

# **The Sources of Islamic Law on the Muamalah Concept About Contract Viewed on Philosophical Studies**

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## **Abstract**

*Islamic law of the contract is used as the basis for muamalah transaction, which is oriented towards developing a general theory of Islamic law. This research is significant because of the birth of sharia institutions based on the provisions of Islamic contract and muamalah, as well as the growing business of Muslims accompanied by the emergence of a desire to harmonize business as a modern phenomenon, with the sharia principle. The methodology of this research, including normative Islamic law research, is to obtain concrete legal regulations which are the development of norms between Islamic legal doctrines, which are also derived from basic values in Al-Qur'an and Sunnah. The result is, based on the Islamic contract in Indonesia, several are used as basis in carrying out and forming the Islamic contract law. The purpose of implementing muamalah in philosophy is a contract that upholds socio-economic justice and income/welfare justice which are considered important components of Islamic moral philosophy. Islamic economic philosophy in this regard can be summarized in three aspects namely at-tauhid, al-'adalah, and maslahah, where the source of law is Al-Qur'an and Sunnah.*

**Keywords:** *Philosophy; Civil Law; Islamic Contract Law*

## Abstrak

*Hukum Islam dalam akad digunakan sebagai dasar transaksi muamalah, yang berorientasi pada pengembangan teori umum hukum Islam. Penelitian ini penting karena lahirnya lembaga syariah berdasarkan ketentuan kontrak Islam dan muamalah, serta berkembangnya bisnis umat Islam disertai dengan munculnya keinginan untuk menyelaraskan bisnis sebagai fenomena modern, dengan prinsip syariah. Metodologi dalam penelitian ini termasuk pada penelitian hukum Islam normatif, yakni untuk mendapatkan peraturan hukum yang konkret yang merupakan pengembangan norma-norma antara doktrin hukum Islam, yang juga diturunkan dari nilai-nilai dasar dalam Al-Qur'an dan Sunnah. Hasil yang didapat, berdasarkan akad Islam di Indonesia, beberapa digunakan sebagai dasar dalam menjalankan dan membentuk hukum kontrak Islam. Tujuan pelaksanaan muamalah pada filsafat adalah kontrak yang menjunjung tinggi keadilan sosial ekonomi dan keadilan pendapatan/kesejahteraan yang dianggap sebagai komponen penting dari filsafat moral Islam. Filsafat ekonomi Islam dalam hal ini dapat diringkas dalam tiga aspek yaitu at-tauhid, al-'adalah, dan masalah di mana sumber hukumnya adalah Al-Qur'an dan Sunnah.*

**Kata Kunci:** *Filsafat; Hukum Perdata; Hukum Kontrak Islam*

## Introduction

Human relationships with the others are always associated social relations, economic relations, religious relations, etc. The term of the contract if it is related to the social or economic, then the term becomes an contract or agreement. There are those who say that the contract is more general and universal which covers all aspects while the agreement is more special or private such as contractual agreements, loans, and so on. The contract is viewed from the development of law in Indonesia can be seen from three aspects, namely customary law, positive law, and Islamic law. Each of these laws has differences in accordance with the origin of the law but it is inevitable that there are similarities in some parts of the law. In a business contract, for example, it is a business cooperation that must done in written form although there is also an oral contract, but the contract is made in a written manner. The oral carries a very high risk, because it can have difficulties in evidence in case of legal disputes.<sup>1</sup>

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<sup>1</sup>May Shinta Retnowati, "Konsep Essensialia Pada Prinsip Pembuatan Kontrak Dalam Perikatan," *Jurnal Indonesian Comparative of Syariah Law: Jurnal Ilmu Syariah Dan*

In Indonesia every law must have legal sources. As Muslims also have true guidelines that they must obey, these provisions have been regulated in the Al-Qur'an and Sunnah of the Prophet Muhammad Saw. As for the logical consequences for Muslims to understand well and correctly which is fully in the form of the truth of Islamic teachings striving to practice it in various activities is evidence of submission to Allah Swt. commandments and prohibitions, as in Al-Qur'an surah Az-Zariyat verse 56:

وَمَا خَلَقْتُ الْجِنَّ وَالْإِنْسَ إِلَّا لِيَعْبُدُونِ

“And I did not create the jinn and mankind except to worship Me”.

