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The Principle of Mudharabah Financing Contract on Justice in Sharia Bank

Aris Dwi Muladi, Prof. Dr. Adi Sulistiyono, S.H., M.H., Burhanuddin Harahap, S.H., M.H., M.Hi, Ph.D
Participants of the Doctor of Law Programma
The Postgraduate Program of the Universitas Sebelas Maret Surakarta
Corresponding Author: Prof. Dr. Adi Sulistiyono

Abstract: In the business and investment world, contract is a means for the parties to meet your wishes and their significance. *Mudharabah* financing contract is an agreement to meet the interests of the Shariah bank as the provider of funds and the customer as the user of the fund with the principles of profit sharing. Mudharabah financing contract in the standardized form is often judged as unfair contract because it ignores the freedom of the parties, unbalanced and not give proper regard towards the good will of both parties either, so the contract's power to bind is often questioned. This research aims at answering questions about how justice can be realized on *mudharabah* financing contract. The approach used in this research are legislation approach and conceptual approach. The results of the study concluded that to realize justice in *mudharabah* financing contract there are four principle that need to be need to be elaborated, the four principles are: the principle of freedom of contracts, the principle of basic balance, the principle of contract binding power and the principle of good will.
Keywords: *mudharabah* contract, justice, the principle of freedom of contracts, the principle of freedom of contracts, the principle of basic balance, the binding power principle and the principle of good will.

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I. BACKGROUND OF STUDY

At the beginning of the formation of the bank's Shariah Indoneia in many people who doubted that the Sharia bank will survive to compete with conventional banks that already existed previously and more popular in the public. Pessimistic attitude will be the presence of bank Indonesia in Sharia's is caused by several reasons, first, the interest-free banking system is something unusual and not possible, to the existence of the presumption that the two banks could not operational without interest, in the sense of how banks finance their operations if without interest. However, on the other hand Sharia bank also is viewed as an alternative economic system in accordance with Islamic values and teachings of Islam believed all Muslims able to bring blessing without breaching existing in the Qur'an and The Prophet Muhammad's Hadith as a source of Islam's Sharia.[1]

Nowadays, after a formal legally acquire a definite legal basis based on Act No. 21 of the year 2008 the existence of Shariah bank in operations have been aligned with the conventional banks. As a function of the bank in General, Shariah bank is also carrying out the function of intermediary agencies that bring together as the interests of the parties or the client in need of funds with the customer or the excess funds. Various products provided for Shariah bank meets the needs of Community funds in order to develop the business and perekonomianya are packed in various contract good financing or other funding.

Among the forms of funding offered by the bank to the customer and the public Sharia is financing with the principles of profit sharing. Financing under the principle of profit sharing in the sharia banking transaction is categorized as *mudhrabah* financing contract that involving the Sharia bank as the funds provider and the customer as the user of the funds to finance a specific project or business. Based on its pattern of relationships and transactions that occur between Shariah bank as fund providers or *shahibul al maal* with fund users i.e. customer as *mudharib* mudharabah financing is approved, a partnership based on the principles of profit sharing. In the *mudharabah* financing contract, if it turns out that business or project managed *mudharib* suffered losses, any financial risk or loss is borne by *shahibul al maal*, whereas *mudharib* borne all risk related to time and the expected profit.

[1] Hamidi, M.Lutfi, 2003, Jejak – Jejak Ekonomi Syari'ah, Jakarta, Senayan Abadi Publishing , pg. 6

Discussion about the relationship of the contractual party on *mudharabah* financing contract in fact cannot be released in conjunction with the issue of justice. Contract as a container that bring together the interests of one party by the other party demands a fair exchange of interests form[2]. Therefore the *mudharabah* financing contract is based on the principle of justice or fundamental justice tend to give birth to a fair contract that is a contract free from *riba*, *maisyir*, *gharar* and speculative conducts. Fundamental justice referred to in the contract is the basis of *mudharabah* financing puts all rights and obligations based on the principle of legal truth of sharia ', because of it, someone will not doing something bad or means any harm to the others[3]. However, in practice the desire of the parties to bring about justice in the contract often have many obstacles.

