instrument in digital business transactions, E-contracts have encouraged Indonesia's contract law system to adapt to ensure legal certainty for all parties involved. This type of contract allows parties to conclude agreements online without needing physical documents. It has been widely adopted across sectors such as e-commerce, digital financial services, *fintech*, and cross-border business transactions.[17]

Article 1 paragraph (17) of Law No. 11 of 2008 on Electronic Information and Transactions, as amended by Law No. 1 of 2024 on the Second Amendment to Law No. 11 of 2008, defines an electronic contract as "an agreement concluded through an electronic system," which is considered valid as long as it fulfills the legal requirements for a contract as stipulated in Article 1320 of the *KUHPerdata*.[18] E-contracts are available on e-commerce platforms such as Tokopedia, Shopee, and Bukalapak, as well as on digital financial services such as OVO and GoPay.

Despite these developments, conventional and electronic standard contracts pose several legal challenges, particularly concerning inequality between parties and the abuse of unilateral clauses.[19] Standard clauses often contain unfair terms,

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[16] Mc Levis Lynne Junior, "Standard Agreements and the Protection of Consumers: A Critical Analysis," *Scholars International Journal of Law, Crime and Justice* 8, no. 03 (March 2025): 59–67, https://doi.org/10.36348/sijlcj.2025.v08i03.002.

[17] Zidna Ilma Nafi'a and Ery Agus Priyono, "Perkembangan Hukum Perjanjian Di Era Digital : Tinjauan Atas Kontrak Elektronik," *Jurnal Ilmu Hukum, Humaniora Dan Politik* 5, no. 4 (2025): 3327–33, https://doi.org/10.38035/jihhp.v5i4.4452.

[18] Sakti Alamsyah and Fauzie Yusuf Hasibuan, "Legal Protection For Consumers In E-Commerce Transactions In Indonesia: Contract Validity And Dispute Resolution Effectiveness," *PENA LAW: International Journal of Law* 3, no. 1 (March 2025), https://doi.org/10.56107/penalaw.v3i1.220.

[19] Riska Riska, Seri Mughni Sulubara, and Nurkhalisah Nurkhalisah, "Legal Aspects of Electronic Contracts, Financial Technology (Fintech), Peer-to-Peer Lending, Shopee Paylater," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 7, no. 1 (December 2025): 141–50, https://doi.org/10.37680/almanhaj.v7i1.7797.

such as unilateral limitation of liability, excessive penalties, or hidden additional costs, thereby creating an imbalance that potentially violates the principle of contractual fairness.[20] This issue is evident across various sectors in Indonesia, where standard clauses are widely used in both the goods and services industries, including telecommunications, banking, credit, insurance, logistics, and e-commerce. The following are examples of standard clauses found in several business sectors: [21]

Table 1. Examples of Standard Clauses in Commercial Agreements

No	Sector	Standart Clauses	Impact
1	Telephone/ Internet Services	The service provider shall not be held liable for any claims, losses, or damages suffered by customers, whether directly or indirectly related to the use of such telecommunication services.	The operator limits its legal liability for any damage or loss arising from the services provided.
2	Electronic Commerce (E-Commerce)	All matters related to the delivery of goods shall be the responsibility of the logistics company partnered with the platform.	Users are deemed to have agreed not to file any claims or legal actions against the e-commerce provider for delays, damages, or losses during the shipping process.
3	Credit and Banking	Customers authorize the bank to use, process, and share their personal data with third parties that have a cooperative relationship with the bank to implement specific commercial programs.	This clause authorizes the bank to use customer data for promotional activities and business partnerships.
4	Insurance	Any changes to the allocation of investment funds shall be	The company is entitled to determine the amount of

[20] Melisa Aquaria Putri S, "Klausula Baku Dalam Suatu Perjanjian Berdasarkan Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *Jurnal Gagasan Hukum* 2, no. 02 (2020): 122–34, https://doi.org/10.31849/jgh.v2i02.8553.
[21] Johannes Gunawan, *Perjanjian Baku Masalah Dan Solusi* (Bonn and Eschborn, Germany Consumer Protection in ASEAN (PROTECT): Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2021).

No	Sector	Standart Clauses	Impact
		entirely subject to the insurance company's policy.	offers and the terms for modifying investment fund allocations without prior written consent from the policyholder.
5	Delivery/ Shipping Services	The delivery service provider shall not be responsible for any loss, damage, or penalty incurred while the goods or documents are under inspection by customs authorities or other competent officials	By signing the agreement, the sender is legally deemed to have released the shipping company from any obligation to compensate for such incidents.

***Source**: Johannes Gunawan & Bernadette M. Waluyo, processed by Author, 2025.*

Sectors demonstrate a tendency among business actors to limit their legal liability while simultaneously strengthening their bargaining position vis-à-vis consumers. Although, in theory, the principle of freedom of contract grants the parties equal rights to determine the content of an agreement, in practice this principle often loses its substantive meaning when the contract is drafted unilaterally by the economically and legally stronger party. This condition is clearly reflected in the examples of five sectors—telecommunications, electronic commerce (e-commerce), banking, insurance, and delivery services.

In the telecommunications sector, clauses that exempt operators from liability for any claims or losses suffered by customers constitute a concrete manifestation of the misuse of the freedom-of-contract principle. Consumers have no room to negotiate the terms of the agreement; they can only accept or reject the predetermined conditions. As a result, an imbalance arises that contradicts the principles of justice and good faith set out in Article 1338 (3) of the Indonesian Civil Code. Furthermore, Article 18 paragraph (1) of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as the Consumer Protection Law) explicitly prohibits business actors from limiting or excluding liability for consumer losses. Consequently, the existence of such clauses not only undermines public trust

in service providers but also obscures the meaning of contractual justice within the national legal system.[22]

In the electronic commerce (e-commerce) sector, a clause that places all delivery responsibility on the logistics company while exempting the e-commerce platform from liability for loss or damage effectively weakens consumers' rights. From a legal standpoint, this clause creates an asymmetry because the contractual relationship exists between the user and the platform, not between the user and the logistics company. As a result, this creates information asymmetry: consumers cannot clearly identify who is responsible for the losses, which undermines fairness and good faith. Therefore, contractual freedom in the digital sector becomes illusory, as consumers are deprived of any real opportunity to exercise free will.[23]