The agreement in customary law is a law that refers to the habits of people in certain areas by adhering to the customs carried out in the community group. Western law (positive law) is a law that refers to the laws that apply in Europe that were brought during the Dutch colonial era to Indonesia. The purpose of the law is to regulate society so that security and comfort in society can be achieved. Customary law and positive law applied in Indonesia can be applied to all circles of society, even though it is Muslim or non-Muslim, but essentially the law can be implemented in Muslim communities, if it does not conflict with Islamic law.<sup>2</sup> As well as *muamalah* transactions related to contracts, Muslim should still follow the rules rather than the law that has passed.<sup>3</sup>

In the determination of a law other than coming from the source of the law itself, both positive and Islamic law must show good values that are able to achieve wisdom and justice, this is called the concept of philosophy. An *ulil amri* in determining what laws will be accepted by their people, they must be able to think broadly in achieving truth

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<sup>2</sup>Salim H. S., *Hukum Kontrak: Teori & Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2014), 22.

<sup>3</sup>May Shinta Retnowati, “The Dimensions of Legal Opinion’s Role in Settlement of Civil Law Cases,” *Legal Brief* 11, no. 2 (2022): 571, <https://legal.isha.or.id/index.php/legal/article/view/172>.

and justice so as to have an impact on the welfare of their people.<sup>4</sup>

The source of the law contains certain elements to achieve an expected goal from the emergence of the law, as well as Islamic law, especially regarding contracts. This research aim to describe the philosophical review of the sources of Islamic law related to contracts, resulting in the importance of contracts rather than *muamalah* transactions.

## Methodology

This research is a normative-philosophical research which is qualitative. This normative-philosophical juridical research refers to the philosophical basis of the philosophical values like as of the doctrine of the binding force of the contract. With this research method, the legal history of the legal basis for the doctrine power of the contract. It was also carried out this research also explores the basis and source of the application of these principles. The research method used in this paper is library research, where this research focuses on collecting data and also on referring to previous articles and literacy related to Islamic law in Indonesia.<sup>5</sup> Literature research is research that requires more philosophical and theoretical processing. With an important step where after a researcher determines the research topic, the next step is to conduct a philosophical study and references related to the research conducted.<sup>6</sup>

## Results and Discussion

### *Islamic Contract Law*

Islamic law of the contract studies is part of Islamic law in the field of *muamalah* transaction which regulates human behavior in carrying out economic relations. As the positive law, the contract

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<sup>4</sup>Saiful Anwar, "Evaluasi Pendidikan Menuju Insan Kamil Perspektif Filsafat Islam," *Jurnal Pendidikan Nusantara* 1, no. 1 (2022): 64, <https://doi.org/10.55080/jpn.v1i1.7>.

<sup>5</sup>Devid Frastiawan Amir Sup, "Tinjauan Masalah Terhadap Amdal," *Muslim Heritage* 4, no. 1 (2019): 40–41, <https://doi.org/10.21154/muslimheritage.v4i1.1724>.

<sup>6</sup>Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif, Dan R&D* (Bandung: Alfabeta, 2017), 291.

classification Article 1234 of the Civil Code is to give something, to do something, or not to do something. According to Prof. Dr. H. M. Tahir Azhary, S.H., Islamic contract law is a set of legal rules sourced from the Al-Quran and Sunnah, and *ar-ra'yu (ijtihad)* which regulates the relationship between two or more people regarding an object that is lawful to be the object of a transaction.<sup>7</sup>

The *iltizam* (Islamic contract law) wider scope than positive law. This can be seen from the relationship between the law of contract itself and the Islamic law that surrounds it, which not only regulates the relationship between humans, but also the relationship between humans and God and with their natural environment.<sup>8</sup> In Dutch, the contract is called *verbintenis* while the agreement is called *overeenkomst* as the term is commonly used by legal experts.<sup>9</sup> The term of the contract also has the same word in Arabic, namely *iltizam* or *'aqdun*. In English, contract has a meaning related to words such as contract, agreement, obligation, and duty (Digital Dictionary). So it can be interpreted that the contract is closely related to the agreement, responsibility, obligation, and trust.