A variety of factors that are often hampered in manifesting justice in the contract of *mudharabah* financing contract includes: first, the form of the contract which is standardized and often being printed in a particular and specific form, in standardized contract positions of the parties in determining the content of the contract is not balanced or equivalent so that potentially creates an unfair contract. Second, unequal bargaining positions, where parties need funds or *mudharib* can only follow the desires of the Sharia bank as *shahibul al maal* , Third, on a standardized contract, it is possible to state a clause that indicated exception in deed which can be detrimental to either party. Exception in deed clause in the stamdardized treaty listed as an attempt of one party to protect its own interests from possible incidence of risk of loss from the agreed treaty.

In the mudharabah financing, the exception of deed clause is stated in the contract in order to avoid the possibility of the incidence of the risk of loss can be seen from two sides. First, from the interest of *shohibul al maal* or the sharia bank has disbursed funds to *mudharib* as a form of achievement without the cons achievement of *mudharib*. The funds for the bank that used to fund the business or project managed by *mudharib* also contains the value of investment, so that needs to be protected with a specific clause in the contract so that the value of the investments itself are not reduced. Second, from the point of view of the interests of business managers or *mudharib* as project, the exception of deed clause is stated in the contract to avoid the authority limitation of *mudharib* in managing business or project that was run. This is necessary because when the *mudharabah* contract already runs, *mudharib* as business or project manager cannot be intervened by *shahibul al maal* as a provider of funds.

Mudharabah financing contract as an agreement of the parties in the channeling of funds into the runway and *mudharabah* financing rules for the parties as tied it a law. This principle forms a contractual relationship as well as laying out the rights and obligations of the parties in accordance with a mutually agreed. The inclusion of clause *mudharabah* financing contract on raw as part of the agreement of the parties, should be able to be viewed objectively and fairly for the common interest of the parties. *Mudharabah* financing contract if that is standardized is only seen from the inception of the process or the occurrence of the contract, then the uprising issue is the existence of inequity in the contract because the *mudharib* ushered in need of funds from a sharia bank must be willing to meet the specified requirements of the sharia bank as the provider of fund or *shahibul al maal*. However, in economics the point of view efficiency in the spending costs, time and effort with the contract clause of became a practical option. It means economic and practical use of standardized clause on standard contract has a practical advantage, reducing the process of negotiation of the rambling, and cost savings, but legally give unbalanced position for the party because one of the parties is usually forced to accept terms already standardized by the other party[4]. The existence of an imbalance of the position of the parties to the contract may result in a lower position parties were treated unfairly. An imbalance in the contract can also be utilized by powerful party position to misuse the state particularly in the division of rights and responsibilities in the risk management.

Depart from the issue above, this study intends to solve the problems related to the basic question of how justice can be embodied in the *mudharabah* financing contract on sharia banking. The purpose of this research is to find and describe the values of justice contained on the *mudharabah* financing contract. In order to get the answers to the questions above, then the necessary secondary data in the form of legal materials of primary legal materials, good material, as well as secondary legal materials tertiary law. The data collected through utilizing the library research, namely data collection conducted with collecting material relevant to the legal issues that will be solved. The legal materials further analyzed with technical analysis of the contents of a technical analysis of the

[2] Hernoko, Agus Yudha, 2010, Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial, Jakarta, Kencana Prenada Media Group, pg. 47

[3] S, Burhanuddin, 2009, Hukum Kontrak Syari'ah, Faculty of Economics and Business Publishers , Gajah Mada University, pg. 45

[4] Mulyati, Etty, 2016, Asas Keseimbangan pada Perjanjian Kredit Perbankan dengan Nasabah Pelaku Usaha Kecil, Bina Mulia Law Journal, Vol. 1, No. 1, September 2016, pg. 38

opposite of the content or substance of a rule of law relating to *mudharabah* financing contract. The approach used in the analysis of such data is legal product approximation is done by reviewing all the rules relating to the issue of Justice in *mudharabah* financing contract on sharia banking. Second, a conceptual approach that is an approach that depart from the views and doctrines that emerging in the science of law[5]. On the basis of both approaches will be drawn a conclusion about the objective embodiment of the principle of *mudharabah* financing contract on Justice on Sharia banking.

II. THE NATURE OF JUSTICE IN CONTRACT (*AKAD*)

A discussion of the relationship of the contractual parties in fact cannot be released in conjunction with justice. Contract (*Akad*) which is a means to bring together the interests of one party by the other party requires equitable interests exchange form. Therefore, the understanding of the parties regarding the meaning and philosophical in intrinsic fairness in contracts being important to be carried out before the contract (*akad*) is agreed and sealed.