In the credit and banking sector, many contracts include clauses authorizing banks to use, store, and share customers' personal data with third parties for commercial purposes. Although such authorization formally constitutes consent, it is structurally coercive. It is a prerequisite for accessing credit facilities or credit cards. This practice risks violating privacy and the potential misuse of personal data, which is inconsistent with Law Number 27 of 2022 concerning Personal Data Protection. From the perspective of contractual freedom, these clauses show that freedom for one party (the bank) can restrict the other party (the customer). Thus, freedom becomes a form of economic domination.[24]

A similar pattern is seen in the insurance industry. Clauses granting companies full authority to alter investment fund allocations create a significant imbalance

[22] Mulia Akbar Santoso and Marlinah Marlinah, "Consumer Protection in Business Law: Conflict of Norms and Its Implications under Article 18 of Law No. 8 of 1999 on Consumer Protection," *International Journal Of Multidisciplinary Research And Analysis* 07, no. 10 (October 2024), https://doi.org/10.47191/ijmra/v7-i10-42.

[23] Ghazwan Aqrabin Faqih, Djumardin Djumardin, and Aris Munandar, "Klausula Baku Dalam Perjanjian Jual Beli Melalui E-Commerce Menurut Hukum Positif Indonesia," *Jurnal Risalah Kenotariatan* 4, no. 2 (2023), https://doi.org/10.29303/risalahkenotariatan.v4i2.188.

[24] Mardiaton Mardiaton, Mukhsin Nyak Umar, and Nevi Hasnita, "Islamic Law Review of the Principle of Freedom of Contract in Murabahah Contracts," *Advances In Social Humanities Research* 2, no. 8 (August 2024): 986–96, https://doi.org/10.46799/adv.v2i3.200.

between the company and the policyholder. When investment policies are changed unilaterally, policyholders lose control over their funds.[25] This violates transparency and fairness and breaches the principle of information disclosure as required by the Financial Services Authority (OJK) in Regulation No. 69/POJK.05/2016, amended by Regulation No. 38/POJK.05/2020. These rules concern the Conduct of Business by Insurance Companies, Sharia Insurance Companies, Reinsurance Companies, and Sharia Reinsurance Companies. In the context of contractual freedom, insurance companies' freedom is overly dominant. Meanwhile, policyholder freedom becomes merely symbolic.

In the delivery or shipping services sector, clauses that exempt companies from liability for loss, damage, or penalties during customs inspections are a clear form of exoneration. In practice, consumers must accept these terms, resulting in a contractual imbalance.[26] Article 18 of the Consumer Protection Law declares such clauses null and void. This situation shows that contractual freedom is often exercised unilaterally by business actors, without regard for fairness or propriety.[27]These principles are the spirit of contract law.

The use of standard clauses in these economic sectors distorts the principle of freedom of contract. Freedom should ensure equality, but instead, it has become a tool of domination by the stronger party. Standard clauses are found in various documents, such as notes, receipts, and standardized forms provided by business actors. These clauses are often placed in hard-to-notice sections or written in small print, making them difficult to read. Additionally, the substance often uses complex

[25] Made Dwi Wahyuni, Ratna Artha Windari, and Si Ngurah Ardhya, "Implementasi Asas Kebebasan Berkontrak Pada Perjanjian Polis Asuransi Jiwa (Studi Pada PT Aia Financial)," *Jurnal Komunitas Yustisia* 6, no. 2 (2025): 578–85, https://doi.org/10.23887/jatayu.v6i2.93342.
[26] Devinda Diana Valentina, "Analisis Pencantuman Klausula Eksonerasi Dalam Perjanjian E-Commerce Menurut Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen," *Terang : Jurnal Kajian Ilmu Sosial, Politik Dan Hukum* 1, no. 1 (2024): 361–69, https://doi.org/10.62383/terang.v1i1.148.
[27] Alamsyah and Hasibuan, "Legal Protection For Consumers In E-Commerce Transactions In Indonesia: Contract Validity And Dispute Resolution Effectiveness."

legal terms that laypeople struggle to understand.[28] This is a clear legal problem that needs serious attention, especially to strengthen consumer protection.

This imbalance underscores the need to reconstruct the principle of freedom of contract in commercial agreements. Contractual freedom should not focus solely on formal freedom; it should also guarantee substantive justice and moral protection. In the national legal framework, this aligns with efforts to harmonize the Civil Code, the Consumer Protection Law, and the principles of *fiqh muamalah. These principles* emphasize balance, honesty, and public benefit (*maslahah*) in every economic transaction.

Dialectics of the Principle of Freedom of Contract According to the Civil Code and Muamalah Fiqh

1) The Principle of Freedom of Contract under the Indonesian Civil Code

In the Indonesian civil law system, contracts are regulated under Book III of the Indonesian Civil Code (KUHPerdata), specifically in Article 1313 of the Civil Code, which provides that:

> *"A contract is an act whereby one or more persons bind themselves to one or more other persons."*

This provision implies that an agreement is made by one or more persons, wherein the parties mutually bind themselves to each other. In its implementation, the parties are free to determine the content, form, and parties to the contract without interference from third parties, provided that this freedom does not contravene the law, public order, or morality. This principle is known as the freedom of contract, a fundamental doctrine guaranteed by Article 1338(1) of the Civil Code, which states that:

> *"All legally executed agreements shall bind the parties as law."*

[28] Gunawan, *Perjanjian Baku Masalah Dan Solusi*.

According to Patrik, as cited in Nia Susanti, this principle encompasses four elements, namely:[29] a) The freedom of parties to decide whether or not to enter into a contract; b) The freedom to choose with whom the contract will be concluded; c) The freedom to determine the form or format of the contract, whether written or oral; d) The freedom of parties to stipulate the content, duration, and terms governing the contract.

