

Normative Analysis of Article 1338 of the Indonesian Civil Code in the Perspective of Article 28d of the 1945 Constitution

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ABSTRACT

This study analyzes the compatibility of Article 1338 of the Indonesian Civil Code (KUHPperdata) with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which guarantees the right to protection and fair legal certainty. Article 1338 affirms the principle of freedom of contract, which grants full autonomy to the parties to create agreements. However, in practice, this principle often results in an imbalance of positions between the stronger and weaker parties, especially in standard contracts that are drafted unilaterally. This study employs a normative juridical method with a statutory and conceptual approach to assess whether the absolute application of freedom of contract can be considered consistent with the constitutional principles of justice. The findings indicate that unrestricted freedom of contract may potentially eliminate legal protection for weaker parties and undermine the principle of justice guaranteed by the Constitution. Therefore, interpretative limitations on Article 1338 are necessary so that its implementation remains aligned with the values of social justice and the constitutional legality in Indonesia.

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1. INTRODUCTION

The principle of freedom of contract is a classical foundation of civil law that grants autonomy to legal subjects to regulate relationships and risks between them through agreements. In Indonesia, this principle is concisely formulated in Article 1338 of the Indonesian Civil Code (KUHPperdata), which stipulates that “all legally made agreements shall apply as law for those who make them.” This norm has long been praised as a manifestation of respect for the parties’ autonomous will and contractual legal certainty, while also serving as the primary engine of the modern market mechanism. However, the development of contractual practices particularly the expansion of standard-form contracts in digital transactions, platform services, and gig-economy work relations has created substantive challenges to the assumption of equal bargaining positions between parties, which is a prerequisite of freedom of contract. When standard-form contracts are drafted unilaterally by powerful economic entities and

accepted through a “click to agree” mechanism by weaker parties without genuine negotiation, the freedom claimed by Article 1338 has the potential to become a source of structural injustice. This situation raises an important constitutional question: to what extent may the authority of a civil-law norm such as Article 1338 be maintained when reality shows an erosion of the right to protection and fair legal certainty as guaranteed by Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia?

The theoretical debate concerning the limits of freedom of contract and the need for state intervention is not new. In the continental law tradition, autonomy of will is limited by the principles of public order and morality (e.g., Subekti’s doctrine), whereas the Anglo-Saxon tradition introduces the concept of unconscionability to refuse the enforcement of highly unfair contracts (Atiyah, 1985). In the Indonesian context, several empirical and normative studies highlight the transformation of contractual practices alongside economic digitalization. Kusumaatmadja (2018) argues that without artificial limits, freedom of contract may result in the erosion of protection for weaker parties, thus requiring more proactive legal instruments. Rahardjo (2019) emphasizes the relevance of the principle of social justice as a benchmark for interpreting agreements, while Wijayanti & Simatupang (2020) empirically show how exculpatory clauses in standard-form service contracts eliminate effective compensation mechanisms for consumers. In the comparative realm, studies on the United Kingdom’s Unfair Contract Terms Act (UCTA) and the European Union Consumer Protection Directive provide a conceptual foundation on how the law may invalidate clauses that eliminate remedial rights (Brownsword, 2008). In addition, constitutional studies on the “constitutionalization of private law” the process by which constitutional principles influence and limit civil law have developed and prompted demands that civil-law norms be tested for their conformity with the fundamental values of the constitution (Tamanaha, 2001). In Indonesia, discourse on the relationship between the Civil Code and constitutional principles has begun to grow, yet empirical studies specifically examining Article 1338 in relation to Article 28D of the 1945 Constitution remain limited; most works focus on phenomena surrounding standard contracts or consumer protection without tying their analysis to a formal constitutional review of Article 1338 (see the literature reviewed above) (Kusumaatmadja, 2018; Rahardjo, 2019; Wijayanti & Simatupang, 2020).

Based on this literature, the scientific novelty of this article lies in its effort to conduct a direct normative-constitutional analysis of Article 1338 of the Civil Code by using Article 28D paragraph (1) of the 1945 Constitution as a constitutional benchmark. Rather than merely examining the phenomenology of standard-form clauses or demanding sectoral revisions, this article assesses whether the literal application of Article 1338 within contemporary contractual conditions (standard contracts, digital contracts, and asymmetric employment relations) can withstand scrutiny when confronted with the principle of fair legal protection. In other words, this study applies the perspective of the constitutionalization of private law to formulate interpretive limits on Article 1338 so that its implementation aligns with constitutional ideals. This approach distinguishes the present research from previous studies, which are generally empirical-sectoral or theoretical without proposing concrete constitutional interpretive parameters for provisions in the Civil Code.

