

## Hardship Clauses in Business Contracts from the Perspective of Prophetic Law

**Junaidi Arif\*** 

*Doctoral Student, Faculty of Law, Universitas Islam Indonesia, Yogyakarta, Indonesia, and Lecturer, Faculty of Law, Lambung Mangkurat University, Banjarmasin, Indonesia*

**Nandang Sutrisno** 

*Faculty of Law, Universitas Islam Indonesia, Yogyakarta, Indonesia*

**Dodik Setiawan Nur Heriyanto** 

*Faculty of Law, Universitas Islam Indonesia, Yogyakarta, Indonesia*

(\*) corresponding author, email: [junaidi.arif@ulm.ac.id](mailto:junaidi.arif@ulm.ac.id)

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### Abstract

*The concept of hardship clauses is not explicitly recognized in the Civil Code. In practice, Indonesian courts rely on force majeure and good faith (Article 1338 paragraph (3) of the Civil Code). Nevertheless, the development of hardship clauses in business contracts play an important role in providing flexibility and fairness to the parties involved when facing significant and unexpected changes in circumstances. The emergence of hardship clauses is driven by the dynamics of global business contracts and their continued development, which require a breakthrough system based on humanitarian values, without being constricted to legal positivism. From a prophetic legal perspective, the principles of justice (al-'adl), public welfare (maslahah), and protection of the rights of the weaker party serve as key elements in the drafting and implementation of such clauses. This article examines hardship clauses in the context of Indonesian law using a normative and conceptual approach based on prophetic values. The results of the study show that regulations regarding hardship clauses are not regulated in contract law in Indonesia.that should exist in accordance with prophetic legal values: humanization, liberation, and transcendence. On the other hand, hardship clauses, when viewed from an prophetic law perspective, demonstrate harmony, indicating that business relationships are not solely concerned with muamalah (transactional transactions) but aim to achieve the essence of divine values. This study recommends responsive regulatory reforms in the form of hardship clauses to ensure a balanced distribution of rights and obligations among parties in business contracts. The findings emphasize the importance of integrating prophetic values into contract law to create a more humane, responsive, and just legal system.*

**Keywords:** *Hardship Clause, Business Contract, Prophetic Law*



## INTRODUCTION

Philosophically, the connection between hardship clauses of business contracts and prophetic law is based on the fundamental concepts of justice, balance and social responsibility. In the field of commercial contracts, justice is normally evaluated by the performance of the formal obligations, but also through the moral principles contained in the agreement, namely substantial justice, in order to assure the fair result of the transaction for all the parties. Hardship provisions can be considered as an attempt to respond to imbalances that develop in contractual agreements as an instrument of renegotiation or alteration of contracts in the event of unforeseen situations.<sup>1</sup>

Contracts are vital legal documents in national and international business and trade. These form the framework for interaction between participants to also different economic transactions. The clauses in contracts play a very important role in managing the rights and obligations of each party and preparing them for the probability of certain situations occurring during the course of contract.<sup>2</sup> However, contracts are often exposed to dynamics that are unanticipated such as major changes that can impair the performance of the contract as agreed. This includes cases where the execution of the contract becomes extremely difficult for one of the parties, for example, due to changes in economic conditions, excessive inflation or abrupt variations in the exchange rate. This is referred to as hardship. However, Indonesian contract law has not been able to provide a comprehensive remedy for the parties experiencing hardship, causing many problems that have not yet been handled fairly.<sup>3</sup>

A fundamental distinction between hardship and force majeure is a prerequisite to an in depth investigation. In contract law, hardship means that implementation of the agreement is still possible, but unforeseen external circumstances have a substantial effect on the situation and make an unreasonable burden on one of the parties,

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<sup>1</sup> Syaugi Mubarak et al., "Legal Harmonization of International Trade Contracts in the Framework of Islamic Transaction Law," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 2 (2025): 376–92, <https://doi.org/10.18592/sjhp.v24i2.13977>.

<sup>2</sup> Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts," *Victoria University of Wellington Law Review* 39, no. 4 (2008): 709–26, <https://doi.org/10.26686/vuwlr.v39i4.5487>.

<sup>3</sup> Ferinda K Fachri, "Sejumlah Isu Hukum Perjanjian yang Bisa Jadi Ide Topik Tugas Akhir," accessed November 12, 2024, <https://www.hukumonline.com/berita/a/sejumlah-isu-hukum-perjanjian-yang-bisa-jadi-ide-topik-tugas-akhir-lt6452293aa4b30/?page=2>.

producing a serious imbalance. On the other hand, force majeure is an incident outside the control of the parties that makes the performance of the agreement virtually impossible. This distinction is important to stress, since the Indonesian legal system has traditionally emphasized the recognition of force majeure, while hardship has not yet received sufficient regulatory attention to preserve contractual equity within the dynamics of modern business transactions.<sup>4</sup>

Two main topics can be highlighted about the legal concerns of the non-adoption of the principle of hardship in the Indonesian legal system. Firstly, there is a contradiction between the principle of freedom of contract and the reality of power imbalances and external hazards. Secondly, the judiciary is sometimes required to devise remedies by resorting to generic concepts (e.g. good faith or force majeure) which may not necessarily offer sufficient or consistent legal grounds. This leads to variation in the outcome of litigation, unpredictability in contract law and at the sectoral level, maladministration in small, medium and large scale enterprises, limiting investment and upsetting overall business certainty.