These four elements demonstrate that the principle of contractual freedom grants the parties full autonomy to regulate their legal relationship. Nevertheless, in practice, this principle is no longer absolute, as there is potential imbalance of economic power between stronger and weaker parties.[30] Such an imbalance often manifests in standard form contracts.

A standard form contract arises in modern commercial practice, referring to an agreement whose terms are unilaterally predetermined by one party, leaving the other party only the option to "take it or leave it." Under Indonesian law, this concept is not explicitly regulated in the Civil Code but has emerged through practice and the influence of modern economic law. According to Dwi Atmoko, standard form contracts represent a concrete form of the freedom of contract that has undergone distortion because formal (theoretical) freedom is not accompanied by substantive (factual) freedom.[31] This aligns with J. Satrio's view that standard-form contracts essentially "violate the principle of freedom of contract," since only one party is genuinely free to determine the contract's terms.[32] A concrete example in

[29] Nia Susanti, "Kepastian Hukum Penerapan Asas Kebebasan Berkontrak Dalam Sebuah Perjanjian Baku Ditinjau Berdasarkan Pasal 1338 Kitab Undang-Undang Hukum Perdata," *Indragiri Law Review* 2, no. 2 (August 2024): 33–39, https://doi.org/10.32520/ilr.v2i2.32.
[30] Andita Putri Nabila and Gunawan Djayaputra, "Urgensi Pelaksanaan Kebebasan Berkontrak Dalam Merumuskan Perjanjian Guna Mewujudkan Keadilan Bagi Para Pihak," *UNES Law Review* 6, no. 2 (December 2023): 4072–80, https://doi.org/10.31933/unesrev.v6i2.1246.
[31] Danil Danil et al., "Implications of the Contract Freedom Principle and Legal Consequences of Standard Contract Which Detrimental to Debtors of Bank Syariah Indonesia (BSI) Makassar," *Jurnal Ilmiah AL-Jauhari: Jurnal Studi Islam Dan Interdisipliner* 7, no. 2 (December 2022): 236–51, https://doi.org/10.30603/jiaj.v7i2.3063.
[32] Fernanda Martinus Napitupulu, Ria Siregar, and Roida Nababan, "Legal Protection Against Debtors in a Standard Agreement with the Existence of Freedom of Contract," *Formosa Journal of*

Indonesian positive law is found in Article 18 of Law No. 8 of 1999 on Consumer Protection, which prohibits the inclusion of unfair standard terms that disadvantage consumers.

In relation to the above, it is important to understand that the Civil Code imposes limitations on the principle of freedom of contract, namely: 1) The substance of a contract must not contain an unlawful cause or objective, particularly if it contradicts statutory regulations, morality, or public order, as provided in Article 1335 in conjunction with Article 1337 of the Civil Code; 2) A contract must also observe principles of fairness, equity, and established usages recognized in society, as mandated by Article 1339 of the Civil Code. "Usages" in this context do not refer to local customs, but to norms or practices consistently observed and applied within a particular community or sector. [33]

These limitations are essential in standard-form contracts because they protect the weaker party from unilateral clauses. This protection is further reinforced by Constitutional Court Decision No. 83/PUU-XXII/2024, which declared Article 251 of the Commercial Code (KUHD) concerning the unilateral cancellation of insurance contracts as conditionally unconstitutional. The ruling states that contract termination must be based on mutual consent or a court decision.[34] This ruling reaffirms that freedom of contract must be subordinate to constitutional justice, not merely unilateral will. This is important to ensure that agreements do not deviate from the Constitution and the principles of protecting rights, thereby enabling parties to conclude fair, transparent, and balanced contracts while still respecting contractual autonomy.

Multidisciplinary Research 4, no. 8 (August 2025): 3633–52, https://doi.org/10.55927/fjmr.v4i8.365.

[33] Agustia, "Implementasi Asas Kebebasan Berkontrak Dan Pengaruhnya Terhadap Kegagalan Pekerjaan Konstruksi," *JISHUM : Jurnal Ilmu Sosial Dan Humaniora* 1, no. 3 (2023): 685–700, https://doi.org/10.57248/jishum.v1i3.140.

[34] Xaviera Netanya Putri, "Implikasi Pasca Ditetapkannya Putusan Mahkamah Konstitusi Nomor 83/PUU-XXII/2024 Terhadap Penerapan Prinsip Itikad Baik Yang Sempurna Berdasarkan Pasal 251 Kitab Undang-Undang Hukum Dagang," *Jurnal Ilmu Hukum, Humaniora Dan Politik* 5, no. 6 (September 2025): 5475–89, https://doi.org/10.38035/jihhp.v5i6.5613.

The legal standards following the Constitutional Court's decision may serve as a basis or reference in the implementation of commercial agreements such as Joint Venture Agreements between local and foreign companies, Licensing Agreements, franchise contracts, electronic contracts (e-contracts) on digital platforms, and standard form contracts in the insurance and banking sectors, as well as other commercial arrangements. A concrete example is found in digital service agreements (such as those of Shopee, Gojek, Tokopedia, and Grab), where users must agree to terms and conditions unilaterally drafted by the service provider. Although formally valid, contractual freedom is limited in such cases because no equal negotiation takes place. Therefore, the Constitutional Court's ruling provides a foundation for understanding that the principle of freedom of contract has shifted from an absolute freedom to a freedom constrained by justice and the protection of weaker parties.

2) The Principle of Freedom of Contract in Fiqh Muamalah

In fiqh muamalah, the concept of freedom of contract is known as *hurriyyat al-ta'aqqud*, namely the freedom to conclude a contract (*'aqd*) in accordance with the will of the parties, so long as it does not violate the principles of *sharia*.[35] This means that contractual freedom is recognized, but it is always accompanied by moral responsibility and Sharī'ah-based limitations. This aligns with the principle *"al-Ashlu fil Mu'āmalāt al-Ibāhah"*, which states that all forms of muamalah are essentially permissible unless there is evidence prohibiting them.[36] This is based on the *fiqh* maxim:

> *"Al-ashlu fil asy-ya'i al-ibāhah hattā yadulla ad-dalīl 'alā taḥrīmihā."*
> *Meaning: the basic ruling of all matters is permissibility until there is evidence prohibiting them."*

[35] Trisadini Prasastinah Usanti, "Akad Baku Pada Pembiayaan Murabahah Di Bank Syariah," *Perspektif* 18, no. 1 (2013): 46–55, https://doi.org/10.30742/perspektif.v18i1.113.
[36] Abdulrahim Habel, "Analisis Kaidah-Kaidah Fiqih Muamalah Dan Implementasinya Di Indonesia," *An Nuqud* 2, no. 2 (2023): 56–69, https://doi.org/10.51192/annuqud.v2i2.672.