Based on the research gap and the scientific novelty described above, this article formulates the following main research questions: (1) Does the literal application of Article 1338 of the Civil Code in modern contractual practice conflict with the right to protection and fair legal certainty as mandated by Article 28D paragraph (1) of the 1945 Constitution?; (2) What interpretive or normative mechanisms can be used to limit freedom of contract so that the remedial rights of weaker parties are not eliminated?

This study aims to: (1) conduct a normative-judicial analysis to assess the compatibility of Article 1338 of the Civil Code with Article 28D paragraph (1) of the 1945 Constitution; (2) formulate interpretive principles and normative limitation models on freedom of contract that maintain a balance between party autonomy and constitutional protection; and (3) provide applicable legal policy recommendations in the form of judicial interpretive guidelines, sectoral legislative interventions, or protective instruments that may be adopted by lawmakers and courts.

2. METHODS

This study uses a normative juridical method with a qualitative approach, focusing on the analysis of positive legal norms and constitutional principles governing freedom of contract in Indonesia. The normative juridical approach is employed because the main issue examined does not originate from empirical events, but rather from the disharmony between the provisions in the Indonesian Civil Code (KUHPerdata), which regulates the principle of freedom of contract, and the constitutional provisions in the 1945 Constitution of the Republic of Indonesia, particularly Article 28D, which guarantees fair legal protection for every citizen.

The sources of data in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include relevant legislation such as the 1945 Constitution, the Civil Code, and Law Number 8 of 1999 on Consumer Protection. Secondary legal materials include academic literature, previous research, legal journals, and expert opinions discussing freedom of contract, exculpation, and legal protection for weaker parties in agreements. Meanwhile, tertiary legal materials include legal dictionaries and legal encyclopedias that help strengthen conceptual understanding.

The analysis is carried out qualitatively and descriptively by interpreting existing legal norms and then linking them with the principles of justice and constitutional protection. The stages of analysis begin by identifying articles that have the potential to create imbalance in agreements, such as provisions that grant unlimited freedom to one of the parties. This is followed by systematic and teleological interpretation of related regulations to assess their conformity with constitutional values. The results of this interpretation are then compared with practices or legal doctrines applied in other countries as a form of strengthening comparative legal analysis.

The research procedure does not involve experiments or the collection of empirical data, but rather the examination of legal documents and argumentative analysis of normative conclusions. Thus, this method is expected to explain rationally and critically how the application of the principle of freedom of contract may conflict with the principle of constitutional legal protection, as well as offer a more just and proportional model of limitation for the interests of national law.

3. FINDINGS AND DISCUSSION

Normative analysis of Article 1338 of the Indonesian Civil Code shows that the principle of freedom of contract grants full autonomy to the parties to determine the content of a contract. This article emphasizes the principle of *pacta sunt servanda*, meaning that a lawful agreement applies as law for the parties who create it (Soekanto, 2018). Although this principle is important for legal certainty, the study finds that in modern practice, this freedom is often applied formally without considering the balance of rights and obligations between the parties. Secondary data from contractual practices in the banking, telecommunications, and employment sectors indicate that parties with strong bargaining positions tend to use standard form contracts to limit their liability. Total exculpatory clauses often include the elimination of liability for gross negligence or fraud, causing economically or socially weaker parties to lose their right to claim compensation (Satjipto, 2019).

This phenomenon indicates a substantive imbalance between the rights and obligations of the parties. The formal freedom provided by Article 1338 of the Civil Code becomes illusory when it is not accompanied by the principle of substantive justice as guaranteed by Article 28D paragraph (1) of the 1945 Constitution. This article affirms the right of every citizen to recognition, guarantees, protection, and fair legal certainty, which serves as the constitutional basis to assess the validity of contracts that eliminate the rights of weaker parties (Wang, 2016).

Further analysis shows that unilateral contractual clauses not only harm weaker parties but also potentially create negative impacts on overall legal certainty. When contractual practices allow the elimination of the right to compensation, public trust in the legal system diminishes, as the law is perceived to protect only the strong and ignore the principle of social justice (Muttakin et al., 2015).

This phenomenon is reinforced by Indonesia's economic conditions, which exhibit a high disparity between parties with large capital and individuals or groups with weak economic positions. This inequality renders contractual freedom formal in nature, while substantively it is highly limited for weaker parties. Thus, the application of Article 1338 of the Civil Code shows a tendency to strengthen the position of stronger parties and weaken legal protection for vulnerable parties.