From a practical perspective, the doctrine or model of hardship clauses has not been regulated or implemented in business practices in Indonesia, where such clause is usually inserted in the general provisions. The clause that has been applied is *overmacht* (force majeure). However, in practice, when a dispute develops, the basic principle that guides a judge in settling that issue is the idea of proportionality.<sup>5</sup> While hardship provisions have been conceptually and technically embraced in the international legal system, the lack of recognition of such clauses within the Indonesian legal system has an ultimate impact on the dispute resolution model that is still based mostly on the principle of good faith and force majeure.<sup>6</sup>

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<sup>4</sup> Catherine Kessedjian, "Competing Approaches to Force Majeure and Hardship," *Conference on Commercial Law Theory and the Convention on the International Sale Of Goods (CISG)* 25, no. 3 (2005): 415–33, <https://doi.org/10.1016/j.irle.2006.02.007>.

<sup>5</sup> Agus Yudha Hernoko, "'Force Majeur Clause' Atau 'Hardship Clause' Problematika Dalam Perancangan Kontrak Bisnis," *Perspektif* 11, no. 3 (2006): 203–27, <https://doi.org/10.30742/perspektif.v11i3.276>.

<sup>6</sup> Taufik Armandhanto et al., "Paradigma Prinsip Hardship Dalam Hukum Perjanjian Pasca Era New Normal di Indonesia," *Jurnal Hukum Bisnis Bonum Commune*, January 29, 2021, 50–60, <https://doi.org/10.30996/jhbbc.v4i1.4441>.

In comparison, the legal systems of Indonesia and Germany reveal significant differences in their treatment of hardship. In German law, the hardship doctrine is explicitly regulated under § 313 of the *Bürgerliches Gesetzbuch* (BGB) regarding *Störung der Geschäftsgrundlage* (disturbance of the basis of the transaction).<sup>7</sup> This principle is strongly related to the idea of renegotiating and amending contracts in order to correct imbalances resulting from major changes in the basic contractual terms. This trend highlights the importance of embedding the hardship concept within the Indonesian legal system in order to provide legal protection and to provide a more effective and efficient implementation of social justice.<sup>8</sup>

Several literature reviews proved the usefulness of hardship provisions as an alternative or breakthrough legal mechanism, which can facilitate economic development at national and worldwide levels. However, although these provisions are growing popular in many nations, the notion of hardship clauses is still rare in Indonesia. This is indicative of a regulatory and practical void in the use of hardship provisions which may otherwise facilitate fairer and rather transparent business risk management. Previous studies on hardship clauses in Indonesia generally focus on force majeure doctrine, comparative legal studies, or economic-contract perspectives. Limited attention has been given to integrating hardship clauses with ethical-religious values, particularly prophetic law. This study addresses that gap by examining hardship clauses through prophetic legal principles and proposing a normative framework for contractual justice in Indonesia.

This research responds to this gap by providing a normative-legal analysis that integrates the prophetic justification (justice, mercy, prevention of harm) into the hardship framework. At the same time, this research also aims to provide concrete recommendations in the form of criteria for identifying hardship, renegotiation mechanisms, and proposed jurisprudential guidelines for legislative reform and judicial/arbitral practice. Therefore, the fundamental objective of this study is to fill

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<sup>7</sup> Bürgerliches Gesetzbuch, 313 Störung der Geschäftsgrundlage (2025).

<sup>8</sup> Annisa Adelya Serawai, "Analisis Penerapan Prinsip Hardship di Jerman Dengan Indonesia Dalam Urgensi Pandemi Covid-19," *JURNAL RECTUM: Tinjauan Yuridis Penanganan Tindak Pidana* 5, no. 3 (2023): 232, <https://doi.org/10.46930/jurnalrectum.v5i3.3325>.

this theoretical vacuum and practical gap by giving a value-based and operational tool by which the regulation of hardship in Indonesia can be established legitimately, quantitatively and applicably.

In Indonesia's socio-cultural context, prophetic law offers a relevant normative foundation for hardship clauses because it emphasizes justice, deliberation, social harmony, and collective welfare. Integrating these values may strengthen contractual fairness while remaining consistent with local legal culture.<sup>9</sup> In practice, the application of these provisions in positive law often prioritizes efficiency and individual rights over broader moral considerations. In this context, prophetic law offers an ethical framework that emphasizes justice, balance, protection of vulnerable parties, and public welfare (*masalah*), ensuring that legal norms serve not only individual interests but also the common good.<sup>10</sup>

Drawing on the previous discussion, this research aims to address two main issues: (1) the practical implications of the absence of hardship clauses in the Indonesian legal system; and (2) the relevance of prophetic legal principles such as *adl* (justice), *rahmah* (compassion), and the prevention of harm, which can function as a normative basis in the formulation of hardship clauses. The purpose of this study is to include the prophetic legal perspective in the study of hardship provisions so that solutions are not only equitable and sustainable but also in accordance with moral values that give precedence to social justice in commercial dealings. The research also seeks to contribute to the development of fairer contract models, aligned with local values, in order to promote the development of more durable and harmonious commercial relationships.

## METHODOLOGY

This article employs a doctrinal legal research method and a conceptual approach to studying hardship clauses in business contracts, in the framework of the principles of

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<sup>9</sup> Aditya Yuli Sulistyawan, "Urgensi Harmonisasi Hukum Nasional Terhadap Perkembangan Hukum Global Akibat Globalisasi," *Jurnal Hukum Progresif* 7, no. 2 (2019): 171–81, <https://doi.org/10.14710/hp.7.2.171-181>.

<sup>10</sup> Shobirin Shobirin, "Jual Beli Dalam Pandangan Islam," *BISNIS : Jurnal Bisnis Dan Manajemen Islam* 3, no. 2 (2016): 239–49, <https://doi.org/10.21043/bisnis.v3i2.1494>.

prophetic law. The essay discusses and analyzes two research questions: (1) What are the practical implications of the absence of hardship clauses in the Indonesian legal system? (2) How can hardship provisions and prophetic law be integrated the aforementioned themes, namely to provide more fairness and balance in business contracts?. This essay was based on literature review for data collection. The main tool utilized was secondary data. The secondary data used were document studies, namely textbooks, articles and journals that contained expert opinions (doctrines) on hardship clauses, contract law and prophetic law.