The sources of Islamic law consist of three sources of law, namely the Al-Quran and Sunnah (as the two main sources) and *ar-ra'yu* or human reason which is collected in *ijtihad*. Al-Quran, as one of the first major sources of Islamic law in this Islamic contract law, most of Al-Qur'an only regulates general rules. In the law of contract has a subject and object as described below: (1) The subject of the contract (*al-aqidain*): (a) Humans, as legal subjects of the contract, are parties who can be burdened by law, which is called the *mukallaf*; (b) Legal entity, is an entity that is considered to be able to act under the law and which has rights, obligations, and legal relations towards other people or legal entities; (2) The object of the contract (*al-ma'qud alaih*), the contract object can be in the form of tangible objects, such

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<sup>7</sup>Muhammad Tahir Azhary, *Negara Hukum: Suatu Studi Tentang Prinsip-Prinsipnya Dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah, Dan Masa Kini* (Jakarta: Kencana Prenada Media Group, 2004), 81.

<sup>8</sup>Gemala Dewi, *Hukum Perikatan Islam Indonesia* (Jakarta: Kencana Prenada Media Group, 2005), 33.

<sup>9</sup>Syamsul Anwar, *Hukum Perjanjian Islam: Studi Tentang Teori Akad Dalam Fiqih Muamalah* (Jakarta: PT Raja Grafindo Persada, 2007), 56.

as cars and houses, or intangible objects, such as benefits.<sup>10</sup>

The sources of Islamic contract law. *First*, Al-Qur'an. As one of the main sources of Islamic law, Al-Qur'an only regulates general rules regarding contract. This can be seen, among others, in the following verses:

Al-Qur'an surah Al-Maidah verse 1:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

"O you who have believed, fulfill (all) contracts".

Al-Qur'an surah An-Nisa verse 29:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

"O you who have believed, do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful".

*Second*, Hadith, "Allah Swt. has said (in His hadith qudsi), "I am the third of two people who are united as long as one of them does not betray his friend. If one of them betrays, then I leave the union of the two" (Hadith Riwayat Abu Dawud and Hakim).

As for determining a legal proposition that can be used as a guideline for a contract carried out by the community, Then *istishab* can be done in *muamalah*. *Istishab* is a legal proposition that preserves a legal provision that existed in the past until there is a postulate that changes it. As some *ulama* state, if *istishab* can be used as an absolute legal proposition, as in a contract of which no type is found in the Al-Qur'an or Sunnah, then the contract is permissible. Besides that, there is an *urf*, or a habit, of the community, and it has been lived in aspects of their lives. The majority of scholars state that *urf* can also

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<sup>10</sup>R. Subekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: PT Dnya Paramita, 2015), 89.

be used as a legal proposition.<sup>11</sup> For example, the sale of watermelon is given as an example of the taste of the fruit sold. *Sadd al-dzariah* is the conclusion of the means, the point here is to close all permissible aspects (*mubah*) which will later cause loss or harm.<sup>12</sup> Just like a person who is in bankruptcy is prohibited from making transactions on the property he owns because of the consideration to avoid losses that will occur. The other legal proposition is *shar'u man qablana*, which is the sharia of the people before Islam as in the activities of *syirkah* carried out by mankind before the coming of Islam.<sup>13</sup> The last legal proposition is *mahdzab shahaby* which is the opinion of the companions of the Rasulullah Saw. on a matter, both in the form of *fatwas* and other legal provisions that *nash* does not explain the law. While the source of positive law of contract in Chapter II Book III of the Civil Code which explains that, "*Engagement is the origin of a contract or agreement*".<sup>14</sup>

### ***The Principles of Islamic Contract Law***

*First*, divine principle (*illahiyah*). Every human behavior and actions will not escape the provisions of Allah Swt. *Muamalah* activities, including contract actions, will never be separated from the values of monotheism. Thus, humans have a responsibility for this. Responsibility to the community, responsibility to the second party, responsibility to oneself, and responsibility to Allah Swt. As a result, humans will not do as they please, because all their actions will get a reply from Allah Swt.<sup>15</sup>

*Second*, the principle of freedom. As mentioned in Al-Qur'an surah Al-Hadid verse 4:

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<sup>11</sup>Abdul Rachman, "Dasar Hukum Kontrak (Akad) Dan Implementasinya Pada Perbankan Syariah Di Indonesia," *Jurnal Ilmiah Ekonomi Islam (JIEI)* 8, no. 1 (2022): 50, <https://doi.org/10.29040/jiei.v8i1.3616>.

