

## Freedom of contract versus standard contract: Pros or cons of the principle of balance in contracts in the study of the civil code and compilation of sharia economic law

Zaini Munawir S.\*<sup>1</sup> & Muhammad Yadi Harahap<sup>2</sup>

<sup>1</sup>Universitas Medan Area, Jl. Kolam No.1, Medan Estate, Kec. Percut Sei Tuan, Kabupaten Deli Serdang, Sumatera Utara 20223, Indonesia

<sup>2</sup>Universitas Islam Negeri Sumatera Utara, Jl. IAIN No.1, Gaharu, Kec. Medan Tim., Kota Medan, Sumatera Utara, Indonesia

\*e-mail: [zaini@staff.uma.ac.id](mailto:zaini@staff.uma.ac.id)

*Received 10 September 2025*

*Revised 24 October 2025*

*Accepted 31 October 2025*

### ABSTRACT

Freedom of contract is a core principle of contract law that empowers the parties to define the substance, structure, and conditions of their agreement, provided that it does not contravene statutory regulations, moral standards, or public order. However, the development of modern business practices shows the dominant use of standard contracts that are drawn up unilaterally, potentially shifting the bargaining position of the parties and creating an imbalance in the contractual relationship. This study aims to analyze the pros and cons of applying the principle of freedom of contract in standard contracts and examine the relevance of the principle of balance from the perspective of the Civil Code (KUH Perdata) and the Compilation of Sharia Economic Law (KHES). The research method used is normative legal research with a statutory and conceptual approach. The results of the study indicate that the Civil Code tends to place freedom of contract as the main principle, although it still leaves room for limitations through the principles of good faith and fairness. Meanwhile, KHES explicitly emphasizes the principles of balance, justice, and benefit as the main foundation of contracting, thereby providing stronger protection for the weaker party in standard contracts. Thus, it can be concluded that the implementation of standard contracts requires strengthening the principle of balance so that the freedom of contract does not turn into a means of unilateral domination, both within the framework of positive civil law and sharia economic law.

**Keywords:** freedom of contract, standard contract, principle of balance, civil code, sharia economic law.

**priviet lab.**  
RESEARCH & PUBLISHING



## 1. INTRODUCTION

Contract law serves as the central foundation of the civil law system, regulating legal relationships among legal subjects through agreements. Within each contract, the parties must ensure a proportional balance between their rights and obligations to promote fairness and guarantee legal certainty. Therefore, the principle of balance is a fundamental principle underpinning the process of contract formation, implementation, and enforcement. In the Indonesian legal context, the principle of balance is recognized not only in the Civil Code (KUH Perdata) but also normatively and philosophically in Islamic economic law through the Compilation of Islamic Economic Law (KHES).

The evolution of contemporary transactions necessitates conceptual clarification on how balance in contracts should be established and preserved, especially in the Islamic banking, financing, and digital business sectors. Significant disparities in the parties' bargaining strength are frequently part of the intricate legal arrangements in these transactions. Therefore, a comparative study of the Civil Code and KHES is crucial to assess how the concept of balance is understood, regulated, and applied in two legal systems with different philosophical foundations (Petridean, 2024).

The principle of freedom of contract has long been a key foundation of Indonesian contract law, as stipulated in Book III of the Civil Code. This principle grants the parties broad authority to determine the content, form, and object of an agreement. However, in practice, the freedom of contract does not always align with the balance of bargaining power. This phenomenon is evident in the use of standard-form contracts, agreements whose clauses are unilaterally determined by business actors without providing adequate negotiation space for consumers or weaker parties (Christiawan & Wulandari, 2023).

Normatively, the Civil Code maintains a liberal paradigm of freedom of contract. However, this paradigm faces serious challenges with the widespread use of standard-form contracts in various strategic sectors, such as banking, financing, telecommunications, transportation, and e-commerce. This situation creates an imbalance in contractual relationships, thus highlighting the relevance of the principle of balance as a modern principle that functions to limit the absolutism of the freedom of contract (Ncube, 2023).

Unlike the Civil Code, the Islamic economic legal system, through the Compilation of Islamic Economic Law (KHES), firmly places the principles of justice and balance as fundamental principles in every contract (Smith & Atiyah, 2006). Philosophically, the concept of balance in Islamic law is not only horizontal between the parties, but also vertical, related to moral and religious responsibility to Allah SWT. Therefore, contracts from a sharia perspective are not solely assessed from a formal legal perspective, but also from an ethical and beneficial perspective (Ishom & Zaini, 2020).

