

LEGAL ANALYSIS OF THE PRINCIPLE OF FREEDOM OF CONTRACT TOWARDS LEGAL CERTAINTY AND JUSTICE IN AN AGREEMENT

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Abstract

This study aims to analyze the implementation of the principle of freedom of contract in Indonesian positive law and its implications for legal certainty and justice for the parties in an agreement. The main focus of this study is directed at how to balance individual autonomy (party autonomy) with legal protection for parties with weaker bargaining power, especially in the use of standard contracts. The research method used is normative juridical with a statute approach and a conceptual approach. Data were collected through a literature study of primary legal materials such as the Civil Code and relevant secondary and tertiary legal materials. The results of the study indicate that the implementation of the principle of freedom of contract as regulated in Article 1338 paragraph (1) of the Civil Code has provided legal certainty through the principle of *pacta sunt servanda*. However, in practice, this legal certainty is often formalistic and tends to benefit parties who are economically and informationally dominant. Substantive justice is often neglected when freedom of contract is used as an instrument of exploitation through disproportionate exoneration clauses. This study concludes that freedom of contract is not absolute, but must be limited by the principles of good faith, propriety, and public order in order to create a balance of rights and obligations that is just for all parties.

Keywords: Freedom of Contract, Legal Certainty, Justice, Agreement, Bargaining Position.

INTRODUCTION

The existence of agreements is fundamentally rooted in human nature as social beings (*zoon politikon*) who constantly interact to fulfill their diverse needs (Viyo, Simanullang & Septiandry, 2024). In an increasingly complex society, the exchange of interests (economic, services, or rights) can no longer be conducted simply through barter schemes or mere verbal trust. The need for a “legal framework” becomes crucial to ensure that agreements are legally binding (Sinaga, 2025). These agreements are often synonymously referred to as contracts in practice, as a form of agreement that serves as a means of allocating risk and providing assurance that the parties’ rights will be protected and obligations fulfilled according to pre-agreed terms (Aemanda, 2024).

Historically, the legal roots of agreements (or contracts) can be traced back to Ancient Rome, where agreements were initially formalistic and heavily tied to the ritual of specific words or actions (*stipulatio*) (Solikhudin, 2024). In this tradition, contracts are not only viewed as legal instruments but also have strong moral and religious dimensions. Along with the collapse of the feudal system, in the 19th century, under the strong influence of *laissez-faire* teachings, the will of the parties was considered the highest power that should not be interfered with by the state, so that anything contained in the contract was considered a reflection of justice for the parties (Mukin & Haris, 2024). The birth of the principle of freedom of contract cannot be separated from the need of society at that time for personal autonomy in managing their civil affairs. This mechanism ensures that individuals are free to exchange interests without excessive state intervention as the principle of freedom of contract, which essentially reflects respect for the autonomy of the will of the parties (party autonomy). In practice, this principle allows parties to formulate agreement clauses according to their respective interests without interference from other parties (Harahap & Chrisanta, 2023).

In this context, freedom of contract is a vital instrument, providing flexibility for parties to formulate agreements that best suit their specific economic needs and interests. Legally, the need for this principle rests on the belief that individuals are the best judges of their own interests (Ahmad & Zamri, 2024). Freedom of contract is not only viewed as a right but also as a prerequisite for creating dynamic legal certainty, where every freely made agreement has the binding force of law for the parties (Patria & Rokhim, 2025). However, the application of the principle of freedom of contract often raises problems, particularly related to the unequal bargaining position between the parties (Dewi, 2026). In many cases, the party with greater economic power tends to dominate the content of the agreement, potentially harming the weaker party. This raises fundamental questions about the extent to which the principle of freedom of contract is able to guarantee legal certainty and justice for the parties. The demand for guaranteed legal certainty and justice for the parties in the contract (coupled with the increasingly widespread trade activities in the European continent as previously described during the final collapse of the feudal system in Europe in the 19th century), then resulted in the development of the principles of contract law which recorded a significant paradigm shift, from the understanding of absolute freedom of contract to limited and controlled freedom. This concept existed along with the emergence of industrialization which gave birth to standard contracts, because it was realized that the absolute freedom in contracting (previously) was often only a legal illusion that benefited the party with dominant economic power, while the weaker party had no choice but to accept the terms offered (take it or leave it). This concept then became the foundation for modern contract law in various parts of the world, including in the French Civil Code which became the forerunner of the Dutch *Burgerlijk Wetboek* (BW) (Nabila, et. al., 2025).