<sup>12</sup>Muhamad Takhim, "Saddu Al-Dzari'ah Dalam Muamalah Islam," *AKSES: Jurnal Ekonomi Dan Bisnis* 14, no. 1 (2019): 19, <https://doi.org/10.31942/akses.v14i1.3264>.

<sup>13</sup>Roudotul Jannah, "Analisis Kafalah Dalam Al-Qur'an Dan Hadits, Serta Implementasinya Pada Lembaga Keuangan," *Jurnal Ekonomi Rabbani* 2, no. 2 (2022): 307, <https://doi.org/10.53566/jer.v2i2.122>.

<sup>14</sup>Retnowati, "Konsep Essensialia Pada Prinsip Pembuatan Kontrak Dalam Perikatan," 23.

<sup>15</sup>Akhmad Hulaify, "Asas-Asas Kontrak (Akad) Dalam Hukum Syari'ah," *At-Tadbir: Jurnal Ilmiah Manajemen* 3, no. 1 (2019): 50, <https://doi.org/10.31602/atd.v3i1.1801>.

وَهُوَ مَعَكُمْ أَيْنَ مَا كُنْتُمْ وَاللَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ

*"And He is with you wherever you are. And Allah, of what you do, is Seeing".*

Islam gives freedom to the parties to enter into an contract. The form and content of the contract is determined by the parties. If the form and content have been agreed upon, then the agreement is binding on the parties who agreed to it and all rights and obligations must be carried out. But this freedom is not absolute. As long as it does not conflict with Islamic sharia, the contract may be carried out.<sup>16</sup>

*Third*, the principle of equality. An act of *muamalah* is one way to meet human needs. It often happens that one person has an advantage over the other. As stated in Al-Qur'an surah An-Nahl verse 71:

وَاللَّهُ فَضَّلَ بَعْضَكُمْ عَلَى بَعْضٍ فِي الرِّزْقِ

*"And Allah has favored some of you over others in provision".*

This shows that among human beings each has advantages and disadvantages. For that, between humans with one another should complement each other's shortcomings from the advantages they have. Therefore, every human being has the same opportunity to perform an contract. In carrying out this contract, the parties determine their respective rights and obligations based on this principle of equality. There should be no injustice done in the contract.<sup>17</sup> The realization of justice is always related to the distribution that exists in people's lives. As in the contract, it must uphold justice in order to achieve equitable benefit.

*Fourth*, the principle of justice. The term justice cannot be equated with equality. According to Yusuf Qardhawi, justice is a balance between various individual potentials, both moral and material, between individuals and society, and between communities

<sup>16</sup>Ibid., 51.

<sup>17</sup>Sugiarto Raharjo Japar, "Prinsip-Prinsip Kontrak Kontruksi Indonesia," *Mimbar Yustitia* 2, no. 2 (2018): 194, <https://doi.org/10.52166/mimbar.v2i2.1410>.



based on Islamic sharia.<sup>18</sup> In this principle, the parties to the contract are required to act correctly in the disclosure of their will and circumstances, fulfill the agreement they have made and fulfill all their obligations.<sup>19</sup>

*Fifth*, the principle of willingness. In Al-Qur'an surah An-Nisa verse 29:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

*"O you who have believed, do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful"*.

This verse stated that all transactions carried out must be on the basis of consensual or voluntary consent between each party, there must be no pressure, coercion, or fraud. This principle encompasses everything. The shape of the transaction must be determined by the willingness of all parties. The willingness of the contracting parties is the soul of every Islamic contract and is considered a condition for the completion of all transactions. If this concept is not followed in a transaction, it is regarded as having eaten something for vanity (*al-akl bil-batil*).<sup>20</sup>

*Sixth*, the principle of honesty and truth. Being honest and true distinguishes a believer from a believer from a believer, like in the verse above. As Allah Swt. reveals in Al-Qur'an surah Al-Baqarah verse 177, having an honest and sincere nature is one of the essentials for a pious person:

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<sup>18</sup>Yusuf Qardhawi, *Da'wat Al-Qiyam Wa Al-Akhlaq Fi Al-Iqtisad Al-Islami*, Al-Tab'ah 1 (Kairo: Maktabat Wahbah, 1995), 145.