In relation to this principle, Abdul Karim Zaidan asserts that freedom of contract in Islam refers to the liberty to conclude agreements according to human needs, provided that such agreements do not contradict the law of Allah and the values of justice.[37] Based on the above explanation, it can be understood that contractual freedom in fiqh muamalah grants Muslims the space to innovate in economic and contractual activities, provided such innovation does not contradict the maqāṣid al-sharīʻah and the principles of justice. In other words, this freedom is not absolute as in Western civil law but rather constitutes conditional freedom, accompanied by limitations grounded in Sharīʻah. These limitations are encapsulated in key Sharīʻah principles, including:

a) The Prohibition of *Gharar*

Etymologically, gharar refers to uncertainty, risk, or elements of deception within a transaction. It may also connote danger, while *taghrīr* refers to engaging in conduct that exposes one to risky or unknown outcomes.[38] Generally, gharar may be classified into two forms: uncertainty about whether an event will occur, and ambiguity about the characteristics, quantity, or type of the object of sale. Both forms indicate that gharar entails harm and injustice, as implied by its linguistic meaning.[39] In the context of muamalah transactions or Sharīʻah-compliant commercial activities, including commercial contracts, gharar may harm both sellers (producers) and buyers (consumers) by creating ambiguity, suspicion, imbalance, and potential disputes in the exchange.[40] Accordingly, any transaction

[37] Elfaty Kameliya Khotimah, "Kontrak Syariah Dalam Hukum Islam," *Maliki Interdisciplinary Journal (MIJ)* 1, no. 5 (2023): 601–10.
[38] Pejman Abedifar, "Formalism versus Purposivism in Islamic Jurisprudence: The Case of Islamic Finance Law," *Religions* 14, no. 4 (April 2023): 465, https://doi.org/10.3390/rel14040465.
[39] Dina Ilham Nurjanah et al., "Konsep Gharar Dan Maisir Dalam Transaksi Ekonomi Fikih Mu'amalah," *Al-Fiqh: Journal of Islamic Studies* 2, no. 3 (2024): 159–66, https://doi.org/10.59996/al-fiqh.v2i3.368.
[40] Nurul Fatimah, Kamaruddin Kamaruddin, and Supriadi Supriadi, "Gharar in Sharia Financial Products: Forms, Implications, and Prevention Measures," *AHKAM* 4, no. 3 (July 2025): 809–20, https://doi.org/10.58578/ahkam.v4i3.6702.

involving uncertainty or ignorance is deemed invalid under Islamic principles (muamalah).[41] This is consistent with the hadith of the Prophet Muhammad.

"The Prophet forbade transactions involving gharar" (Narrated by Muslim).

b) The Prohibition of *Riba*

Islam prohibits all forms of transactions, or *muamalah*, including commercial contracts, that involve *riba*. This is explicitly affirmed in QS. Al-Baqarah Ayat 275, translated exactly as provided:

> *"Those who consume usury (riba) will not stand except like the standing of a person beaten by Satan into madness. That is because they say, 'Indeed, trade is just like usury,' while Allah has permitted trade and prohibited usury. So whoever has received a warning from his Lord and then desists, he may keep what he has taken in the past, and his matter rests with Allah. However, whoever returns (to dealing in usury), such people are the inhabitants of the Hellfire; they will abide therein eternally."*

Etymologically, *riba* means increase or growth, but not every increase is considered *riba* in the legal sense—only those increases that have no *sharīa* basis fall within the prohibition.[42] Terminologically, *riba* may be understood as an unlawful increment attached to wealth under specific conditions that contradict the principle of justice in transactions. Scholars have elaborated on the definition of *riba*. Abu Bakar Jabir Al-Jazeeri describes *riba* as an unlawful increment added to a transaction.[43] Wahbah Zuhaili, citing Ibn Rifa'ah, explains that *riba* occurs when one obtains an increment over the principal amount, especially in transactions involving gold, silver, or staple food commodities. The Hanabilah define *riba* as an "unlawful

[41] Rudiansyah Rudiansyah, "Telaah Gharar, Riba, Dan Maisir Dalam Perspektif Transaksi Ekonomi Islam," *Al-Huquq: Journal of Indonesian Islamic Economic Law* 2, no. 1 (2020): 98–113, https://doi.org/10.19105/alhuquq.v2i1.2818.
[42] Abdul Chamid and Jamal Abdul Aziz, "The Normative Logic of Riba and Its Manifestations in Market Exchange: An Islamic Legal Analysis," *Journal Of Islamic Education And Intellectual Discourse (JIED)* 1, no. 2 (November 2025): 100–114, https://doi.org/10.37304/jied.v1i2.23431.
[43] Shahid Sultan and Ambreen Sultan, "Bounding the Boundless: The Excesses of Riba and the Equality in Exchange in Islam," *International Journal of Finance & Economics*, December 2025, https://doi.org/10.1002/ijfe.70114.

premium" in transactions[44], while the Hanafiyah view it as an increment obtained in exchange for wealth without a legitimate countervalue.[45] Meanwhile, the *Shafi'i Mazhab* also affirms that *riba* arises in transactions lacking apparent equivalence or when performance is delayed by one party.[46]

c) The Prohibition of *Maisir*

Etymologically, *maisir* derives from the Arabic *yasara* or *yasar*, meaning ease or obtaining something effortlessly. In Islamic economics, the term refers to generating profit without productive effort.[47]More broadly, *maisir* refers to any transaction involving speculation in which a person may lose or gain purely by chance.[48] Although trade also involves the possibility of profit or loss, the key distinction lies in the presence of a lawful exchange of goods or services. *Maisir* is essentially associated with gambling, which entails high speculative elements and dependence on luck or uncertain conditions.[49] *Maisir* is the attempt to obtain wealth quickly and without a legitimate basis, such as through gambling or speculative deception.[50] Gambling contradicts the value of justice because the wealth obtained does not originate from lawful effort.[51] Accordingly, Islamic law strictly prohibits all forms of gambling, including *maisir*.