In Indonesia, the need for a written codification of contract law emerged with the enactment of the *Burgerlijk Wetboek voor Indonesie* (Civil Code) by the Dutch colonial government in 1848 based on the principle of concordance. Prior to that period, the Indonesian

archipelago was subject to unwritten customary law, which prioritized the principle of cash and transparency in all transactions. The transformation from communal customary law to individualistic Western civil law marked a new chapter in the need for contract law in Indonesia, where written legal certainty became a primary prerequisite for supporting economic growth and ensuring legal relations between legal entities in the modern era. Then, entering the 20th century, along with developments in social and economic dynamics, particularly in the era of globalization and digitalization, contract law underwent another transformation, incorporating dimensions of social and humanitarian protection.

In this era, legal certainty in contracts requires clarity, consistency, and predictability of legal consequences. On the other hand, justice demands a balance of rights and obligations between parties to prevent exploitation or abuse of circumstances (Putra, et al., 2026). Likewise, the certainty of Social and Humanitarian Protection is an inseparable part of the legal framework of contracts. In this regard, the Courts and the Government, as the initiators and legislators of legislation, have begun to intervene in contracts deemed contrary to propriety and substantial justice. State intervention through legislation and court decisions is crucial in limiting freedom of contract, potentially leading to injustice. For example, in standard contracts, exoneration clauses are often found that limit or even eliminate the responsibilities of one party. This situation demonstrates that freedom of contract without adequate oversight can erode the principle of justice and reduce legal protection for certain parties.

This transition marks the birth of the concept of responsible freedom of contract, where the validity of an agreement is no longer measured solely by formal compliance but must also meet standards of good faith and not violate the public interest or fundamental individual rights. This limitation is not intended to eliminate the principle of freedom, but rather to ensure that freedom operates within fair boundaries to achieve a balance of interests between the parties. Therefore, based on the previous explanation regarding responsible freedom of contract, it can be said that legal relations between legal subjects in the civil realm always culminate in the birth of an agreement, manifested through a contract.

Fundamentally, contract law in Indonesia is based on the principle of individual autonomy, reflected in the principle of freedom of contract (party autonomy) (Arcaropeboka, 2026). This principle gives each individual the authority to determine the content, form, and party with whom they wish to bind themselves, as implied in Article 1338 paragraph (1) of the Civil Code, which states that all legally made agreements apply as law for those who make them. (However, in practice, absolute freedom often clashes with the reality of unequal bargaining power between the parties) (Estefania, et. al., 2025). This inequality risks converting freedom of contract into an instrument of legitimacy for the stronger party to enforce clauses that burden the weaker party, thereby obscuring the essence of justice itself (Hutabarat, 2022).

Based on this description, it can be understood that the principle of freedom of contract has two opposing sides: it serves as a means to guarantee individual freedom and also has the potential to lead to injustice if not balanced with the principle of legal certainty and adequate protection. Therefore, a comprehensive legal study is needed to analyze how the principle of freedom of contract is applied in Indonesian positive law and its implications for legal certainty and justice for the parties to an agreement. Furthermore, contracts arise in response to the need for stability in legal proceedings. Without a formal agreement, any future disagreements or breaches of contract will be difficult to resolve objectively.

The agreement itself functions as “private law” that protects the parties from arbitrary actions or unforeseen changes in circumstances (Ikhsan, Januardi & Satria, 2026). In the modern context, this need is further strengthened by the development of the business world, which demands efficiency and standardization. Therefore, contracts are no longer merely written evidence but rather a primary foundation for establishing legal order in the civil sector (Arif, Saputra & Hikmaturrasyidah, 2024). Therefore, an in-depth juridical analysis is needed

to review how the synchronization between the principles of freedom of contract, legal certainty and justice can be implemented in order to provide balanced legal protection for legal subjects involved in an agreement, so this research is important to carry out in order to provide a deeper understanding of the balance between freedom of contract, legal certainty and justice, as well as to formulate an ideal concept that can guarantee fair legal protection for all parties in an agreement.