KHES emphasizes that contracts must be free from elements of usury (*riba*), *gharar* (unclear), and *dharar* (unclear), which have the potential to give rise to injustice and exploitation. This view aligns with the thinking of Syed Muhammad Naquib al-Attas, who stated that justice in transactions relates not only to legal aspects but also to ethics aimed at preventing injustice. From a sharia economic legal perspective, the principle of balance is closely related to the principles of justice (*'adl*), honesty (*shidq*), and the prohibition of exploitation through *gharar*, *jahalah*, and *ikrah* (Mescher, 2009).

Based on this background, this research begins with the problem of how the principle of balance is understood and regulated in Indonesian contract law. The main problem studied is the concept and regulation of the principle of balance in contract law according to the Civil Code (KUH Perdata) and how this principle is applied in contract practice, particularly in the use of standard contracts. In addition, this research also examines how the Compilation of Sharia Economic Law (KHES) views and places the principle of balance in every contract, as well as the relationship between the principle of freedom of contract and protection for parties with weak bargaining positions. Thus, this research problem focuses on the comparison of the concept, regulation, and application of the principle of balance in contracts between the Civil Code and KHES, as well as its relevance in creating justice and legal certainty in modern contractual practice.

## 2. METHOD

This research is a normative legal study aimed at examining and analyzing the principle of balance in contract law, particularly in the context of the conflict between the principle of freedom of contract and the practice of using standard contracts (Li, 2022). A normative approach is used because this research focuses on the legal norms, legal principles, and doctrines governing agreements in the Indonesian legal system, both within the framework of the Civil Code (KUH Perdata) and the Compilation of Sharia Economic Law (KHES). The research approaches employed include a statutory approach and a conceptual approach (Abdussamad & Sik, 2021). The statutory approach is conducted by examining relevant legal provisions in Book III of the KUH Perdata and other laws and regulations related to agreements and standard contracts. Meanwhile, the conceptual approach is used to examine the concepts of the principle of freedom of contract, the principle of balance, and the principle of justice from the perspective of civil law and Sharia economic law through the doctrines and thoughts of legal experts. This research is descriptive-analytical in nature, systematically describing the provisions and concepts of the principle of balance in contract law, then critically analyzing them by comparing the provisions in the Civil Code and the Compilation of Sharia Economic Law (KHES). The comparative analysis was conducted to identify similarities and differences in the approaches of the two legal systems in implementing the principle of balance, particularly in the practice of using standard contracts. The types and sources of legal materials used in this research consist of primary legal materials, secondary legal materials, and tertiary legal materials (Abdussamad & Sik, 2021). Primary legal materials include the Civil Code (KUH Perdata) and the Compilation of Sharia Economic Law (KHES). Secondary legal materials include legal textbooks, scientific journals, research results, scholarly opinions, and scholarly articles related to contract law, the principle of balance, and Sharia economic law. Tertiary legal materials include legal dictionaries, encyclopedias, and other supporting sources relevant to the research topic (Syaodih, 2009). The legal material collection technique was conducted through library research, which involved exploring and reviewing various laws and regulations, legal literature, and relevant scientific documents. All legal materials that have been collected are then analyzed using qualitative analysis methods, namely by interpreting and constructing legal norms logically and systematically to answer research problems and draw conclusions that are argumentative and can be scientifically justified.

## 3. RESULT AND DISCUSSION

### 3.1. Freedom of Contract in the Civil Code and Compilation of Sharia Economic Law

Freedom of contract is one of the fundamental principles in contract law which gives the parties the authority to freely determine the content, form and terms of the agreement. In the Indonesian legal system, this principle finds its main normative basis in the Civil Code (KUH Perdata), especially as reflected in the provisions of Article 1338 paragraph (1) which states that all agreements made legally apply as law for those who make them. This provision emphasizes that the will of the parties is the main source of the birth of the agreement, as long as the agreement meets the legal requirements for an agreement as regulated in Article 1320 of the Civil Code (Agustina et al., 2022).

From the perspective of the Civil Code, freedom of contract is broad and liberal in nature. In principle, parties are free to determine who they will contract with, what the contents of the agreement are, and what form the agreement will take. However, this freedom is not absolute (Sophar Maru Hutagalung, 2022). The Civil Code provides restrictions through the provision that agreements must not conflict with law, morality and public order. In addition, the principle of good faith as regulated in Article 1338 paragraph (3) of the Civil Code functions as a corrective instrument to prevent abuse of freedom of contract which has the potential to cause injustice or harm one of the parties (Mallet & Nassar, 2025).