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[44] Rahmania, Afifah Dwy Rezky Razak, and Ahmad Fauzan Jamal, "Penerapan Prinsip Larangan Maysir, Gharar, Dan Riba Dalam Bank Syariah," *Jurnal Al-Muqaranah: Jurnal Hukum Dan Pemikiran Islam* 3, no. 2 (2025): 9–19, https://doi.org/10.33477/am.v3i2.9202.

[45] Dewi Nurul Musjtari, Fiska Silvia Raden Roro, and Ro'fah Setyowati, "Islamic P2p Lending As An Alternative Solution For The Unfair Conventional Platform In Indonesia," *UUM Journal of Legal Studies* 13 (2022), https://doi.org/10.32890/uumjls2022.13.1.2.

[46] Rudiansyah, "Telaah Gharar, Riba, Dan Maisir Dalam Perspektif Transaksi Ekonomi Islam."

[47] Rahmania, Razak, and Jamal, "Penerapan Prinsip Larangan Maysir, Gharar, Dan Riba Dalam Bank Syariah."

[48] Rudiansyah, "Telaah Gharar, Riba, Dan Maisir Dalam Perspektif Transaksi Ekonomi Islam."

[49] Waqar Yousufi and Dr. Shahnaz Ghazi, "Prohibition of Interest and Gambling in the Islamic Economic System," *Al Khadim Research Journal of Islamic Culture and Civilization* 2, no. 2 (September 2021): 154–70, https://doi.org/10.53575/arjicc.u10-v2.2(21)154-170.

[50] Oishi Chowdhury et al., "The Decentralized Shariah-Based Banking System in Bangladesh Using Block-Chain Technology," *International Journal of Information Engineering and Electronic Business* 15, no. 3 (June 2023): 12–28, https://doi.org/10.5815/ijieeb.2023.03.02.

[51] Iin Candrawati and Shofa Robbani, "Understanding The 7 Key Prohibitions In Islamic Trade Practices," *Profit : Jurnal Kajian Ekonomi Dan Perbankan Syariah* 9, no. 1 (June 2025): 43–53, https://doi.org/10.33650/profit.v9i1.10642.

Based on the above explanations, when a commercial agreement—particularly a standard form contract—includes any of the elements mentioned above, even if those clauses are formally agreed upon, the contract contradicts Sharī'ah principles and justice. In fiqh muamalah, contractual freedom does not permit the stipulation of clauses that create uncertainty, speculation, or unlawful interest. Such clauses may be deemed *bāṭil* (void) or at least morally/ethically invalid, even if formally enforceable.[52] Therefore, the parties' freedom must always be balanced with the pursuit of justice and social responsibility so that standard form contracts do not become tools of exploitation. Moreover, Islam places a strong emphasis on public interest (*maslahah*), meaning that when commercial or standard-form contracts are free from *gharar*, *riba*, and *maisir*, they benefit not only the parties but also society at large.[53] Accordingly, standard form contracts must ensure that both parties obtain proportional benefits, prevent harmful practices, and promote equitable wealth distribution. This can be achieved through transparency and mutual consent, grounded in the principle of freedom of contract in *fiqh muamalah*, which is oriented not only toward *sharī*a principles but also toward justice, moral responsibility, and public welfare.

Dialectics Between the Civil Code and *Fiqh Muamalah*

Based on the explanations of the principle of freedom of contract from the perspectives of the Indonesian Civil Code and *Fiqh Muamalah*, both recognize the parties' autonomy in concluding a contract.[54] However, such freedom is not absolute; it must remain subject to norms of justice, law, and morality. The differences between these two perspectives are illustrated in the table below.

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[52] Rahmat et al., "Terms and Conditions Applicability Muamalat," *International Journal of Economics (IJEC)* 2, no. 1 (June 2023): 162–69, https://doi.org/10.55299/ijec.v2i1.441.
[53] Sufiana Fahmi, Mukhtar Lutfi, and Amiruddin K, "Prinsip Syariah Dalam Pengelolaan Akad Untuk Transaksi Ekonomi Islam," *SANTRI : Jurnal Ekonomi Dan Keuangan Islam* 3, no. 1 (2025): 62–73, https://doi.org/10.61132/santri.v3i1.1233.
[54] Istianah Zainal Asyiqin, "Ethical Contracts vs. Commercial Realities in Indonesian Sharia Insurance," *Fiat Justisia: Jurnal Ilmu Hukum* 18, no. 4 (February 4, 2025): 425–40, https://doi.org/10.25041/fiatjustisia.v18no4.3635.

Table 2. Differences in the Principle of Freedom of Contract between the Indonesian Civil Code and *Fiqh Muamalah*

Aspect of Comparison	**Indonesian Civil Code**	***Fiqh Muamalah***
Legal Basis / Normative Foundation	Regulated under Book III of the Indonesian Civil Code, particularly Article 1313 and Article 1338(1) of the Civil Code.	Based on the principle of *hurriyyat al-ta'aqqud* and the fiqh maxim *"al-ashlu fil mu'āmalāt al-ibāhah hattā yadulla ad-dalīl 'alā taḥrīmihā"* (the basic rule in muamalah is permissibility unless there is evidence prohibiting it).
Nature of Freedom	Grants full autonomy to the parties to determine the content, form, and contractual counterpart without interference, so long as it does not violate law, morality, or public order.	Grants conditional freedom to the parties in forming contracts (*akad*), provided that such freedom does not contradict Sharī'ah principles and public interest (*maslahah*).
Primary Objective	To guarantee the independence of the parties' will in determining their legal relationship.	To ensure justice, public interest (*maslahah*), and adherence to the law of Allah in every *muamalah* contract.
Restrictions and Limitations	1) Must not contradict statutory regulations, morality, or public order (Articles 1335–1337 of the Civil Code). 2) Must observe principles of justice, propriety, and prevailing customs (Article 1339 of the Civil Code).	1) Prohibition of *gharar*: transactions must not contain uncertainty or deception; 2) Prohibition of *riba*: no unlawful or exploitative increment may be imposed; 3) Prohibition of *maisir*: transactions must not involve speculation or elements resembling gambling.
Value Orientation	Individualistic and liberal (derived from the European civil law system), emphasizing the interests and will of the contracting parties.	Moral and social in orientation, emphasizing responsibility toward society and the prohibition of exploitation, with a focus on *maslahah* (public welfare).