## RESULT AND DISCUSSION

### **The Practical Implications of Hardship Clauses Analyzed Through the Principles of Prophetic Law**

The implications of the hardship clauses in practice as seen from prophetic legal principles indicate a legal perspective that prioritizes not only formal justice, but also substantive justice based on moral and humanitarian ideals. The use of hardship clauses, from a prophetic legal perspective, based on the goals of humanization, liberation and transcendence, is to preserve the contractual equilibrium, in the face of extraordinary changes in circumstances. The principle of humanization is about safeguarding the party that suffers difficulty from excessive damage. Liberation is one aspect that seeks to liberate parties from exploitative and unethical commercial practices. The last element, transcendence, underscores that every contract must be implemented with intention, moral responsibility, in accordance with God's justice. Therefore, hardship provisions are not only tools of current civil law, but also expressions of prophetic law they secure justice, the welfare and social balance of commercial practices.<sup>11</sup>

The National Sharia Council of the Indonesian Council of Ulama (*Dewan Syariah Nasional – Majelis Ulama Indonesia or DSN-MUI*) regularly issues fatwas and technical

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<sup>11</sup> Huala Adolf, "Prinsip Itikad Baik (Good Faith) Dalam Hukum Kontrak," Articles, *BANI Arbitration and Law Journal* 1, no. 1 (2024): 26–42, <https://doi.org/10.63400/balj.v1i1.3>.

guidelines that formalize the provisions of sharia economic contracts and products in order that values such as justice (*‘adl*), prevention of harm, and trustworthiness become practical references for market players and regulators. These steps are reinforced by financial sector regulatory policies and roadmaps that facilitate the development of sharia banking channels and sharia capital market instruments. As a result, regulatory fatwas, policies, and programs collectively form an institutional pathway for the internalization of prophetic principles into business governance and products.<sup>12</sup>

Conceptually and practically, hardship clauses are understood in the relevant legal literature as a doctrine that allows for contract adjustment when a supervening event fundamentally changes the balance of the contract, making performance of obligations extremely burdensome although not completely impossible.<sup>13</sup> These conditions create legal uncertainty, particularly when a renegotiation claim is brought to the judicial forums.<sup>14</sup>

A comparative analysis with German law indicates that the theory of hardship is expressly regulated by the § 313 of the Bürgerliches Gesetzbuch (BGB). This provision offers a legal foundation for the modification of the contract if a fundamental change in circumstances happens after the conclusion of the contract, and if such circumstances had been known at the time of the conclusion of the contract, the parties would not have entered into the contract on the same terms.<sup>15</sup> This clause provides for renegotiation or even contract termination if ongoing performance will cause a disproportionate hardship on one of the parties. This normative structure is very different from the Indonesian Civil Law which only acknowledges the principle of *pacta sunt servanda* (Article 1338 of the Civil Code) and force majeure (Articles 1244-1245 of the Civil Code), and the extension of contractual provisions through propriety and custom (Article 1339

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<sup>12</sup> Dewan Syariah Nasional, “Fatwa Dewan Syariah Nasional No. 157/DSN-MUI/VII/2024 Tentang Penerapan Prinsip Syariah Dalam Pelindungan Aset Investor Pasar Modal,” Fatwa, 2024. p 2-5.

<sup>13</sup> Tiurma M. P. Allagan et al., “Supervening Event on International Contracts in Indonesia,” *Journal of Central Banking Law and Institutions* 1, no. 2 (2022): 1–14, <https://doi.org/10.21098/jcli.v1i2.14>.

<sup>14</sup> Agus Yudha Hernoko, “Force Majur Clause atau Hardship Clause Problematika dalam Perancangan Kontrak Bisnis,” *Perspektif* 11, no. 3 (2006): 203, <https://doi.org/10.30742/perspektif.v11i3.276>.

<sup>15</sup> “Bürgerliches Gesetzbuch / § 313 Störung der Geschäftsgrundlage,” accessed November 30, 2025, [https://www.haufe.de/id/norm/buergerliches-gesetzbuch-313-stoerung-der-geschaeftsgrundlage-HI873797\\_p313.html](https://www.haufe.de/id/norm/buergerliches-gesetzbuch-313-stoerung-der-geschaeftsgrundlage-HI873797_p313.html).

of the Civil Code).<sup>16</sup> However, these rules do not constitute an explicit legal foundation for the contractual changes because of changed circumstances, where the performance becomes only exceedingly difficult but not impossible.

The absence of an equivalent provision to § 313 BGB in the Indonesian Civil Code indicates that the Indonesian legal system has yet to recognize the doctrine of hardship as a mechanism for correcting contractual imbalances. Therefore, protection for parties harmed by significant changes of circumstances relies on the existence of a hardship clause in the contract or on judicial interpretation based on the principle of good faith. This comparison highlights the necessity for the development of contractual norms or practices in Indonesia which are more flexible to changing conditions in order to attain modern contractual justice.