Questions about what is "justice" is a question that frequently is heard, but a proper understanding thus complicated even abstract, especially when associated with the various interests that are so complex[6]. Because of the complicated and complex understanding of the birth of various concepts of Justice from experts based on their respective viewpoints. Ulpianus in Satjipto Rahardjo[7] expressing the conception of "fairness" as the will which is constant and continuous to give each person what should it (*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*). In view of the nature of Justice, Ulpianus more emphasis on giving something to everyone what is right or what has been tried out. This means that every person has the right to acquire what remained of his right.

J.S. Mill[8] stated that justice is a concept where we find one of its essence-yaiitu rights granted to an individual – implies and testified enjoined more binding. For Mill, among those rights the strongest fundamental rights would be freedom. The underlying dispute does not occur between the biggest good for all and the protection of fundamental freedoms as the freedom of thought. Rights of freedom given to each individual also demanded the presence of a more binding obligation. The balance between the rights and obligations that will create justice and benefit for many people.

According to Aristotle in Nichomachean ethics means do virtue, or in other words, justice is the main virtue. According to Aristotle[9] "justice consist in treating equals equality and unquails inequality, in proportion to their inequality". This principle of moving on from the assumption "for the same things are treated equally, and that is not the same also treated are not the same proportionally". Aristotle in this approach the problem of Justice in terms of the basic equations, it wants the world's resources is given on the basis of the similarities to the members of the community. The law in this regard should be to keep such a division is always guaranteed and protected from coercive efforts against him. In this connection, Aristotle distinguishes between the justice Distributive Justice and Corrective Justice.

According to Thomas Aquinas[10] as quoted by Agus Yudha Hernoko in relation to justice propose three fundamental structure (basic relationships) which includes, among others: (a) the relationship between individuals (*order parium ad partes*), (b). Relationships between society as a whole and the individual (*order totius ad partes*), (c). The relationship between the individual against society as a whole (*ordo ad partiun totum*). In the view of Thomas Aquinas[11], distributive justice basically a respect for the human person (*acceptio personarum*) and its dignity (*dignitas*). In the context of distributive justice, justice and propriety (equity) was not accomplished solely with actual values assignment but also on the basis of similarities between one things with the other (rei aequalitas ad rem). There are two forms of similarities in shaping the distributive justice, namely: first, the proportional similarity (*acqualitas proportionis*), the second, the similarity or the amount of quantity (*acqualitas quantitas*).

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[5] Marzuki, Peter Mahmud, 2007, Penelitian Hukum, 3rd ed., Jakarta, Kencana Prenada Media Group, pg. 93 & 95

[6] Robert Reiner in Hernoko Op. Cit. pg 47

[7] Rahardjo, Satjipto, 2012, Ilmu Hukum, 7th ed, Edited by: Awaludin Marwan, Bandung, PT. Citra Aditya Bakti, pg. 173.

[8] J.S. Mill in Lebacqz, Karen, 2015, Theories of Justice, 5th ed, Bandung, Nusa Media, pg. 23

[9] Hernoko, Op.Cit, pg. 48

[10] Ibid. pg. 49

[11] Sumaryanto, E, 2002, Etika Hukum Relevansi Teori Hukum Kodrat Thomas Aquinas, Yogyakarta, Kanisius, pg. 90 - 91

On the other side of Thomas Aquinas[12] also stated that respect for the person can be realized when there is something to be shared or given to someone comparable with that he should have received (*praeter proportionem dignitas ipsius*). On that basis, then recognition of the person should be directed on the recognition of propriety (equity), then service and pnghargaan are distributed proportionally on the basis of the dignity and the dignity of human beings. Paul Tillich[13] as quoted Agus Yudha Hernoko, stated that justice is contained in the attributive, distributive, and retributive justice are proportional (both positive and negative), which by Tillich proportional justice is called "tribute justice ".

Modern scientists and thinkers such as John Boatright and Manuel Velasquez[14], as quoted by E. Sumaryono, divide justice into three kinds, among them:

a. Distributive Justice, has the same sense on the traditional pattern in which benefits and burdens should be shared equitably.

b. Retributive Justice, related to the occurrence of an error of law or where the fines charged to those who are guilty must be valued fairly

c. Justice Compensatory, concerns on the mistake committed but according to other aspects where people have a moral obligation to provide compensation or damages to another party are harmed.