Freedom of contract in the Compilation of Sharia Economic Law (KHES) is not only based on the free will of the parties but must also be in line with sharia principles. In the KHES, freedom of contract is embodied in the concept of akad, which requires a voluntary, honest, and responsible agreement between the parties (Wirakusuma et al., 2025). However, this freedom is strictly limited by prohibitions against riba

(usury), gharar (unlawful betting), maysir (unlawful gambling), dharar (unlawful gambling), and other practices that conflict with the principles of justice and public interest. Philosophically, freedom of contract in the KHES has a broader dimension than the Civil Code. In addition to its horizontal nature in the relationship between the parties, this freedom also contains a vertical dimension in the form of moral and religious responsibility to Allah SWT. Therefore, a contract is not only assessed based on its formal validity but also on its ethical and substantive aspects of justice. Freedom of contract in the KHES is thus inseparable from the primary objective of Islamic economic law, namely realizing justice ('adl) and the welfare (maslahah) for all parties involved (Nafis & Nor, 2025).

Consequently, it can be said that while the Civil Code and KHES both acknowledge the idea of contract flexibility, their emphasis is distinct. While KHES situates freedom of contract within the framework of Islamic values that prioritize justice, balance, and moral responsibility, the Civil Code views freedom of contract as a fundamental concept constrained by positive legal rules and the good faith principle. This paradigm shift affects how the two legal systems react to contemporary contract practices, especially when it comes to typical contracts and the disparity in the parties' bargaining positions.

Research results show that the principle of freedom of contract remains a key foundation in the Indonesian contract law system, as reflected in the Civil Code (KUH Perdata). Article 1338 paragraph (1) of the Civil Code stipulates that every legally entered into agreement shall be lawful for the parties making it. This principle provides ample scope for the parties to determine the content, form, and object of the contract based on their free will. However, in practice, this freedom is often not balanced with equal bargaining power, particularly in the use of standard contracts (Smith & Atiyah, 2006).

According to this study, standard contracts are now the most common tool used in contemporary banking, financing, telecommunications, and e-commerce operations. Standard contracts are "take it or leave it" agreements that are typically created unilaterally by business players, giving the opposing party especially consumers little opportunity for discussion. Even though the contract legally satisfies the conditions for a valid agreement under the Civil Code, this arrangement leads to an imbalance in the parties' rights and obligations.

From the perspective of the Civil Code, the principle of balance is not explicitly formulated but rather exists implicitly through the principles of good faith, propriety, and the prohibition of agreements that conflict with morality and public order. The principle of balance in this system is corrective and reactive, meaning it only comes into play when a dispute arises or when a judge assesses the fairness of the contract's contents. As a result, protection for the weaker party in standard contracts tends to be limited and dependent on judicial interpretation.

In contrast to the Civil Code, research shows that the Compilation of Sharia Economic Law (KHES) places the principle of balance as a fundamental principle inherent from the contract formation stage. The KHES firmly emphasizes that contracts must be based on the principles of justice ('adl), balance, and benefit, and must be free from elements of riba (riba), gharar (gharar), maysir (maysir), and dharar (dangerous). Thus, balance in the KHES is understood not only formally but also substantively, by assessing the fairness of the contract's contents and impact on the parties (Wen, 2022).

### **3.2. Comparative Analysis of the Principle of Balance between the Civil Code and the Compilation of Islamic Economic Law**

The principle of balance in contract law serves as a principle that regulates the legal relationship between parties in a fair and proportional manner. This principle requires harmony between the rights and obligations of the parties from the formation, implementation, and completion of the contract. In the Indonesian legal system, the principle of balance is not explicitly formulated in the Civil Code (KUH Perdata), but its existence can be traced implicitly through various provisions emphasizing justice, propriety, and good faith. Conversely, in the Compilation of Islamic Economic Law (KHES), the principle of balance is normatively affirmed as a fundamental principle that must be inherent in every contract (Asari & Firdaus, 2022).

From the perspective of the Civil Code, the principle of balance arises as a consequence of the principle of freedom of contract, which is limited by the principles of good faith and propriety. The

provision of Article 1338 paragraph (3) of the Civil Code, which requires the implementation of agreements in good faith, is the primary instrument for maintaining balance in contractual relationships. Furthermore, the provisions regarding lawful causes and the prohibition of agreements that conflict with morality and public order demonstrate efforts to prevent injustice in agreements. However, because the Civil Code still stems from a liberal paradigm, the principle of balance in this system is more corrective and reactive, meaning it only comes into play when deviations or disputes arise (Bitca et al., 2015).