In practice, the Indonesian contract law system constantly relies on the clauses based on the principles of *pacta sunt servanda* and *force majeure*, without providing explicit recognition for the doctrine of hardship. Article 1338 of the Civil Code states that “all legally formed agreements shall bind the parties as law,” and thus agreement of tense contracts to be performed as agreed unless otherwise stipulated or justified by lawful grounds. This construction is further strengthened by Article 1339 of the Civil Code,<sup>17</sup> which expands the contents of the agreement through propriety, custom, and law as complementary norms, yet still it fails to provide for renegotiation due to changes in aggravating circumstances.<sup>18</sup> On the other hand, the only explicitly regulated mechanism for exemption from liability is found in Articles 1244 and 1245 of the Civil Code regarding force majeure, namely the condition when the debtor cannot fulfill the performance due to an unforeseen event beyond the debtor’s responsible, thereby leading to an impossible implementation of the contract, rather than a merely difficult one.<sup>19</sup>

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<sup>16</sup> Niru Anita Sinaga, “Perspektif Force Majeure Dan Rebus Sic Stantibus Dalam Sistem Hukum Indonesia,” *Jurnal Ilmiah Hukum Dirgantara* 11, no. 1 (2021): 1–27, <https://doi.org/10.35968/jh.v11i1>.

<sup>17</sup> Kitab Undang-Undang Hukum Perdata (Indonesian Civil Code/*Burgerlijk Wetboek voor Indonesië*), article 1339.

<sup>18</sup> Kitab Undang-Undang Hukum Perdata (Indonesian Civil Code/*Burgerlijk Wetboek voor Indonesië*), article 1244 & 1245.

<sup>19</sup> Daryl John Rasuh, “Kajian Hukum Keadaan Memaksa (Force Majeure) Menurut Pasal 1244 Dan Pasal 1245 Kitab Undang-Undang Hukum Perdata,” *Lex Privatum* 4, no. 2 (2016): 173–80.

This pattern is also seen in the judicial practice of the Indonesian Supreme Court. For example, Supreme Court Decision No. 20/Pdt.Sus/2021/PN Dps is a case of industrial relations dispute between PT Dua Cahaya Anugrah as the owner of Hotel W Bali Seminyak and 34 workers who refused to terminate their employment (PHK). Although some workers accepted the decision, 34 others sued the company, until finally the Panel of Judges in its decision stated that the company was indeed experiencing force majeure or at least hardship conditions.<sup>20</sup> In a number of judicial practices, the application of force majeure is characterized by the court using severe and selective standards of examination of claims for force majeure.

In Decision No. 587 PK/Pdt/2010, the panel of judges dismissed the contention that rain, floods and bridge damage hindering coal shipments were force majeure, on the grounds that such events were still regarded as foreseeable business risks. In extreme contexts, such as the social unrest of May 14, 1998 (2914 K/Pdt/2001), the panel of judges rejected the force majeure argument for the destruction of inventory, considering that neither the causal relationship nor the nature of the events fulfilled the objective and subjective elements of force majeure as required by Articles 1244–1245 of the Civil Code.<sup>21</sup>

These judicial patterns demonstrate that the Indonesian courts emphasize the direct relationship and the objective impossibility of fulfilling obligations as absolute requirements for claiming force majeure. Therefore, force majeure is only accepted in circumstances truly beyond the control of the parties and not merely impeding or burdening the performance of the contract.<sup>22</sup> Therefore, doctrinally and jurisprudentially, the Indonesian legal system does not provide adequate space for resolving situations of hardship, namely situations where a contract can still be enforced but imposes a disproportionate burden on one of the parties. This gap then

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<sup>20</sup> Mahkamah Agung, “Supreme Court Decision No. 20/Pdt.Sus-PHI/2021/PN Dps,” 2021.

<sup>21</sup> Muhammad Yasin, “Penting Diketahui! Alasan-Alasan Force Majeur dalam Yurisprudensi Perdata,” Hukumonline, accessed November 30, 2025, <https://www.hukumonline.com/berita/a/penting-diketahui-alasan-alasan-iforce-majeur-i-dalam-yurisprudensi-perdata-lt5e734b032159c?page=all>.

<sup>22</sup> Davide Burkhart and Christoph Bode, “Force Majeure in Business Relationships,” *Journal of Business Research* 195 (2025): 1–15, <https://doi.org/10.1016/j.jbusres.2025.115409>.

opens up the urgency of implementing or recognizing hardship clauses as a corrective mechanism to maintain contractual fairness in modern business practices.<sup>23</sup>

However, the principle of hardship has not been explicitly regulated, making its practical application rely on contract wording,<sup>24</sup> judicial interpretations, or references to international instruments such as the UPICC and post-COVID studies,<sup>25</sup> indicating non-standardized renegotiation practices. A number of jurisprudential decisions or analyses further suggest the need for normative harmonization that incorporates ethical-prophetic indicators into the interpretation of hardship clauses in order to ensure that the integration of prophetic indicators, such as *adl* (justice), *rahmah*, (compassion), *maslahah* (public welfare), and *amanah* (trustworthiness) They have the potential to bridge the legitimacy of values and operational needs in the reformulation of hardship clauses for the Indonesian context.<sup>26</sup>

The prophetic legal approach to the adoption and implementation of the hardship clause emphasizes the principles of justice, wisdom, and welfare rooted in prophetic values. This notion offered by Sidharta comprises of three key elements, namely Humanization, Liberation and Transcendence.<sup>27</sup> Humanization is the understanding of humanity. Man is considered as God's created possessing intrinsic dignity and thus must be treated humanely.

The second element, Liberation, is designed to free people from constraining systems of any sort, be it social, economic or political in nature. This denotes that parties to the contract can adjust the terms of the contract and renegotiate when faced with unforeseen situations so that they are saved from any injustices that may arise from unforeseen events. The third element, Transcendence, is a legal orientation that

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<sup>23</sup> Agri Chairunisa Isradjuningtias, "Force Majeure (Overmacht) dalam Hukum Kontrak (Perjanjian) Indonesia," *Veritas et Justitia* 1, no. 1 (2015): 1–14, <https://doi.org/10.25123/vej.1420>.