<sup>19</sup>Momon Ardiansyah, Siti Hamidah, and Dewi Astuti Mochtar, "Perwujudan Asas Keadilan Dan Keseimbangan Dalam Pembuatan Akta Persekutuan Komanditer Berdasarkan Akad Mudharabah," *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 4, no. 2 (2019): 324, <https://doi.org/10.17977/um019v4i2p321-327>.

<sup>20</sup>Rachman, "Dasar Hukum Kontrak (Akad) Dan Implementasinya Pada Perbankan Syariah Di Indonesia," 53.

لَيْسَ الْبِرَّ أَنْ تُوَلُّوا وُجُوهَكُمْ قِبَلَ الْمَشْرِقِ وَالْمَغْرِبِ وَلَكِنَّ الْبِرَّ مَنْ آمَنَ بِاللَّهِ  
وَالْيَوْمِ الْآخِرِ وَالْمَلَائِكَةِ وَالْكِتَابِ وَالنَّبِيِّينَ وَآتَى الْمَالَ عَلَى حُبِّهِ ذَوِي الْقُرْبَى  
وَالْيَتَامَى وَالْمَسْكِينِ وَابْنَ السَّبِيلِ وَالسَّلِيلِينَ وَالرِّقَابَ وَأَقَامَ الصَّلَاةَ وَآتَى الزَّكَاةَ  
وَالْمُؤْفُونَ بَعْدَهُمْ إِذَا عَاهَدُوا وَالصَّابِرِينَ فِي الْبَأْسَاءِ وَالضَّرَّاءِ وَحِينَ الْبَأْسِ أُولَئِكَ  
الَّذِينَ صَدَقُوا وَأُولَئِكَ هُمُ الْمُتَّقُونَ

*“Righteousness is not that you turn your faces toward the east or the west, but (true) righteousness is (in) one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, those who ask (for help), and for freeing slaves; (and who) establishes prayer and gives zakah; (those who) fulfill their promise when they promise; and (those who) are patient in poverty and hardship and during battle. Those are the ones who have been true, and it is those who are the righteous”.*

Honesty is something that must be done by humans in all areas of life, including in the implementation of *muamalah*. If this honesty is not applied in the contract, it will damage the legality of the contract itself. In addition, if there is dishonesty in the contract, it will cause a dispute between the parties.<sup>21</sup>

*Seventh*, written principles. In Al-Qur'an surah Al-Baqarah verse 282-283:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ ۚ وَلْيَكْتُب بَيْنَكُمْ  
كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي  
عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا بِيخْسٍ مِنْهُ شَيْئًا فَإِن كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا  
أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَنْ يُمْلَ لَهُ هُوَ فَلْيُمْلِلْ وَلِيَّهُ بِالْعَدْلِ ۚ وَاسْتَشْهِدُوا شَهِيدَيْنِ  
مِنْ رَجَالِكُمْ فَإِن لَّمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتٌ مِّمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَن  
تَضِلَّ أَحَدُهُمَا فَتَذَكَّرَ أَحَدُهُمَا الْأُخْرَىٰ وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا وَلَا تَسْمُوا

<sup>21</sup>Muhammad Noor, “Penerapan Prinsip-Prinsip Hukum Perikatan Dalam Pembuatan Kontrak,” *Mazahib: Jurnal Pemikiran Hukum Islam* 14, no. 1 (2015): 92, <https://doi.org/10.21093/mj.v14i1.338>.

أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلِهِ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَىٰ  
أَلَّا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ  
أَلَّا تَكْتُبُوهَا وَأَشْهَدُوا إِذَا تَبَايَعْتُمْ وَلَا يُضِلَّ كَاتِبٌ وَلَا شَهِيدٌ ۗ وَإِنْ تَفَعَّلُوا فَإِنَّهُ  
فُسُوقٌ بِكُمْ وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ ۝ وَإِنْ كُنْتُمْ  
عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهْنِ مَقْبُوضَةً فَإِنْ أَمِنَ بَعْضُكُمْ بَعْضًا فَلْيُؤَدِّ الَّذِي  
أُؤْتِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثِمٌ قَلْبُهُ  
وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

*“O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write (it) between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men (available), then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be (too) weary to write it, whether it is small or large, for its (specified) term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For (then) there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is (grave) disobedience in you. And fear Allah. And Allah teaches you. And Allah is Knowing of all things. And if you are on a journey and cannot find a scribe, then a security deposit (should be) taken. And if one of you entrusts another, then let him who is entrusted discharge his trust (faithfully) and let him fear Allah, his Lord. And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allah is Knowing of what you do”.*

In this verse, Allah Swt. recommends to humans that an contract should be made in writing, attended by witnesses, and given the responsibility of the individual who carries out the contract and who is a witness. In addition, it is also recommended that if an contract is not executed in cash, an object can be held as collateral. The existence of writings, witnesses, or collateral objects is evidence of the occurrence of the contract.

*Eighth*, the principle of the promise is binding. In normative law, this is known as the “*pacta sunt servanda*” principle, which means that the promise is binding,<sup>22</sup> which refers to a contract formed lawfully by the parties that is binding on such parties fully according to the content of the contract. Article 1338 Paragraph (1) of the Code Civil states that, “*Agreement made legally, it applies as law*”. One the agreement is irrevocable until both parties agree otherwise or the reasons specified in the legislation are sufficient. This contract is based on the principle of strength. It is critical in contract law that people keep their agreements. To put it another way, the principle.<sup>23</sup>

The principles of contract law in the civil law which are general principles that must be heeded by each party involved in an agreement are the principle of freedom, the principle of consensuality, the principle of binding the agreement (*pacta sunt servanda*), the principle of good faith and The principle of force majeure (the principle of Overmacht / the principle of coercion).<sup>24</sup>

### ***The Map of Islamic Contract Law in Indonesia***

In the legal chart in Indonesia, the law is divided into two categories, namely: (1) Public law; and (2) Private law, this law is related to three things, namely: (a) International law; (b) Formal law; and (c) Material law, consist of commercial law and civil law.<sup>25</sup>

There are those who do not distinguish between commercial law and civil law because the two laws are interrelated. After looking at the division or legal chart above, it can be seen that the legal position of the agreement is as part of property law which is included in civil law in Indonesia.<sup>26</sup>

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<sup>22</sup>Rachman, “Dasar Hukum Kontrak (Akad) Dan Implementasinya Pada Perbankan Syariah Di Indonesia,” 56.

<sup>23</sup>May Shinta Retnowati and Namira Muthia Rosalina, “Actualization of Mui Fatwa on Positive Law as Islamic Legal Opinion in Indonesia,” *Indonesian Journal of Law and Islamic Law (IJLIL)* 4, no. 2 (2022): 56, <https://ijlil.iain-jember.ac.id/index.php/ijl/article/view/233>.

<sup>24</sup>Retnowati, “Konsep Essensialia Pada Prinsip Pembuatan Kontrak Dalam Perikatan,” 70.

<sup>25</sup>Abdulkadir Muhammad, *Hukum Perdata Indonesia* (Bandung: Citra Aditya Bakti, 2010), 23.

<sup>26</sup>Sri Lestari Poernomo, “Standar Kontrak Dalam Perspektif Hukum Perlindungan

Covenant law is part of the law of contract, where the law of the agreement is further divided into two, namely the law of written agreements and the law of unwritten agreements. And contract law is a form of written contract law. So, in fact the study that we speak of is only a small part of the existing law in Indonesia.<sup>27</sup>

The law of wealth in Islamic law is included in the law of *muamalah*. Islamic wealth law is not the same as Dutch wealth law. This is because the law of persons and non-persons is included in the law of *muamalah*.