RESEARCH METHODS

In general, this research uses the type of juridical (legal) normative (doctrinal) research, namely research that focuses on the inventory of positive law, synchronization of rules, or legal discovery in abstracto. The Statute Approach, namely examining written legal norms in legislation relevant to the research issue and the Conceptual Approach, namely using legal concepts, principles, and doctrines to build academic arguments. Using the statute approach, researchers can examine positive legal rules that regulate contracts, the principle of legal certainty, and protection of justice. The analysis is carried out on civil law codes, related laws and regulations, and contract law doctrine. Likewise, the Conceptual Approach is used to explore the theory and doctrine of contract law, so that the research does not stop at the text of the law, but also connects legal concepts with the values of legal certainty and justice. This strengthens the theoretical framework of the research and provides academic legitimacy. This combination ensures comprehensive, systematic, and academic research, linking written norms, legal theory, and judicial practice to address issues of legal certainty and justice in freedom of contract.

Regarding the data sources used in this research, the selection of legal sources is based on methodological considerations: normative juridical research emphasizes library research with analysis of written legal norms, doctrines, and court decisions. Researchers use primary legal materials to examine the conformity of norms with legal principles, identify gaps or disharmonies in regulations, and develop academically sound legal arguments. Thus, primary legal materials serve as a normative foundation that distinguishes legal research from other social research. Primary legal materials include statutory regulations (the 1945 Constitution, laws, government regulations, regional regulations), relevant court decisions, and international conventions or treaties (if relevant). In legal research, secondary legal materials can take the form of various academic publications and scholarly works that provide explanations, commentary, or analysis of primary legal materials. Focusing on document exploration through library research as the primary technique in legal research. Documentary research (or library research) is expected to enrich the discussion and sharpen the analysis.

Searching through Digital Media, because in the modern era, legal material collection techniques also include searching through credible digital legal databases. This includes the Snowball Sampling technique (in Legal Materials), which involves reviewing the bibliography of a book or journal and then tracing the original sources cited by the author. The legal analysis is qualitative-normative (doctrinal), as in this research. The collected materials are then analyzed based on the quality of their content, meaning, and binding force (not the quantity of data). This includes providing a critical assessment or determining whether there are conflicting norms (antinomies) or whether there are legal gaps related to a judge's decision that could satisfy a sense of justice.

RESULT AND DISCUSSION

In the realm of contract law in Indonesia, the implementation of the principle of freedom of contract creates a significant gap between normative concepts and practical reality. Normatively, Article 1338 paragraph (1) of the Civil Code grants full freedom to the parties to

formulate the contents of the agreement as a manifestation of party autonomy. However, in practice, especially in the use of standard contracts, unequal bargaining power often occurs. The economically and informationally dominant party often imposes unilateral clauses that burden the weaker party. Although the law limits this freedom through the principles of good faith, morality, and public order (Articles 1337 and 1338 paragraph (3) of the Civil Code), these limitations are often abstract. This creates a dilemma in court, where judges must choose between rigidly upholding legal certainty (*pacta sunt servanda*) or making corrections for the sake of substantive justice. This challenge is further complicated in the digital economy era, where platform-based electronic contracts are presented in a take-it-or-leave-it format without any room for negotiation, thus obscuring the essence of free will in an agreement.