<sup>24</sup> Hukumonline. "Penerapan Force Majeure dan Hardship dalam Kontrak Energi di Indonesia," Hukumonline, March 13, 2025, <https://www.hukumonline.com/berita/a/penerapan-force-majeure-dan-hardship-dalam-kontrak-energi-di-indonesia-lt67d3a32e332a3/>

<sup>25</sup> Junaidi Junaidi et al., "Force Majeure or Hardship Principle In Termination of Employment During The Covid-19 Pandemic," *SASI*, 2022, 344–57, <https://doi.org/10.47268/sasi.v28i3.941>.

<sup>26</sup> Pardomuan Gultom and Romainur, "Contract Renegotiation Due to the Covid-19 Pandemic from the Hardship Perspective," *Indonesian Law Journal* 15, no. 1 (2022): 79–99, <https://doi.org/10.33331/ilj.v15i1.86>.

<sup>27</sup> Shidarta, "Hukum Profetik: Antara Humanisasi, Liberasi, dan Transendensi," Binus University, accessed November 12, 2024, [https://business-law.binus.ac.id/2019/05/02/antara\\_humanisasi\\_liberasi\\_transendensi/](https://business-law.binus.ac.id/2019/05/02/antara_humanisasi_liberasi_transendensi/).

connects the entire process of forming, enforcing, and implementing law with divine values, morality, and spiritual responsibility, so that the law is not merely legal, but also just and ethically meaningful.<sup>28</sup>

In this sense, the hardship provision is understood as an instrument that is used not just to preserve legal interests but also to achieve social and moral fairness for the parties to an agreement. The core idea of prophetic law is the construction of a legal system that seeks the common good according to universal principles such as honesty, compassion and social justice, not only via normative regulation of human relations but also through a transformational mission.<sup>29</sup> The prophetic legal paradigm is not anti-positivistic. Rather, it recognizes that the modern use of law is often instrumental, with legal principles being used to achieve certain ends. However, in terms of the reality or empirical aspects, these positive norms are often not sufficient to cope with the more complicated situations.<sup>30</sup> This perspective demands what can be called a “moral reading” in the making and applying of law.<sup>31</sup>

In line with the prophetic goals of welfare of the people and substantive justice, hardship clauses offer a possibility for parties affected by significant changes in circumstances to avoid injurious injustice. This approach emphasizes the need of empathy and shared responsibility for maintaining balance and addressing disparities that may occur in contractual partnerships.<sup>32</sup> On the prophetic level, the application of hardship clauses aims at fostering the common good, and at distinguishing economic operations from unilateral objectives that endanger human values.

The prophetic law is based on two primary pillars, namely justice (*al-'adalah*) and public welfare (*al-maslahah*). The prophetic law demands the application of textual legal rules, but it also calls for the consideration of the social context and the human

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<sup>28</sup> Bachrul Amiq and Wahyu Prawesthi, “Standard Contract Based on the Legal Positivist Paradigm of Study;” conference paper presented at the *International Conference on Environmental and Energy Policy* (ICEEP 2021), Surakarta, Central Java, Indonesia, 2021, <https://doi.org/10.2991/assehr.k.211014.055>.

<sup>29</sup> Ellectrananda Anugerah Ash-shidiqqi, “Meneropong Ilmu Hukum Profetik: Penegakan Hukum yang Berketuhanan,” *Amnesti Jurnal Hukum* 2, no. 1 (2020): 33–42, <https://doi.org/10.37729/amnesti.v2i1.701>.

<sup>30</sup> Absori, *Pemikiran Hukum Profetik Ragam Paradigma Menuju Hukum Berketuhanan* (Ruas Media, 2018). p. 15.

<sup>31</sup> Ronald Dworkin, *Freedom's Law The Moral Reading of The American Constitution* (Oxford University Press, 1996). 98.

<sup>32</sup> Jing Zhou, “Basic Legal Framework of Hardship Clause and Comparative Research,” *Science of Law Journal* 2, no. 2 (2023): 1–20, <https://doi.org/10.23977/law.2023.020202>.

values relevant to the needs of society. In the event of difficulties in the implementation of a contract that are not expected (hardship), the principles of *maqasid sharia* or objectives of sharia, especially the protection of property (*hifzh al-mal*),<sup>33</sup> provide mechanisms to protect the parties to the contract from unjust losses. The hardship clause in Islamic law can be understood as an expression of the concepts of *al-dharar yuzal* (damage must be eradicated) and *la darar wa la dirar* (there shall be neither harm nor reciprocating harm) which are the foundation for equitable renegotiation or modification of contracts.<sup>34</sup>

The hardship clause, therefore, represents a dimension of prophetic law that synthesizes divine and humanistic principles, maintains a balance between rights and duties, and accommodates socio-economic phenomena within the parameters of divine justice. This view is supported by the Qur'anic passage in Surah Al-Baqarah (2:280). The interpretation of verse 280 is essentially related to debts. The verse is placed after Surah Al Baqarah, verses 271 to 274, which discuss the virtues or recommendations for giving charity and alms, and verses 275 to 279, which describe the prohibition of usury transactions. This concept essentially teaches the values of compassion and justice for all parties in order to preserve all aspects of life within the community through the role of charity and ensure the avoidance of the cruelty of usury.<sup>35</sup> In the Tahlili interpretation, Verse 280 contains three main values: 1) encouraging charity to debtors unable to repay their obligations; 2) requiring creditors to grant respite towards debtors experiencing financial hardship; and 3) the debtor should be released from part or all of their debt and/or look for other options if they are totally unable of paying it back.<sup>36</sup>

Furthermore, this concept is also supported by the meaning or content of QS. An-Nisa verse 29. This passage is interpreted to signify that seizing the property of another person in an illegal or unjustifiable manner is prohibited except by trade or sale based

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<sup>33</sup> Ali Sodikin, *Fiqh Dan Ushul Fiqh Sejarah, Metodologi Dan Implementasinya Di Indonesia* (Beranda Publishing, 2012).