### *Philosophical Basis for the Enactment of Islamic Contract Law*

According to Prof. Abdul Gani Abdullah, there are two major things underlying the enactment of Islamic contract law (*iltizam*). The first basis is *aqidah*, namely beliefs that force its implementation in transactions, and the second basis is sharia, as long as the norms or legal rules have two dimensions, namely the “*transcendental*” or vertical dimension and the horizontal dimension.<sup>28</sup> This transcendental dimension is known as “*hablum-minallah*” which is individual and collective accountability to God. While the other dimension is the horizontal dimension known as “*hablum-minannaas*” which regulates social interaction between humans. These two dimensions influence the behavior of Muslims in their daily transaction activities.<sup>29</sup>

Mushthafa Ahmad Az-Zarqa, divides aspects of Islamic law into seven groups: (1) Law of worship, laws related to worship of Allah Swt., such as prayer, fasting, pilgrimage, clean from *hadas*, and so on; (2) Family law (*al-ahwal al-syakshiyah*), laws related to family life; (3) *Muamalah* law, laws that have a relationship with social life

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Konsumen,” *Jurnal Penelitian Hukum De Jure* 19, no. 1 (2019): 112, <https://doi.org/10.30641/dejure.2019.V19.109-120>.

<sup>27</sup>Azalia Septina Wardani, “Analisis Memorandum of Understanding Dalam Kontrak Kerjasama Ditinjau Dari Hukum Kontrak (Studi Memorandum of Understanding Antara Forisinct Dan Partner)” (Universitas Muhammadiyah Surakarta, 2017), 40, <https://eprints.ums.ac.id/54896/>.

<sup>28</sup>Umi Rohmah, “Perikatan (Iltizam) Dalam Hukum Barat Dan Islam,” *Al-’Adl* 7, no. 2 (2014): 146, <https://doi.org/10.31332/aladl.v7i2.225>.

<sup>29</sup>Pangestika Rizki Utami, “Penerapan Prinsip Hukum Perjanjian Dalam Kontrak Kerjasama Pengelolaan Barang Milik Daerah,” *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, no. 1 (2020): 20, <https://doi.org/10.24090/volksgeist.v3i1.3512>.

in society regarding objects and rights and the resolution of disputes; (4) Constitutional law and governance (*al-ahkam as-sulthaniyah* or *as-siyasah asy-syari'ah*), laws related to state life; (5) Criminal law (*al-jinayat*), laws related to crime, such as various types of criminal acts and criminal threats; (6) Law between countries (*as-siyar*), the laws governing the relationship between the Islamic state and other countries; and (7) Law of courtesy (*al-adab*), laws related to character, propriety, good values, and drinking with the right hand, reconcile those who are in conflict.<sup>30 31</sup>

In Indonesia, contracts are included in positive law, which is regulated in the civil law section, while the philosophical basis for contracts in *muamalah* transactions according to sharia is that they can be included in vertical (*habluminallah*) and horizontal (*habluminannas*) relationships. As stated in Al-Qur'an surah Al-A'raf verse 172:

وَإِذْ أَخَذَ رَبُّكَ مِنْ بَنِي آدَمَ مِنْ ظُهُورِهِمْ ذُرِّيَّتَهُمْ وَأَشْهَدَهُمْ عَلَىٰ أَنْفُسِهِمْ أَلَسْتُ بِرَبِّكُمْ قَالُوا بَلَىٰ شَهِدْنَا أَن تَقُولُوا يَوْمَ الْقِيَامَةِ إِنَّا كُنَّا عَنْ هَذَا غٰفِلِينَ

*"And (mention) when your Lord took from the children of Adam (from their loins) their descendants and made them testify of themselves, (saying to them), "Am I not your Lord?" They said, "Yes, we have testified". (This) lest you should say on the day of Resurrection, "Indeed, we were of this unaware".*

From the verse above, it is explained that there has been an agreement between God and humans who are about to be born on earth. As for the agreement made, it also contains several missions from Allah Swt. and His servants. While in the implementation of contracts carried out by humans, there are many kinds, such as those regulated in Article 1234 of the Civil Code, giving something (*hibah* contracts, *waqf* contracts, *infaq*, and alms), doing something (sale and purchase transactions, leasing, *wakalah*, and others), not doing something (limitations that should not be done by the parties or not

<sup>30</sup>Mustafa Ahmad Az-Zarqa', *Madkhal Al-Fiqh Al-'Am* (Beirut: Dar Al-Fikr, 1968), 223.

<sup>31</sup>Dewi, *Hukum Perikatan Islam Indonesia*, 55.

bad activities).<sup>32</sup>

The study of Islamic law will increasingly face challenges because the problems that arise are increasingly complex. The rapid development in the field of Islamic economics and also the development of technology today requires the availability of adequate laws governing various existing business transactions. Especially today business is not only done traditionally but also sophisticated and modern. This condition needs to be supported by adequate literature. The lack of Islamic legal literature related to transactions that continue to develop causes the slow pace of development of sharia business.