This contractual inequality ultimately leads to the issue of the effectiveness of dispute resolution mechanisms. When contract implementation deviates from the initial agreement due to default or changing circumstances, law enforcement often finds itself caught in a conflict between formal legal certainty and the demands of substantive justice. If judges only apply the text of the contract, the weaker party will be further disadvantaged. Conversely, if the contract is set aside, legal certainty will be shaken as the parties lose control of the legal consequences of their agreements. From an institutional perspective, dispute resolution through litigation (courts) often faces classic obstacles: protracted processes, high costs, and the risk of inconsistent decisions. Ironically, non-litigation or alternative dispute resolution channels (such as mediation and arbitration), which are faster, more flexible, and oriented toward win-win solutions, have not been optimally utilized by the public. This issue is exacerbated in cross-jurisdictional digital contract disputes, which often spark debates regarding the validity of agreements and jurisdictional responsibility. Therefore, the primary challenge is to formulate a dispute resolution model that is technologically adaptive, procedurally efficient, and able to proportionally integrate legal certainty and justice.

In the Indonesian civil law system, contracts hold a central position as legal instruments governing the relationship between two or more parties. They are essentially manifestations of the parties' free will to create certain legal consequences based on the principle of freedom of contract, as normatively stipulated in Article 1338 paragraph (1) of the Civil Code (KUHPerdata). The provision stating that all legally made agreements apply as law for those who make them (*pacta sunt servanda*) provides legal certainty, predictability, and protection of the parties' legal expectations. From the perspective of the Legal Certainty Theory proposed by Gustav Radbruch and Jan M. Otto, this principle is essential because it ensures that everyone can estimate the rights, obligations, risks, and legal consequences of their actions, thus positioning contracts as a binding source of law. However, developments in modern law and business practices, particularly with the widespread use of standard contracts, show that freedom of contract understood in an absolute sense risk giving rise to substantive injustice.

In contemporary reality, the idealized principle of freedom of contract, based on the assumption of equal bargaining power, often confronts situations where one party possesses significantly greater economic dominance, leaving the weaker party faced with a take-it-or-leave-it choice without adequate room for negotiation. This situation transforms autonomy of will into a fictitious freedom, which the dominant party often exploits to insert exoneration clauses that unilaterally limit their legal liability and impose disproportionate risks on the weaker party. Therefore, when analyzed using the Theory of Justice, both Aristotle's commutative justice and John Rawls's concept of justice as fairness, the rigid application of contracts solely based on formal texts without regard for protection of the least advantaged party actually undermines the value of justice itself.

To bridge this antinomy between formal legal certainty and substantive justice, the Theory of Proportionality, proposed by Agus Yudha Hernoko, serves as a crucial balancing instrument (equilibrium point). This theory demands that freedom of contract must be exercised

responsibly (responsible autonomy) by ensuring that the distribution of rights, obligations, and risks remains within functionally reasonable limits. Restrictions on freedom of contract have actually been accommodated by the Indonesian legal system through the objective conditions of the agreement (Article 1320 in conjunction with Article 1335 and Article 1337 of the Civil Code) which prohibit causes that are contrary to public order and morality, as well as through the corrective function of the principle of good faith (Article 1338 paragraph (3) of the Civil Code). The principle of objective good faith demands standards of behavior in the form of propriety, fairness, and loyalty, which provide legitimacy for judges to make legal discoveries (*rechtsvinding*) and assess the context in which the contract was born, especially to prevent abuse of circumstances (*misbruik van omstandigheden*). Thus, judges play a central role, not merely serving as mouthpieces of the law, reading texts grammatically, but also being required to employ systematic, teleological, and sociological interpretation to harmonize *pacta sunt servanda* with justice. Ultimately, the successful implementation of the principle of freedom of contract in Indonesian law is not solely measured by fulfilling the formal requirements for a valid agreement, but rather by its ability to operate within the bounds of propriety and balance, thereby maintaining legal certainty without sacrificing justice for all parties bound by the agreement.