International literature indicates that this phenomenon is not unique to Indonesia. In the Netherlands and Germany, for instance, contract law has restricted formal freedom through the principles of reasonableness, good faith, and protection of weaker parties. Contract law in both countries emphasizes that agreements contrary to public morals or public interest have no legal force (Schlechtriem & Schwenger, 2016). This comparison highlights Indonesia's need to adjust the interpretation of Article 1338 of the Civil Code in accordance with constitutional principles.

Scientific findings from this study affirm that freedom of contract in Indonesia requires contextual interpretation. The formal principle should not be construed as unlimited freedom, but as a right that must be framed within the principles of social justice, public morality, and contractual responsibility. Thus, Article 1338 must be understood not only within the context of legal certainty but also within the context of constitutional protection of the rights of weaker parties (Soekanto, 2018).

The phenomenon of standard form contracts serves as a concrete example of how freedom of contract can be misused. Clauses that exempt liability entirely eliminate remedial principles for disadvantaged parties. This condition indicates the need for juridical limiting mechanisms, whether through sectoral legislation such as the Consumer Protection Act (Law No. 8 of 1999) or the Manpower Act (Law No. 13 of 2003 in conjunction with Law No. 6 of 2023), which are still insufficient to close the gap of injustice. In addition, the study finds that unclear boundaries of liability in contracts affect the behavior of stronger parties, encouraging exploitative contractual practices and neglecting social interests. These implications are not only individual but also systemic, as they alter public perception of legal justice and create long-term legal uncertainty.

Based on these findings, this study affirms the need to develop the doctrine of "constitutional freedom of contract," a concept that balances individual autonomy with public interest, justice principles, and social responsibility. This concept ensures that contracts that are legally valid are also substantively fair and aligned with the values of Pancasila and the 1945 Constitution.

A synthesis of these findings shows that Indonesian contract law is at a crossroads between a colonial tradition that emphasizes formal freedom and modern demands for the protection of the constitutional rights of weaker parties. This study, using a normative juridical approach, provides a scientific foundation that the interpretation and implementation of Article 1338 of the Civil Code must be evaluated to ensure alignment between civil law and constitutional principles.

These findings conclude that the phenomenon of unlimited contractual freedom is a real challenge for the enforcement of legal justice in Indonesia. The findings answer the research question regarding whether the principle of freedom of contract aligns with the principle of constitutional justice and affirm the need for normative and interpretative reforms to protect the rights of weaker parties.

Normative Analysis and Its Impact on Constitutional Justice

In the normative context, the principle of freedom of contract under Article 1338 of the Civil Code grants parties autonomy to determine the content of their contract. However, the study finds that this formal freedom has the potential to create substantive injustice if used without limitations. The analysis reveals several critical elements that form the basis for normative evaluation:

1. Freedom of Contract

Article 1338 affirms the principle of *pacta sunt servanda*, which obliges parties to adhere to agreements they have made. Although this principle is important for legal certainty, standard form contracts are often used to eliminate the rights of weaker parties, especially when total

- exculpatory clauses are inserted, including exemptions from liability for gross negligence and fraud (Soekanto, 2018).
2. **Protection of Constitutional Rights**
Article 28D of the 1945 Constitution emphasizes that every citizen has the right to recognition, guarantees, protection, and fair legal certainty. Contractual clauses that eliminate the right to claim damages are inconsistent with this constitutional principle, as weaker parties lose remedial mechanisms to recover the losses they suffer (Wang, 2016).
 3. **Social Responsibility and Reasonableness**
The analysis shows that unilateral and unrestricted contracts may violate the principle of substantive fairness. Parties with greater power tend to prioritize personal or organizational interests while disregarding social impacts on weaker parties. This phenomenon necessitates juridical limiting mechanisms to ensure that contracts comply with the principles of justice, good faith, and public morality (Satjipto, 2019).
 4. **Imbalance in the Position of the Parties**
Modern contractual practices in consumer and employment sectors reveal structural imbalances:
 - a. Stronger parties determine the content of standard form contracts unilaterally.
 - b. Weaker parties have limited options other than accepting the terms imposed.
 - c. Unclear boundaries of liability increase the risk of abuse of contractual power (Muttakin et al., 2015).
 5. **Normative and Social Impacts**
This study identifies five impacts arising from total exculpatory clauses:
 - a. Reduction of remedial rights for weaker parties.
 - b. Strengthening the structural position of stronger parties.
 - c. Creation of legal uncertainty and potential conflicts.
 - d. Decline in public trust toward the legal system.
 - e. Hindrance to the consistent application of social justice principles.
 6. **International Comparison**
Comparative studies show that developed countries place the protection of weaker parties as a principal element of contract law. For instance, in Germany and the Netherlands, clauses that contradict reasonableness or public morality can be invalidated by the courts. Indonesia, on the other hand, still relies on partial sectoral protection, thus requiring a normative adaptation of the interpretation of Article 1338 of the Civil Code to align with constitutional principles (Schlechtriem & Schwenger, 2016).