Aspect of Comparison	Indonesian Civil Code	*Fiqh Muamalah*
Legal Consequences for Violations	The contract becomes null and void by operation of law or may be annulled (Article 1335 of the Civil Code).	The *aqad* becomes *bāṭil* or *fāsid*, invalid under Islamic law and lacking both moral and *sharīa*-based legal force.

Source: *Compiled and processed by the author*

The dialectic between the Indonesian Civil Code and *fiqh muamalah* becomes evident in the divergent paradigms through which both systems conceptualize the principle of freedom of contract. The Indonesian Civil Code, rooted in the continental European legal tradition, embodies a liberal orientation in which individual will is regarded as the primary source of legal relations.[55] This paradigm elevates individual autonomy as the highest value; thus, as long as an agreement is made with free consent and meets the formal requirements, the contract is considered valid and binding as law between the parties (*pacta sunt servanda*). Conversely, *fiqh muamalah* is grounded in the principles of *tawhid*, morality, and social justice, viewing freedom not merely as an individual right but as a trust (*amanah*) that must be exercised responsibly before Allah and society.[56] Every economic transaction in Islamic law is intended to generate benefit (*maslahah*) and prevent harm (*mudarat*) for both parties as well as for the wider community. Accordingly, freedom of contract in *fiqh muamalah* is not absolute. However, it is consistently constrained by the principles of Sharia and Islamic economic ethics, which prohibit *gharar riba*, and *maisir*.

In the context of standard-form contracts (adhesion contracts), these contrasting paradigms become particularly significant. The Indonesian Civil Code generally treats standard-form agreements as valid, provided they comply with the

[55] Ikka Puspita Sari, "Legal Certainty in the Conformity of Smart Contracts with the Indonesian Civil Code," *Priviet Social Sciences Journal* 6, no. 2 (February 2026): 468–78, https://doi.org/10.55942/pssj.v6i2.1574.

[56] Firdha Luthfiyah Azhar, Eva Fauziyah, and Neng Dewi Himayasari, "Tinjauan Fikih Muamalah Adabiyah Terhadap Etika Pedagang Dalam Menerapkan Denda All You Can Eat," *Bandung Conference Series: Sharia Economic Law* 3, no. 1 (January 2023), https://doi.org/10.29313/bcssel.v3i1.5485.

formal requirements of civil law, even when one party is substantially in a weaker bargaining position.[57] In contrast, *fiqh muamalah* asserts that the validity of a contract cannot rest solely on formal consent; it must also reflect substantive justice, including balanced rights and obligations, transparency, and genuine freedom in decision-making. In other words, *fiqh muamalah* assesses the validity of a contract not only through the lens of positive law, but also through the purity of intention (*niyyah*) and its conformity with moral values and the pursuit of *maslahah* for humankind (particularly for the contracting parties).[58]

Based on the foregoing explanation, it is understood that the principle of freedom of contract under the Indonesian Civil Code emphasizes formal legality and individual rationality. In contrast, *fiqh muamalah* emphasizes moral legitimacy, substantive justice, and social welfare. These differences underscore the need to reconstruct the principle of freedom of contract in Indonesian law, so that it does not rely solely on the Western liberal paradigm, but also incorporates the values of social justice inherent in and developed within Indonesian society.

Reconstructing the Principle of Freedom of Contract: Harmonizing the Indonesian Civil Code and *Fiqh Muamalah*

The reconstruction of the principle of freedom of contract aims to reorganize the concept of party autonomy in contractual relations so that it more adequately reflects balance, justice, and social responsibility. This study adopts a comparative approach by examining the Dutch Civil Code (*Nieuw Burgerlijk Wetboek* or *NBW*), in which the principle of freedom of contract occupies a fundamental position but is no longer understood as absolute freedom. Unlike the classical construction of nineteenth-century contract law that emphasized autonomy of will (*autonomie van de wil*), modern Dutch civil law situates freedom of contract within a framework of

[57] Nadine Adika Tifana, Etty Haryati Djukardi, and Sherly Ayuna Putri, "Annulment of Lease Agreements Based on Third-Party Undue Influence under the Indonesian Civil Code," *JUSTISI* 11, no. 3 (September 2025): 984–1003, https://doi.org/10.33506/js.v11i3.4762.
[58] Iis Sukaesih et al., "Practice Of Consignment Services In Online Transactions: Fiqh Muamalah Analysis Of The Agreement And Its Mechanism," *ANAYASA : Journal of Legal Studies* 3, no. 2 (February 2026): 51–61, https://doi.org/10.61397/ays.v3i2.474.

justice, reasonableness, and social responsibility.[59] This shift has positioned Dutch contract law as one of the most progressive legal systems in limiting contractual freedom in order to protect balance and the interests of weaker parties.

Normatively, the principle of freedom of contract in Dutch law is not expressly set out in a single provision but is implicitly reflected in several key articles, particularly Articles 3:33 and 6:213 NBW, which state that contracts arise from the parties' free will. However, such freedom is inherently constrained by Article 6:248 NBW, which introduces the principle of reasonableness and fairness (*redelijkheid en billijkheid*) as a corrective standard governing both the content and performance of contracts.[60] Article 6:248(2) NBW explicitly provides that a contractual clause may be set aside if its application is contrary to the principles of reasonableness and fairness. This provision demonstrates that freedom of contract in Dutch law is not an end in itself but a means that must remain subordinate to substantive justice. Accordingly, even where a contract is concluded on the parties' free consent, the state, through the judiciary, retains the authority to intervene to correct injustice or an abuse of a dominant position.