<sup>34</sup> Wildan Jauhari, *Kaidah Fikih; Adh-Dhararu Yuzal* (Rumah Fiqih Publishing, 2018). pp. 1-20.

<sup>35</sup> M. Quraish Shihab, *Tafsir Al-Misbab Pesan, Kesan Dan Keserasian al-Qur'an* (Lentera Hati, 2009). pp. 729-730.

<sup>36</sup> Lajnah Pentashihan Mushaf, *Al-Qur'an Dan Tafsirnya Jilid II* (Lajnah Pentashihan Mushaf Al-Qur'an Departemen Agama RI, 2011)., p 153-154.

on mutual consent. This principle is mainly based on the understanding that, in essence, the ownership of property in Islam contains three essential aspects: 1) religion recognizes the right to private property and the right to protection; 2) when wealth reaches a certain threshold (*nisab*), the owner shall be obliged to pay *zakat*; and 3) even when an individual possesses substantial wealth, such property cannot be taken unilaterally and must instead be transferred only through legal procedures.<sup>37</sup> On this basis, three substantive principles may be derived:

1	Justice and Relief
2	Renegotiation or Contractual Adjustment
3	The Principle of Honesty in Transactions

Table: Fundamental Values Underlying Hardship Clauses

A careful consideration of several verses in the Qur'an reveals the significance and correlation of the Hardship Clause, within a prophetic legal approach, to modern contract law issues, which is not merely a legally binding business agreement but also reflects social ethics, values of compassion, and concern for the common good, rooted in prophetic moral teachings or the divine dimension to create a more harmonious and just social order.<sup>38</sup> Therefore, hardship clauses, as an alternative solution to contractual problems in the modern era, can be implemented on a humanitarian basis derived from divine principles. In this case, it is necessary to assess the application of the hardship clause in light of the principles of prophetic law oriented towards humanity (humanization), liberation from injustice (liberation), and divine values (transcendence).<sup>39</sup>

The interpretation of prophetic legal principles that emphasize the values of Transcendence (*tawhid*), Humanization (*al-insāniyyah*), and Liberation (*al-tahrīr*) reveal that the application of hardship clauses in the Indonesian business legal system can be seen as reflective efforts to balance economic interests and moral responsibility. The

<sup>37</sup> Lajnah Pentashihan Mushaf, *Al-Qur'an Dan Tafsirnya Jilid II.*, p 216-219.

<sup>38</sup> Shobirin Shobirin, "Jual Beli Dalam Pandangan Islam," *BISNIS : Jurnal Bisnis dan Manajemen Islam* 3, no. 2 (2016): 239, <https://doi.org/10.21043/bisnis.v3i2.1494>.

<sup>39</sup> M. Syamsuddin et al., *Ilmu Hukum Profetik: Gagasan Awal Landasan Keilsafatan dan Kemungkinan Pengembangannya di Era Post Modern* (Center for Legal Studies, Universitas Islam Indonesia in collaboration with FH UII Press, 2013).

value of transcendence requires the orientation of every business contract not only toward material gain but also toward substantive justice and blessings in the transaction, as emphasized in the *maqāṣid al-syarī'ah* (laws of the Islamic law) to preserve property (*ḥifẓ al-māl*) without neglecting the principle of public welfare (*maṣlahah 'āmmah*).<sup>40</sup> In the context of hardship, this principle emphasizes the need for renegotiation mechanisms as a way to maintain justice and prevent injustice when economic conditions change drastically and unexpectedly.

The notion of Humanization, however, emphasizes respect for human dignity as legal subjects with equal rights and obligations. Hardship clauses allowing renegotiation without penalty and unilateral termination are an acknowledgement of ethical and equitable business relationships.<sup>41</sup> This is consistent with the objective of prophetic law to establish a legal system that humanizes human beings (*insāniyah al-qānūn*), since contracts are not only hard legal tools, but also a form of social trust (a trust-based relationship) between the parties. Therefore, the existence of hardship clauses can be considered as a kind of moral safeguard in civil partnerships, which allows the parties to establish a new balance without causing damage to either party.

The value of Liberation (freedom from structural injustice) provides an ethical basis for the rejection of commercial practices that oppress one party through unequal clauses.<sup>42</sup> One-sided and biased contracts are still common in Indonesian commercial practice, notably in the relationship between corporate giants and small businesses or parties with weak bargaining power. The application of hardship clauses based on liberative principles will boost the development of fair and mutually beneficial contractual mechanisms, where the right to renegotiate is perceived as a component of distributive justice.<sup>43</sup> This also solidifies the perspective that prophetic law is not just an idealistic norm, but can be operationalized as a paradigm in the creation and implementation of modern business contracts in Indonesia.<sup>43</sup>

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<sup>40</sup> Kuntowijoyo, *Paradigma Islam: Interpretasi untuk Aksi* (Mizan, 1991), 279–280.

<sup>41</sup> Siswanto Siswanto, “Perspektif Amin Abdullah Tentang Integrasi-Interkoneksi Dalam Kajian Islam,” *Articles, Teosofi: Jurnal Tasawuf Dan Pemikiran Islam* 3, no. 2 (2013): 376–409, <https://doi.org/10.15642/teosofi.2013.3.2.376-409>.

<sup>42</sup> Amin Abdullah, *Islam sebagai Paradigma Ilmu: Integrasi Interkoneksi Ilmu dan Agama* (Pustaka Pelajar, 2003)

<sup>43</sup> Siswanto. “Perspektif Amin Abdullah Tentang Integrasi-Interkoneksi Dalam Kajian Islam”.