This normative analysis demonstrates that freedom of contract must not be used to eliminate the constitutional rights of weaker parties. A progressive interpretation of Article 1338 of the Civil Code is necessary to bridge the gap between formal law and substantive protection, ensuring that contracts remain legally valid while also being fair and consistent with the principles of the 1945 Constitution. Through the implementation of the recommended normative limitations, standard form contracts can balance legal certainty, social responsibility, and substantive justice. Weaker parties receive legal protection, while stronger parties retain contractual certainty without violating constitutional principles.

These findings affirm that modern contracts must consider three main elements: (1) freedom of contract, (2) protection of constitutional rights, and (3) social responsibility. The integration of these three elements constitutes an important scholarly innovation to strengthen the relationship between formal civil law and constitutional principles in Indonesia.

Analysis of Freedom of Contract and the Implications of Constitutional Justice in Standard Contracts

Freedom of contract in Indonesia grants autonomy to the parties to freely determine the contents of the contract, but the practice of total exculpatory clauses creates an imbalance between legal

certainty and the protection of the rights of weaker parties. Article 1338 of the Civil Code emphasizes the principle of *pacta sunt servanda*, but when an exculpatory clause includes gross negligence or fraud, the remedial rights of the weaker party are eliminated. This phenomenon contradicts Article 28D of the 1945 Constitution, which guarantees fair legal protection. The imbalance of bargaining positions is often found in consumer and employment standard contracts, where the stronger party has dominance in determining the contractual terms. Literature studies show that the principles of good faith and reasonableness must serve as the foundation so that contractual freedom does not lead to substantive injustice (Soekanto, 2018). Normative juridical analysis reveals that total exculpatory clauses can harm the weaker party both materially and immaterially. International comparative studies show that in Germany and the Netherlands, clauses that disadvantage weaker parties may be annulled by the courts. These findings indicate the need for normative adaptation to harmonize Article 1338 of the Civil Code with constitutional principles. Reforming the interpretation of standard contracts can create a balance between legal certainty and substantive justice. Therefore, integrating the principles of freedom of contract, constitutional protection of rights, and social responsibility becomes highly important.

The practice of standard contracts reveals several key elements that influence substantive injustice. First, dominant bargaining power enables the stronger party to establish unilateral clauses that limit liability. Second, the lack of transparency in contract drafting makes it difficult for the weaker party to understand their rights and obligations. Third, the absence of an effective supervisory mechanism allows potential abuses of contracts to persist. Fourth, this imbalance affects public trust in the legal system and the legitimacy of contracts. Fifth, research shows five significant types of social impact, ranging from the reduction of remedial rights to obstacles in implementing the principle of justice. Sixth, literature analysis also identifies that substantive protection must become a pillar in contract interpretation to balance the rights of weaker parties and legal certainty. Seventh, the integration of the three elements freedom of contract, constitutional protection, and social responsibility can form the concept of “constitutional freedom of contract.” Eighth, the underlying social phenomenon shows that stronger parties use exculpatory clauses to minimize legal risks. Ninth, such practices have the potential to violate the principle of substantive justice. Tenth, these findings emphasize the need for normative reform and strengthened supervisory mechanisms.

Table 1. Impact of Total Exculpatory Clauses on the Weaker Party

Impact of Exculpatory Clause	Explanation
Reduction of remedial rights	The weaker party loses the right to claim compensation for material and immaterial losses
Imbalance of bargaining position	The stronger party holds dominance in determining the contents of the contract
Potential legal conflict	Unclear boundaries of liability increase the risk of disputes
Decline in public trust	The public tends to doubt the effectiveness of the legal system
Barriers to social justice	Substantive justice principles are difficult to implement in contractual practice

Source: Results of normative research and juridical literature

International comparison shows a fairer practice in regulating contractual clauses. Countries such as Germany and the Netherlands apply the annulment of clauses that contradict the principles of fairness and public interest. This becomes a benchmark indicating that normative interpretation in Indonesia still requires reform. Total exculpatory clauses without limitations increase the risk of injustice and undermine the balance between formal and substantive law. Integrating substantive justice principles into contractual practices can ensure the protection of the interests of the weaker party. In addition, limiting exculpatory clauses can strengthen the legitimacy of contract law in the

eyes of the public. This reform is also aligned with the principles of good faith and reasonableness in the Civil Code (KUHPperdata). Thus, strengthening contract monitoring mechanisms by legal institutions and the judiciary becomes crucial. Reforming the interpretation of Article 1338 of the Civil Code allows formal contracts to remain valid while also being fair. This approach becomes a foundation for scientific innovation in Indonesian civil law.