According to the view of John Rawls[15], is not fair to sacrifice the rights of one or some people just for the sake of greater economic benefits for society as a whole. This attitude is precisely contrary to justice as fairness principle that demands the same freedom as the basis for informing social welfare arrangements. Therefore the economical consideration must not be contrary to the principle of freedom and equal rights for all people. In other words the social decisions that have consequences for all members of society should be made on the basis of the right (right weight based) rather than on the basis of the benefit (good based weight), just by way of Justice as fairness can be enjoyed all person.

By taking a lesson from the failure of the previous theories, John Rawls offers a settlement related to its justice by building a theory of justice-based contract. According to Rawls, a theory of Justice is adequate must be established by contract whereby the basic approach whereas the essences of justice which selected altogether is the result of a mutual agreement of all the person free, rational, and equal[16]. Through a contractual approach to a theory of Justice is able to guarantee the exercise of the rights and obligations of distributing equitably to all people. In this case the Rawls States a concept of a good justice must be contractual in nature, the consequences of any concept of Justice that is not contractual-based should be ruled out in the interest of Justice itself.

In the context of the contract-based theory of Justice, Rawls called it as justice as fairness meant a Justice who can be fair or equitable justice. Yet, to interpret the "just" means fair according to its content (substance) and referred to as substantial justice, while the "fair" means fair according to procedures or procedural justice. Thus, justice as fairness can be meant as a fair justice in the substance or procedure. The Justice as fairness concept is supported by three basic principles, namely the principles of rationality, the principle of freedom, and the principle of equality.

According to as the Justice distinction above, distributive justice is seen as the beginning of any kind of a theory of Justice. The dynamics of the justice society in review experts are generally based on the theory of distributive Justice although with different versions and the sides of his view of each[17]. Therefore, in conducting a study critical of the contractual relationship of the parties, especially in the lyrical *mudharabah* financing contract works of distributive justice. This is because in the *mudharabah* financing contract other than a contract of partnership is also based on the principle of contractual basis as a result. The manifestation of the distributive justice on *mudharabah* financing contract will be realized when the exchange of interests of the parties are distributed in accordance with the rights and obligations in a fair and proportionate.

In theory there are two modern principles of ethics for distributive Justice i.e. formal principle and material principle. On the principle of formal stated that "for the same things are treated equally and for things that are not the same will be treated by the same" on condition that the whole conditions in *cetiris paribus* state. This principle therefore rejects the existence of discriminatory treatment or difference in treatment. The principle of judicial review, this principle more complete formal principle more emphasis on aspects of

[12] Loc. Cit pg. 125
[13] Loc. Cit. pg 49
[14] Sumaryono. Op.Cit. pg 90
[15] Ujan, Andre Ata, 1999, Keadilan dan Demokrasi (Telaah Filsafat Politik John Rawls), Yogyakarta, Kanisius, pg. 18
[16] Hernoko, Op.Cit. pg. 55
[17] Ibid. pg. 50

procedural formality but still pays attention to the substantive aspects of the award against the treatment to each party.

The principle of the same award to each party as well as discriminatory treatment in distributive justice also shown by L.J. van Apeldoorn[18] in his opinion stating that it treats the same justice of the same and not the same treat is proportional to its difference. Under this statement, then the principle of Justice did not make an essential equation in the Division of life needs. With regard to this it is necessary to note the meaning of Justice from a principle of Justice which specifies the "shape" to be the principle which gives the "content" of a standard size or specific criteria.

Beauchamp and Bowie[19] in J. van Kan and J.H Beekhuis promote six principles so that distributive justice can be realized. Distributive justice can be realized if it is given to:

a. everyone equal parts
b. any person in accordance with its individual needs
c. any person in accordance with its rights
d. any person in accordance with its individual business
e. any person in accordance with his contribution
f. any person in accordance with merit (service)

While John Rawls[20] as quoted by Karen Lebacqz formulated the two principles of distributive justice that includes, among others:

a. Principle I : every person that have equal rights towards the most extensive total system for the basic freedoms that are similar to a system similar to the freedom of all. Everyone should have the same rights to freedom of the most widespread base of roughly the same freedom for everyone. This is the most basic things (rights) that should be owned by all the people. In other words only with a guarantee of the same freedom for everyone, then Justice will unfold (principle of Equality). This principle can be described as the principle of equality of rights and gave the course is inversely proportional to the burden of obligations owned everyone. This principle then is the spirit or principle of freedom of soul into contracts.
b. Principle II : the principle of distinction (the difference principle) which States the social and economic inequalities for example inequality in wealth and authority will be fair if it produces benefits compensation for everyone, particularly for the members of the community who are less fortunate. This principle allows the inequality in the distribution, but only if it can protect even fix the position of those less fortunate in the society.