## **Integrating Hardship Clauses and Prophetic Law to Improve Justice and Balance in Business Contracts**

Prophetic law requires that business contracts be concluded on the basis of the *al-adl* (justice) concept which tries to avoid the disadvantage or exploitation of either party. Hardship clauses, which provide a party the right to renegotiate or terminate a contract when the underlying conditions change abruptly and suddenly, might be viewed as an instrument reflecting this notion of justice. The prophetic legal framework, which is based on the values of *al-'adl* (justice), *al-maslahah* (public welfare), and the principle of protection against relational vulnerability, is not intended to replace positive legal obligations in the Indonesian contract system, but rather to provide an ethical basis that enriches its normative orientation.<sup>44</sup>

In the national civil law system, contractual relationships continue to be built on the principle of *pacta sunt servanda*, as provided for in Article 1338 of the Civil Code, and the force majeure regime in Articles 1244–1245 of the Civil Code that only normatively recognizes the release or modification of obligations when the performance becomes impossible. Therefore, the hardship theory has not yet had a clear legal basis in Indonesian positive law. However, the prophetic framework might serve as a normative justification to bridge this gap, through the principle of good faith, based on Article 1339 of the Civil Code, which imposes on the parties not only the literal execution of the contracts, but the proper regard for propriety and balance.

In this scenario, the inclusion of a hardship provision is a vital instrument to combine moral demands and legal certainty simultaneously.<sup>45</sup> The renegotiation mechanism in a hardship clause can be seen as a real application of the principle of *al-'adl*, as a way to avoid structural injustice due to the change of circumstances that are disproportionate to the burden. In addition, it also ensures the implementation of the principle of *al-maslahah*, because it maintains the continuity of the contract in a more

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<sup>44</sup> Vernon Valentine Palmer, “Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts,” *The American Journal of Comparative Law* 70, no. 1 (2022): 70–88, <https://doi.org/10.1093/ajcl/avac017>.

<sup>45</sup> Ndubuisi Nwafor and Chidi Lloyd, “Re-Imagining the Doctrines of Hardship and Exemption/Force Majeure under the Cisg and Unidroit Principles of International Commercial Contracts,” *Global Journal of Comparative Law*, 8, no. 1 (2019): 52–79, <https://doi.org/10.1163/2211906X-00801003>.

adaptive way to the dynamics of the economy and external risks. Thus, the hardship clause should not only be viewed as a contractual innovation but also a form of harmonization between the ethical imperatives in prophetic law and the legal imperatives in Indonesian civil law. This, in turn, will strengthen the rationality of substantive justice in modern contract law practice.

In many cases, external uncertainties such as economic changes or natural disasters may cause one party in a contractual relationship to face an extremely heavy or even impossible burden to sustain. In these situations, the application of a hardship clause provides room to adjust the terms of the contract, which thus ensures that both parties are treated fairly without harming either party. This principle is in line with Surah Al-Baqarah [2:188]. This verse highlights the importance of fairness in transactions and the prohibition against causing harms to others.<sup>46</sup>

The principle of ease (*al-yusr*) in prophetic law is also highly relevant in the context of the application of the hardship clause. Islam teaches that human affairs should be carried out with ease, rather than with difficulty, as stated in Surah Al-Baqarah [2:286].<sup>47</sup> This principle allows for flexibility in business contracts when one party experiences extraordinary hardship due to unforeseen changes in circumstances. Hardship clauses, thus, provide an opportunity for disadvantaged parties to request adjustments to contractual terms that may alleviate their burdens, as long as the changes do not unfairly disadvantage the other party. This reflects the understanding that contracts in Islam are not rigid, but shall be made adaptable to existing conditions to ensure that no party is subjected to unbearable hardship.

The business contracts application of hardship clauses is likewise based on the public welfare principle (*maqasid alshariah*) which is the ultimate goal of all prophetic law. Public welfare is an attempt to achieve the common good and to prevent unnecessary harms.<sup>48</sup> In the context of business contracts, the notion of *maslahah* stipulates that each

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<sup>46</sup> Ministry of Religions Republic of Indonesia, “Al-Qur’an, Surah Al-Baqarah, 2:188. Translation by the Ministry of Religious Affairs of the Republic of Indonesia,” 2016.

<sup>47</sup> Subekti, *Pokok-Pokok Hukum Perdata* (Intermassa, 2010). p. 75.

<sup>48</sup> Nur Hidayah, “Asas Kontrak Perjanjian dalam Perspektif Islam,” *Al-Huquq: Journal of Indonesian Islamic Economic Law* 1, no. 2 (2019): 166, <https://doi.org/10.19105/alhuquq.v1i2.3183>.

transaction should benefit all parties involved, rather than merely serving the interest of one side. The hardship clause, which allows for the renegotiation or termination of a contract in the event of exceptional difficulty, is intended to safeguard this ideal of public benefit. Without this kind of clause, one party affected by adverse external conditions could be forced to bear significant losses disproportionate to their interests in the contract.