Table 2. Strategies for Normative Reform

Reform Strategy	Objective
Limiting total exculpatory clauses	Protecting the weaker party from losing remedial rights
Strengthening contract oversight mechanisms	Ensuring contracts comply with principles of justice and the 1945 Constitution
Integrating substantive justice principles in the interpretation of Article 1338	Balancing legal certainty and social justice
Socializing the concept of constitutional freedom of contract	Improving understanding among legal practitioners and the public
Judicial guidelines for contract interpretation	Reducing potential disputes and legal uncertainty

Source: Synthesis of normative research and international literature

The analysis shows that the implementation of these reform strategies has a significant impact on legal and social stability. The weaker party receives effective protection while the stronger party still retains contractual certainty. The integration of the three main elements freedom of contract, constitutional rights, and social responsibility becomes an essential foundation for progressive contract law policies. Standard contractual practices without limits on total exculpation create risks of structural injustice. Normative reform will strengthen the legitimacy of formal law while also fulfilling constitutional objectives. Implementation of these strategies may also reduce the potential for legal conflicts. This approach provides a balance between legal certainty and substantive justice. This phenomenon confirms that contracts should not become instruments to nullify the rights of the weaker party. Ultimately, this synthesis proves the need to integrate constitutional principles into contractual practices. The overall approach becomes a scientific innovation for the development of Indonesian civil law.

This research produces the concept of “constitutional freedom of contract,” which combines formal and substantive principles. This concept provides practical guidelines for drafting standard contracts in the consumer and employment sectors. The results show that a progressive interpretation of Article 1338 can prevent the misuse of exculpatory clauses. Integrating principles of justice, good faith, and legal certainty enables the creation of fair contracts. This research also offers recommendations for policymakers to adjust sectoral regulations. The concept can be adopted by legal institutions and the judiciary in contract interpretation. International developments indicate the need for normative adaptation so that contracts in Indonesia align with global practices. Thus, this research links civil law theory and constitutional principles in an innovative manner. The synthesis of findings and normative recommendations provides a foundation for fair and sustainable contract law reform.

4. CONCLUSION

This research concludes that freedom of contract as regulated in Article 1338 of the Civil Code (KUHPperdata) must not be used absolutely to eliminate the rights of the weaker party, because such use contradicts the principle of constitutional rights protection guaranteed by Article 28D of the 1945 Constitution. The concept of “constitutional freedom of contract” emerges as the main scientific finding, emphasizing that contracts must balance three essential elements: freedom of contract, protection of constitutional rights, and social responsibility. These findings show that the regulation

of standard contracts without limitations on exculpation may result in substantive injustice, undermine the legitimacy of formal law, and reduce public trust in the legal system, thus necessitating normative reform to maintain the balance between legal certainty and substantive justice.

The findings of the research affirm the need for contract supervision mechanisms by legal institutions and the judiciary to ensure that contractual clauses do not harm the weaker party. International comparative analysis shows that limiting total exculpatory clauses is a globally recognized practice to protect the interests of weaker parties, and therefore Indonesia needs to adopt similar principles through a progressive interpretation of Article 1338 of the Civil Code. The practical application of this approach allows the creation of contracts that are valid, fair, and socially just, while simultaneously providing remedial protection to the weaker party and maintaining the responsibility of the stronger party, thereby enhancing contractual legitimacy and socio-economic stability.

This research opens opportunities for the development of further studies in two main directions: first, empirical analysis of the implementation of exculpatory clauses in sectoral contracts such as employment contracts and consumer contracts to assess the effectiveness of constitutional rights protection; second, broader comparative research on international practices in limiting liability-waiver clauses as a basis for national regulatory reform. The final conclusion emphasizes that a progressive interpretation of Article 1338 of the Civil Code through the concept of constitutional freedom of contract is not merely an academic study, but a strategic step to realize contracts that are formally valid and substantively fair, while strengthening the synergy between formal law, substantive justice, and constitutional principles in the practice of Indonesian civil law.

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