In civil law practice, contract disputes are essentially manifestations of a disruption to the balance of rights and obligations agreed upon by the parties, which generally stem from two main factors: breach of contract and structural injustice in the substance of the contract. Breach of contract, as defined in Article 1243 of the Civil Code, encompasses failure to fulfill obligations, delays in performance, inadequate performance, and violations of agreed-upon prohibitions (negative covenants). On the other hand, disputes also often originate from unreasonable clauses (unconscionable clauses) resulting from abuse of circumstances (*misbruik van omstandigheden*), where the economically dominant party exploits the weakness, ignorance, or urgency of the other party to impose an unbalanced standard contract. Therefore, the construction of an ideal contract dispute resolution must be directed at finding a point of balance (equilibrium) between legal certainty and justice, so as not to get caught in an approach that is too rigid (enforcing the contract solely textually) or too subjective (ignoring the contract for the sake of an unmeasured sense of justice).

This balance can be achieved through two main mechanisms: litigation and non-litigation. In litigation, the judge must act as an agent of substantive justice, conducting proportional judicial intervention. This intervention is necessary to assess whether the agreement was truly born of free will or whether it contains defects in will (*wilsgebreken*) such as error, coercion, or fraud. By basing their considerations on the principles of objective good faith and proportionality, the judge has a legal basis for correcting exploitative clauses without having to revoke the principle of freedom of contract altogether. Meanwhile, in non-litigation channels (such as negotiation, mediation, conciliation, and arbitration), the point of balance is achieved through a consensual, flexible, and cooperative approach oriented towards restoring business relationships and achieving win-win solutions, which are often more effective in realizing substantive justice than rigid and adversarial court processes. The complexity of dispute resolution is increasingly challenging in the era of digital transformation, where contractual relationships have shifted to electronic contracts (e.g., click-wrap, browse-wrap agreements), which are unilateral and significantly diminish consumer autonomy. Digital disputes present new issues such as algorithmic transparency, electronic standard clauses, cross-border jurisdiction, and even the access to justice gap due to the inefficiency of conventional litigation processes for micro-losses in e-commerce.

To address this, the legal system has adopted Online Dispute Resolution (ODR) and electronic mediation mechanisms, which offer fast, affordable, and cross-geographical technology-based dispute resolution. However, the digitization of dispute resolution must still

guarantee due process and must not be reduced to a mechanical process that eliminates considerations of propriety. Judges, arbitrators, and mediators are required to broaden their interpretation of conventional contract law doctrine to maintain its relevance in the digital environment, ensuring that technology is not misused to avoid legal liability. In conclusion, the resolution of contract disputes, whether conventionally or digitally, must integrate normative (respect for the existence of the contract) and substantive (testing good faith and balance) aspects simultaneously, in order to realize the full objectives of the law: providing measurable certainty, real benefits, and proportional justice for all parties.

CONCLUSIONS

The implementation of the principle of freedom of contract based on Article 1338 paragraph (1) of the Civil Code has normatively provided formal legal certainty through the application of the principle of *pacta sunt servanda*. However, in practice, this principle often ignores substantive justice when applied to contracts that have an imbalance in bargaining power, such as the phenomenon of standard clauses/exonerations produced unilaterally by dominant economic actors. Function of Legal Restrictions: Indonesian law does not adhere to the principle of absolute freedom of contract. The value of substantive justice is realized through internal and external restrictions in the form of fulfilling the objective legal requirements of the agreement (Articles 1320 and 1337 of the Civil Code) as well as optimizing the function of the Principle of Objective Good Faith (Article 1338 paragraph (3) of the Civil Code) and the principle of proportionality as a corrective instrument of justice to control exploitative and unequal contract clauses.

The mechanism for resolving disputes over agreed contracts to achieve legal certainty and justice, the dualism of dispute resolution characteristics, contract dispute resolution in Indonesia relies on two main paths that have different value orientations. The litigation path (District Court) tends to be rigid and formalistic with an emphasis on the legal aspects of the contract text to achieve formal legal certainty. In contrast, the non-litigation path (ADR/Arbitration) is consensual and flexible, making it more effective in achieving proportional solutions (win-win solutions) to uphold substantive justice for the parties. Legal certainty and true justice in dispute resolution through the courts can only be realized if the judge is not passive towards an unbalanced contract text. By using the instruments of proportionality and objective good faith, the judge has the authority to conduct judicial intervention to correct, set aside, or cancel clauses that are flawed in their will to restore the balance of the bargaining position of the disputing parties.

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