Given the above perspectives, hardship clauses facilitate the realization of the principle of *maslahah* in a fairer manner, since both parties are provided with an opportunity to negotiate in order to find a mutually beneficial solution and avoid excessive losses. This approach is further reinforced by Surah Al-Mumtahanah [60:8], which emphasizes the significance of actions that bring mutual benefit and protect the interests of others in transactions.<sup>49</sup>

Hardship clauses is also consistent with Islamic teachings, which prioritize deliberation or negotiation in dispute resolution. In Islamic law, deliberation is deemed one of the best ways to achieve peaceful and fair dispute resolution. This principle of deliberation teaches that every issue should be discussed openly in order to find a solution that benefits both parties. In the event of unexpected changes in a business contract, the implementation of a hardship clause opens the opportunity for the parties to engage in dialogue and reach a mutual agreement on how to achieve a contractual adjustment. This reflects a process that not only prioritizes the interests of one party but strives to find a more inclusive and equitable solution, in line with Islamic values of justice and balance. This principle is reflected in Surah Ash-Shura [42:38] this verse highlights the need for deliberation in decision-making, which involves multiple parties.<sup>50</sup>

Another essential principles of prophetic law is the prohibition of uncertainty (*gharar*) and exploitation (*riba*) in business transactions. *Gharar*, which refers to uncertainty that is detrimental to one party, and *riba*, which relates to unjust gains or interest, are

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<sup>49</sup> Ministry of Religions Republic of Indonesia, "Surah Al-Mumtahanah [60:8]. Al-Qur'an, Translation by the Ministry of Religious Affairs of the Republic of Indonesia," 2016.

<sup>50</sup> Ministry of Religions Republic of Indonesia, "Surah Ash-Shura [42:38]. Al-Qur'an, Translation by the Ministry of Religious Affairs of the Republic of Indonesia," 2016.

prohibited practices in Islamic teachings.<sup>51</sup> In business contracts devoid of mechanisms such as hardship clauses, uncertainty due to major changes in external conditions can lead to injustice, where one party is forced to bear a disproportionate large loss inconsistent to their contribution to the transaction. Hardship clauses, which provide room for renegotiation or termination of the contract, prevent uncertainty that is detrimental to one party and avoid exploitative practices, since they give both parties the opportunity to adjust contractual terms to ensure fairness and appropriateness to the existing conditions.<sup>52</sup> This principle is reinforced by Surah An-Nisa [4:29].<sup>53</sup> This emphasizes the importance of fair transactions that do not harm the other party.

However, while integrating hardship clauses and Prophetic Law with Indonesian law offers many benefits, challenges remain in its implementation. One major challenge is the limited regulations in many legal systems that do not fully adopt sharia principles. In some countries, particularly those with mixed legal systems, the application of hardship clauses in business contracts may not be clearly regulated or even explicitly recognized.<sup>54</sup> Therefore, efforts are needed to adapt Islamic legal principles to the prevailing legal system in those countries, taking into account the relevance and sustainability of the principles of justice and convenience in the context of modern business contracts.<sup>55</sup>

Another challenge is compliance with prophetic principles by the parties involved in the contract. In the highly profit-oriented business world, some parties may not fully understand or accept the application of prophetic principles in hardship clauses, especially when implementation may potentially limit their economic interests. This condition requires a deeper understanding and awareness among the parties involved

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<sup>51</sup> Endang Suprpti and Arihta Esther Tarigan, "Itikad Baik Dalam Perjanjian Suatu Perspektif Hukum dan Keadilan," *SALAM: Jurnal Sosial dan Budaya Syar-i* 8, no. 1 (2021): 147–58, <https://doi.org/10.15408/sjsbs.v8i1.19377>.

<sup>52</sup> Hamad Kareem Hamad, "The Philosophy of Contract between Theory and Practice," *Pakistan Journal of Humanities and Social Sciences* 12, no. 2 (2024): 2165–75, <https://doi.org/10.52131/pjhss.2024.v12i2.2175>.

<sup>53</sup> Ministry of Religions Republic of Indonesia, "Surah An-Nisa [4:29]. Al-Qur'an, Translation by the Ministry of Religious Affairs of the Republic of Indonesia," 2016.

<sup>54</sup> Ihsan Helmi Lubis, "The Pillars and Condition of A Contract in Muamalat Transactions," *Mu'amalah : Jurnal Hukum Ekonomi Syariah* 2, no. 1 (2023): 15, <https://doi.org/10.32332/muamalah.v2i1.6983>.

<sup>55</sup> Satjipto Raharjo, *Ilmu Hukum* (Citra Aditya Bakti, 2006). 36.

of the importance of conducting business transactions with the principles of justice and balance, and avoiding exploitative practices that harms the other party.<sup>56</sup>

Therefore, the inclusion of hardship clauses in business contracts within the Indonesian legal system is expected to create a fairer and more balanced system. Hardship clauses and prophetic law are concrete ways to amend contracts to maintain balance and avoid unfair losses for either party by applying principles oriented toward humanity (humanization), liberation from injustice (liberation), and divine values (transcendence). The implementation of the integration of hardship clauses is not without several obstacles, particularly in regulation and compliance with sharia principles, but it offers a fairer and more harmonious approach, in line with the basic goal of prophetic law to realize just and moral law.

## CONCLUSION

The integration of prophetic law into the application of provisions on hardship emphasizes the relevance of the concepts of justice, wisdom, and welfare, based on prophetic values. This concept has three basic components: Humanization places respect for human dignity and rights as the goal of law; liberation directs law to free society from all forms of oppression, injustice, and abuse of power; and transcendence makes divine values the moral and ethical foundation in the formation and enforcement of law. Thus, prophetic law is not only oriented towards legal certainty, but also towards the realization of justice, welfare, and moral responsibility based on human values and spiritual awareness. Hardship clauses allow parties to renegotiate or terminate a contract in the event of a material change of circumstances, shielding them from the unfairness that can result from external uncertainty. Hardship provisions provide flexibility in the modification of contracts in line with the concepts of *al-adl* (justice) and *al-yusr* (ease), and encourage discussion in the resolution of disputes.

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<sup>56</sup> Nur Hidayah, "Asas Kontrak Perjanjian Dalam Perspektif Islam," Articles, *Al-Huquq: Journal of Indonesian Islamic Economic Law* 1, no. 2 (2019): 166–84, <https://doi.org/10.19105/alhuquq.v1i2.3183>.

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