These developments are also reflected in Dutch legal doctrine and jurisprudence, which recognize the social function of contracts. Contracts are no longer understood merely as private arrangements between individuals but as legal instruments capable of affecting public interests and social structures. Consequently, freedom of contract must take into account the interests of third parties, consumer protection, and economic balance within society. This approach explicitly restricts standard-form contracts and exculpatory clauses that could disadvantage weaker parties, particularly in modern commercial relationships and digital transactions.

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[59] Jan M. Smith, *Contract Law: A Comparative Introduction (Third Edition)* (UK: Edward Elgar Publishing Limited, 2021).
[60] Olha O. Cherednychenko, "Fundamental Rights, Contract Law and Transactional Justice," *European Review of Contract Law* 17, no. 2 (June 2021): 130–41, https://doi.org/10.1515/ercl-2021-2015.

Another important aspect of Dutch contract law is the strengthening of the principle of good faith as an overarching general principle. Good faith applies not only during contract performance but also during the pre-contractual and post-contractual phases.[61] Violations of duties of disclosure, honesty, and transparency may give rise to legal liability, even where a contract has not yet been fully formed. In this context, freedom of contract is understood as a freedom that must be exercised with moral integrity and in compliance with legal and ethical standards.[62] Accordingly, the construction of freedom of contract in Dutch civil law exhibits three main characteristics. First, freedom of contract remains recognized as a fundamental principle but is relative and contextual in nature. Second, such freedom is internally limited by the principles of reasonableness and fairness, rather than solely by external prohibitions. Third, contracts are positioned as legal institutions with moral and social dimensions, and therefore cannot be detached from the values of honesty, balance, and the protection of weaker parties.

This construction is highly relevant to the development of Indonesian contract law, given that the Indonesian Civil Code, rooted in the old *Burgerlijk Wetboek*, still reflects a formalistic and individualistic paradigm of freedom of contract. The evolution of Dutch civil law demonstrates that the principle of freedom of contract can be reconstructed while preserving its core essence by emphasizing justice, social responsibility, and legal morality. Therefore, an understanding of this concept provides an important comparative foundation for formulating a reconstruction of the principle of freedom of contract in Indonesia, particularly in efforts to harmonize the KUHPerdata with the principles of *fiqh muamalah*, which emphasize justice (*'adl*), public interest (*maslahah*), and honesty (*ṣidq*). This reconstruction model does not aim to abolish the principle of freedom, but to place it within the framework

[61] N. Ike Kusmiati, "Legal Standing of Pre-Contractual Good Faith Principle as a Law Reformation of Indonesian Contract Law," *International Journal of Science and Society* 2, no. 1 (March 2020): 73–85, https://doi.org/10.54783/ijsoc.v2i1.61.
[62] Meydora Cahya Nugrahenti and Ari Hernawan, "Good Faith Principle in Indonesian Contract Law: How to Set the Definition and Its Benchmarks," *Journal of Infrastructure Policy and Development* 8, no. 10 (September 2024): 7358, https://doi.org/10.24294/jipd.v8i10.7358.

of “fair freedom of contract,” namely, a form of freedom that respects party autonomy while being accompanied by ethical, social, and legal limits to ensure a proper balance of rights and obligations.

First, the principle of fair freedom of contract underscores that parties’ contractual autonomy must be accompanied by regulatory mechanisms to prevent inequality or the abuse of dominant bargaining power. Freedom that is not tempered by justice risks producing exploitative contracts, such as adhesion contracts unilaterally drafted by business actors against consumers.[63] Within this reconstruction model, the law must function as a corrective instrument to ensure that contractual freedom is not utilized to oppress weaker parties.[64] Accordingly, limitations on contractual freedom are not intended to reduce party autonomy, but to ensure substantive justice. In this regard, the state—through legal instruments such as the Consumer Protection Act and Constitutional Court Decision No. 83/PUU-XXII/2024—plays a crucial role in ensuring that agreements comply with the principles of balance and the protection of constitutional rights. A concrete example can be seen in standard-form contracts in digital services or e-commerce, such as agreements between marketplace platforms (e.g., Tokopedia, Shopee, GrabFood) and merchants. In practice, such contracts tend to be unilateral, with the platform determining all contractual clauses without any negotiation space for merchants, including commission fees, delivery responsibilities, or account-blocking mechanisms.[65] Under the reconstructed model of fair freedom of contract, such contracts must be subject to legal oversight to ensure fairness for all parties. For

[63] Pipit Anggraini and Ery Agus Priyono, “Examption Clausses in Digital Business Contracts: An Analysis of Contractual Justice in the Platform Economy Era,” *International Journal of Social Science and Human Research* 09, no. 01 (January 2026), https://doi.org/10.47191/ijsshr/v9-i1-57.
[64] I. P. Ivanets, “The Principle of Freedom of Contract: General Characteristics,” *Analytical and Comparative Jurisprudence*, no. 2 (April 2025): 267–71, https://doi.org/10.24144/2788-6018.2025.02.36.
[65] Hamid Masjed Saraei, Mohammad Khaled Nabi Nia, and Mahdiyeh Ghanizadeh, “Feasibility of Permitting ‘Unilateral Contract to Refrain from an Act’ in Islamic Law,” *Journal of Islamic Law Research* 68, no. 2 (2025): 437–54, https://doi.org/https://doi.org/10.30497/law.2025.247479.3676.

instance, through the Consumer Protection Act and Constitutional Court Decision No. 83/PUU-XXII/2024, the government may ensure that standard terms do not eliminate the constitutional rights of weaker parties (merchants or consumers). Clauses containing a "complete transfer of liability" to sellers may be deemed void *ipso jure* for violating the principles of balance and justice as affirmed by the Court. Consequently, platforms retain the freedom to draft agreements, but such freedom must be proportionally limited to protect parties with weaker economic or bargaining positions.