In contrast to the Civil Code, the KHES positions the principle of balance as a preventive and substantive principle. The KHES emphasizes that contracts must be based on the principles of justice ('adl), benefit, and balance, and must be free from elements that have the potential to lead to exploitation, such as usury (riba), gharar (wors), maysir (risk), and dharar (risk). Thus, balance in the KHES is assessed not only by the formal equality of the parties, but also by the material justice of the content and consequences of the contract. This approach demonstrates that the KHES places greater emphasis on protecting the weaker party from the outset of the contract (Nafis & Nor, 2025).

The fundamental difference between the Civil Code and the KHES in their views on the principle of balance also lies in their philosophical foundations. The Civil Code (KUHP) emphasizes the free will of the parties and legal certainty, thus understanding balance as the result of a valid agreement. In contrast, the KHES (Constitutional Law) is based on sharia values, which place balance as a manifestation of moral and religious responsibility, not only to fellow human beings but also to Allah SWT. Therefore, imbalance in sharia contracts is not only viewed as a legal issue, but also as a violation of ethics and substantive justice (Singh & Kumar, 2022).

In the context of standard contract practice, this difference in approach becomes even more apparent. The Civil Code (KUHP) tends to provide ample scope for the enforceability of standard contracts as long as they meet the requirements for a valid agreement, even if they have the potential to create an imbalance in bargaining power. Meanwhile, the KHES (Constitutional Law) normatively rejects clauses containing elements of injustice or exploitation, even if formally agreed to by the parties. Thus, the principle of balance in the KHES serves as a more stringent restriction on freedom of contract in standard contracts.

Based on this comparative analysis, it can be concluded that the principle of balance in the Civil Code (KUHP) and the KHES (Constitutional Law) has different orientations and mechanisms. The Civil Code implicitly places the principle of balance as a correction to freedom of contract, while the Convention on the Law of the Two Holy Laws explicitly emphasizes it as a primary principle in every contract. This difference demonstrates the need to continuously strengthen the integration of the value of balance in Indonesian contract law, particularly in the face of the increasingly complex dynamics of modern transactions that have the potential to create imbalances in contractual relationships (Wirakusuma et al., 2025).

The application of the principle of balance in contracts has both pros and cons. From the pros, the principle of balance serves as a legal protection instrument for the weaker party and encourages the creation of substantive justice in contractual relationships. In the context of the KHES, this principle strengthens the ethical and moral dimensions of contracting. However, from the cons, overly strict application of the principle of balance can be seen as restricting freedom of contract and potentially reducing the flexibility and efficiency of business transactions, particularly in mass contracts (Taufik et al., 2025).

Therefore, this research confirms that the main challenge in Indonesian contract law is finding a balance between freedom of contract and the principle of balance. The Civil Code needs to accommodate the values of balance more explicitly to prevent freedom of contract from becoming a means of unilateral domination. Meanwhile, the principles in the KHES can serve as a normative and philosophical reference in strengthening the protection of justice in contracts, particularly standard contracts.

#### 4. CONCLUSION

This normative legal study concludes that while Indonesian contract law (KUH Perdata) upholds freedom of contract as a dominant principle, the realities of modern transactions—especially “take it or leave it” standard contracts—often produce unequal bargaining power and an imbalanced allocation of rights and obligations; in the Civil Code framework, the “principle of balance” operates mostly implicitly and reactively through doctrines like good faith and judicial correction after disputes arise, whereas KHES places balance, justice, and benefit as explicit, preventive, and substantive requirements from the outset of contracting (including screening out exploitative elements such as *riba/gharar/maysir/dharar*). Therefore, the study argues that standard contracts in Indonesia require a stronger, more explicit integration of the balance principle so that freedom of contract does not become a tool of unilateral domination, while still managing the trade-off that overly rigid balance controls can reduce flexibility and efficiency in mass transactions.

#### **Ethical Approval**

This research does not require ethical approval.

#### **Informed Consent Statement**

This research does not require informed consent.

#### **Author Contributions**

ZMS conceptualized the study, conducted statutory and conceptual analysis, and drafted the manuscript. MYH contributed to literature review, comparative analysis of the Civil Code and KHES perspectives, and manuscript revision. Both authors have read and approved the final manuscript.

#### **Disclosure Statement**

No potential conflicts of interest were reported by the authors.

#### **Data Availability Statement**

The data presented in this study are available upon request from the corresponding author for privacy reasons.

#### **Funding**

This research did not receive funding.