The existing classical literature only contains trade transactions that are still at a puritanical level. This shows that modern and contemporary studies need to be intensified to enrich scientific knowledge and adequate references in responding to global and sophisticated business problems and challenges as they are today and of course in the future. With the emergence of sharia economic and financial institutions such as BMT, Islamic banks, Islamic hotels, Islamic mutual funds, Islamic e-commerce, etc. Protection in the form of standard and clear legal regulations to ensure human security when conducting transactions. In this case, Islamic law should be able to answer the challenges of existing technological and economic developments. So that Islamic laws can be recognized for their existence and can not only be applied to Muslims but also to mankind in general.

Here then comes its own polemic because of the gap between positive law and Islamic law. The point is that Islamic law is a law that is purely based on a particular religious teaching while the positive law that has existed in Indonesia is a western product that has nothing to do with a particular religion. So came the suspicions that ultimately hampered the pace of development of Islamic law and the development of Islamic economics in general. Then how these obstacles should be overcome as soon as possible to open the clogged faucet so far by

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<sup>32</sup>Syaifuddin Muhammad, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: Mandar Maju, 2012), 64.

producing a legal product that is friendly to all religions.

For example, the use of transaction terms used in Islamic banking laws can be refined by using general terms. In addition, with the development of sharia transactions in the international sphere, the formulation of regulations regarding Islamic contract law in the principle of international law is very important. Moreover, considering the development of technology used by electronic transactions that are very rapidly demanding legal certainty that ensures security for the perpetrators.

In the Article of the 1945 Constitution and the first precepts of Pancasila as the implementation of worship in a broad sense for Muslims. In relation to the basic framework of Islam, in an Islamic society three categories of laws apply, namely: (1) Sharia or *syara'* law, namely the laws of Al-Qur'an and Sunnah relating to the actions of legal subjects; (2) *Fiqh*, namely knowledge or understanding of *syara'* from detailed arguments; (3) *Siyasah syar'iyah/al-qawwanin*, namely laws and regulations made by authorized institutions in the country that are in line with Islamic law.

If examined again the philosophical basis that establishes the existence of Islamic contract law in Indonesia can be detailed as follows Islam, *aqidah*, sharia, worship, *muamalah*, sharia law, *fiqh*, 1945 Constitution Article 29, Civil Code Article 1338, and morals.

Thus, the ideal of implementation of *muamalah* on philosophy is contract socioeconomic justice and income/welfare fairness is regarded as an essential component of Islamic moral philosophy. We can see how strongly Islam emphasises socioeconomic justice enforcement. The claims of capitalists and socialists that only they uphold the values of justice are thus false. No, the capitalist concept of socioeconomic justice and income equality does not exist. It is founded on spiritual dedication and fraternity (*ukhuwah*) among fellow humans. The resolve to defend socioeconomic justice stems more from the presence of group pressure. Islamic economic philosophy in this regard can be summarized in two ways, *at-tauhid* and *al-'adalah*, and some members add to three, *maslahah*, where the source of law is Al-Qur'an and Sunnah.



## Conclusion

Islamic contract law is a part of Islamic law in the field of not only *muamalah* transaction which regulates human behavior in carrying out economic relations. However, the concept of a contract can be applied from something that can result in a counterbalance of subject the contract. Islamic contract law is broader than the material contained in western civil contract law. This can be seen from the relationship between the law of contract itself and the Islamic law that surrounds it, which not only regulates the relationship between humans, but also the relationship between humans and Allah Swt. and with their natural environment. The goal of implementation of *muamalah* on philosophy is contract socioeconomic justice and income/welfare fairness is regarded as an essential component of Islamic moral philosophy. It is founded on spiritual dedication and fraternity (*ukhuwah*) among fellow humans. The resolve to defend socioeconomic justice stems more from the presence of group pressure. Islamic economic philosophy in this regard can be summarized in two ways, *at-tauhid* and *al-'adalah*, and some members add to three, *maslahah*, where the source of law is Al-Qur'an and Sunnah.

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