Second, the reconstruction of the principle of freedom of contract must also incorporate the principle of *maslahah* (public welfare) and contractual social responsibility as coequal pillars to freedom.[66] This principle recognizes that contracts are not merely legal relationships between individuals, but also social instruments with broader societal impacts. Accordingly, every agreement must contain elements of *maslahah*, meaning benefits that extend beyond the contracting parties and contribute to social welfare and economic justice.[67] From the perspective of *fiqh muamalah*, *maslahah* constitutes one of the core objectives of *sharia* (*maqāṣid al-syarī'ah*), requiring that economic transactions avoid harmful, speculative, or socially disruptive practices such as *gharar*, *riba*, and *maisir*. Contractual social responsibility, therefore, obliges contracting parties to consider the social consequences of their agreements, including distributive justice, consumer protection, and economic sustainability.[68] In a reconstruction model inspired by *fiqh muamalah*, the principle of *maslahah*, for example, requires that franchise agreements include obligations to empower local partners and provide knowledge transfer or business training, rather than seeking profit alone. Such a

[66] I.V. Stilnyk, "Principle of Freedom of Contract and Its Limitations: Dichotomy of Concepts," *Analytical and Comparative Jurisprudence*, no. 3 (July 2024): 173–76, https://doi.org/10.24144/2788-6018.2024.03.28.
[67] Ali, Fitrian, and Hutomo, "Kepastian Hukum Penerapan Asas Kebebasan Berkontrak Dalam Sebuah Perjanjian Baku Ditinjau Berdasarkan Pasal 1338 Kitab Undang-Undang Hukum Perdata."
[68] Berilian Ayu Kusuma, Sri Wahyuni Jumadi, and Pramidazzura Alifa Rifqi, "Corporate Social Responsibility (CSR) as an Instrument of Economic Justice," *Nomico* 2, no. 9 (October 2025): 33–43, https://doi.org/10.62872/3znftz38.

model aligns with the spirit of contractual social responsibility, which affirms that commercial contracts should not be purely profit-oriented but must also contribute to distributive justice and societal welfare.

Third, the reconstruction model introduces the principle of contractual morality (ethical contracts), which holds that honesty, good faith, and integrity are legally binding elements of contractual relations.[69] In Western civil law systems, the principle of good faith is often regarded as a supplementary doctrine.[70] In contrast, within *fiqh muamalah*, honesty (*ṣidq*), trustworthiness (*amānah*), and intention (*niyyah*) are substantive foundations of contractual validity. Thus, morality is not an external dimension of contract law, but an essential component that determines the legitimacy of legal relations. The "ethical contract" model emphasizes that contractual validity is assessed not solely by formal consent but also by the parties' intentions and integrity in performing the agreement.[71] If a contract is concluded with the intention to deceive, conceal material information, or take advantage of another party's ignorance—for example, through hidden clauses in standard-form agreements—such a contract loses its legal and moral legitimacy. From the perspective of *fiqh muamalah*, this type of agreement constitutes *gharar* (uncertainty) and *tadlis* (fraud), rendering the contract void even if formal requirements under the Indonesian Civil Code are met. This approach aligns with Constitutional Court Decision No. 83/PUU-XXII/2024, which affirms that contractual justice must be evaluated not only from the formal appearance of

[69] N Agus Adyatma Narwadi, I Nyoman Budiana, and I Gede Agus Kurniawan, "Reconstruction of Business Legal Ethics from the Perspective of the Principles of Good Faith and Contractual Fairness," *Pena Justisia: Media Komunikasi Dan Kajian Hukum* 24, no. 1 (June 2025): 7788–7804, https://doi.org/10.31941/pj.v24i2.6888.

[70] Larisa V. Shchennikova, "Good Faith in Civil Law: Legislation, Doctrine, Case Law," *Vestnik Tomskogo Gosudarstvennogo Universiteta. Pravo*, no. 55 (2025): 154–68, https://doi.org/10.17223/22253513/55/12.

[71] Istianah Zainal Asyiqin et al., "Reconciling Ownership Risk Under Islamic Economic Law: Comparative Analysis of Indonesian and Malaysian Contracts," *Indonesia Private Law Review* 6, no. 2 (December 30, 2025): 133–58, https://doi.org/10.25041/iplr.v6i2.4545.

consent but also from the good faith and fair dealing of the parties in its performance.

Based on these three principles, the reconstruction of the principle of freedom of contract moves toward a more ethical, inclusive, and socially oriented paradigm of contract law. Freedom is no longer understood as an absolute individual right but as a right accompanied by moral and social responsibilities. This reconstruction bridges modern civil-law principles with the values of *fiqh muamalah*, which emphasize the balance between rights and obligations and between individual interests and public welfare. Through this model, the principle of freedom of contract is expected not only to facilitate economic gain but also to serve as a means of realizing substantive justice, *maslahah*, and moral integrity in Indonesia's contractual practices.

Conclusion

The reconstruction of the principle of freedom of contract in commercial agreements—aimed at harmonizing the Indonesian Civil Code and *fiqh muamalah*—is carried out by recalibrating the concept of party autonomy toward a more balanced relationship between individual interests and social justice. This harmonization produces three principal models: First, the principle of fair freedom of contract, namely a form of contractual freedom that is controlled by substantive justice to prevent the abuse of dominant bargaining positions in standard-form contracts. Second, the principle of *maslahah* and contractual social responsibility, which positions contracts not merely as legal relations between individuals but also as social instruments that generate broader societal benefits. Third, the principle of ethical contract, which treats honesty, good faith, and integrity as legally binding elements determining the validity of agreements, such that contracts concluded with dishonest or misleading intent lose their legal and moral legitimacy. Together, these three models produce a more ethical, equitable, and welfare-oriented paradigm of contract law, integrating the rationality of modern civil law with the

moral and social values of *fiqh muamalah*, thereby establishing a national contractual framework that is just, balanced, and humanistic.

This study recommended that business actors and financial institutions draft contracts transparently, enabling consumers to understand and negotiate the terms. Social responsibility and contract morality must protect weaker parties. Judges should review contracts not only formally but also in light of justice and good faith. This helps ensure fairer decisions and stronger protection for weaker parties.

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