#### **Notes on Contributors**

##### **Zaini Munawir S.**

Zaini Munawir S. is affiliated with Universitas Medan Area

##### **Muhammad Yadi Harahap**

Muhammad Yadi Harahap is affiliated with Universitas Islam Negeri Sumatera Utara

#### REFERENCES

- Abdussamad, H. Z., & Sik, M. S. (2021). *Metode penelitian kualitatif*. CV. Syakir Media Press.
- Agustina, S. A., Sudiarti, S., & Syahputra, A. (2022). Principles of Rahn Contract Based on MUI Fatwa Number 25/DSN-MUI/III/2002 Concerning the Use of Pawn Land in the People of Southeast Aceh. *Jurnal Ilmiah Ekonomi Islam*, 8(3), 2836–2847. <https://doi.org/10.29040/jiei.v8i3.6574>
- Asari, A., & Firdaus, M. I. (2022). Comparison of rahn contract from the perspective of Islamic law and Indonesian guarantee law. *Journal of Islamic Economics Lariba*, 8(2), 255–270.

<https://doi.org/10.20885/jielariba.vol8.iss2.art1>

- Bitca, I., Shargu, L., & Bevziuc, I. (2015). Refusal to contract in the pre-contractual stage. *Socio-Economic Research Bulletin*, 4, 10–15.
- Christiawan, R., & Wulandari, R. (2023). *Hukum Kontrak Bisnis*. Sinar Grafika.
- Ishom, M., & Zaini, A. (2020). *Sharia Contract Drafting: Merancang Akad Muamalat*. Penerbit A-Empat.
- Li, X. (2022). Normative Approaches to the Protection of Pre-Contractual Reliance in the Civil Code of the PRC. *Law Sci.*, 1, 783.
- Mallet, P., & Nassar, H. (2025). The Limits of Contractual Freedom: Analyzing the Admissibility and Exceptions of Agreements Limiting or Excluding Tort Liability under French Civil Law. *Journal of Indonesian Legal Studies*, 10(2), 751–772. <https://doi.org/10.15294/jils.v10i2.6760>
- Mescher, D. B. (2009). Business Ethics and the Law of Contract. *Journal of Law and Financial Management*, 8(2), 8–12. <https://classic.austlii.edu.au/au/journals/JILawFinMgmt/2009/6.html>
- Nafis, M., & Nor, M. (2025). THE CONVERGENCE OF CIVIL AND ISLAMIC LAW IN CONTRACTS PRACTICES IN INDONESIA. *Malarev*, 2(2), 46–67.
- Ncube, C. B. (2023). The Internet, Freedom of Expression and Intellectual Property. In *The Internet, Development, Human Rights and the Law in Africa* (pp. 100–126). Routledge.
- Petridean, R. F. S. (2024). The Pre-Contractual Abyss. *Law Annals Titu Maiorescu U.*, 151.
- Singh, C. K., & Kumar, M. (2022). The Uniform Civil Code Debate in India: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism. *Chanchal Kumar Singh & Mritunjay Kumar, The Uniform Civil Code Debate in India: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism V SML. L. REV.*, 12.
- Smith, S. A., & Atiyah, P. S. (2006). *Atiyah's Introduction to the Law of Contract*. OUP Oxford.
- Sophar Maru Hutagalung, S. H. (2022). *Kontrak bisnis di ASEAN: pengaruh sistem hukum common law dan civil law*. Sinar Grafika.
- Syaodih, N. (2009). Metode penelitian pendidikan. *Bandung: PT. Remaja Rosdakarya*.
- Taufik, T., Siregar, F. Y. D., Ramadhan, M. C. R., Meher, M., & Chansrakao, R. T. (2025). Construction Dispute Resolution through Alternative Dispute Resolution: A Review of Business Law in Indonesia and Thailand. *Jurnal Hukum Bisnis Bonum Commune*, 520–540. <https://doi.org/10.30996/jhbbc.v8i2.13155>
- Wen, W. (2022). Formality, Freedom of Contract and China's New Civil Code: A Legal Reform Recommendation for Land Sale Contracts. *U. Pa. Asian L. Rev.*, 17, 332.
- Wirakusuma, A., Hasibuan, A. S. A. I., Wijaya, A. A., Azhar, M. Y., & Munthe, M. A. (2025). Comparison of Principles in Rental Agreements According to the Civil Code and KHES. *Jurnal Cendikia ISNU SU*, 2(2), 246–249. <https://doi.org/10.70826/jcisnu.v2i2.840>