Based on explanation above, justice must be understood as fairness in the sense that it is not only those who have talents and abilities better are eligible to enjoy the various social benefits more, but the profit must also be open opportunities for those less fortunate to improve the prospects of his life. Whereas the principle of distinction is not demanding the same benefits to everyone, but the benefits of a reciprocal nature, such as a skilled worker who certainly will be more appreciated than unskilled workers. In this case Justice as fairness more emphasizing on the principle of reciprocity, but also does not mean merely "simply reciprocity" where the distribution of wealth is done without looking at the objective differences between the members of the community.

In order to secure an order of main objective then the acceptable justice as fairness is pure procedural justice, that justice as fairness should be processes at once again reflected through a fair procedure to guarantee results fair use anyway. While the concept of similarity must be understood as the "equality rights" position and not in the sense of "similarity" results that can be obtained by all members of the society. The similarity of the results is not a reason to justify a procedure. Justice as fairness or as pure procedure justice did not prosecute everyone involved and attended the same procedure also should get the same results. Otherwise, the result of a fair procedure that must be accepted as fair, also when everyone does not has the same result.

Advances in various fields also have consequences on justice. The demands of society is not limited on a fair distribution, but also on the process of determining the distribution. In the terminology of Justice, this is known as procedural justice. This issue is increasingly important due to its perceived strategic in the sense that it can precede the distribution itself. Procedural justice has a greater influence than with distributive justice, especially when a community or society have been at the level of knowledge and well-being are relatively high.

[18] Apeldoorn, L.J. van, 2004, Pengantar Ilmu Hukum, 30th ed, Jakarta, Pradnya Pramita, pg. 11 - 13
[19] Kan, van J. & J.H. Beekhuis, 1990, Pengantar Ilmu Hukum, Jakarta, Ghalia Indonesia, pg. 95
[20] Lebacqz, Karen, Op. Cit. pg. 53 - 57

In the view of Islamic scholars, "justice" is understood in a wide sense and meaning, this is because the understanding departs from the Qur'an as its main source. Thus to understand justice done through the efforts of the interpretation of the verses in the Koran holy book is not creating the sense of distinction outside that was already stated by God. In the Quran there is a wide term which contains the meaning of "fair" as *al-' adl*, *al-qisth*, *al-mizan* and *al-hukm*, and with all of its variations. This means that the meaning of fair and justice in Islam depends on the context of the verse and background underlying the decline of the paragraph in question.

Islam as a religion of universal put the value of Justice is also universally where respect for human values into the runway anyway. In Q.S. Al-Maidah verse 8 meaning fair expressed with the word "*ta'dilu*" which means to treat everyone the same based on the value of his humanity. This fair treatment regardless of race, tribe, religion, even economic soial though. More than that hatred against a house or private should not be unjust to apply against the hated it. This is caused by the notion that justice is closer to devotion.

Justice in Islam is defined as justice that was built on human nature so created humanitarian justice covering the whole value of *maknawiyah* (essence) and *ruhaniyah* (spiritual), therefore the values contained in justice not only economic value and value material in general[21]. Thus all the comprehensive humanitarian Justice has not yet been created, then it may manifest fairness in economics and other fields.

Islamic teachings in addition contains the universal values that also contains the value of the balance between the needs of physical and spiritually, therefore Islam also opened up the space for human life in meeting social needs its economy to realize the balance and social justice. Every human being is given the same chance in the fight for the fulfillment of the social needs of its economy to achieve the happiness that she wanted. In this case Islam gives the signs so that the enforcement of social justice can achieve its purpose. Justice in Islam must be upheld above principles which include: (a) absolute Freedom of the soul, (b) the equation of perfect humanity, (c) strong social Guarantees.

Freedom is an important element in upholding justice in Islam even is the first mounds of it upheld other elements. Islam recognizes the reality of life and the power of the soul which thereby giving the open opportunity in order to covering to everyone for exerting all over its ability to reach its full potential on the freedom of a real soul completely. The perfect justice is unlikely to materialize and ensured its implementation without giving it the right of every individual and the needs of the community as well as the existence of a belief that he will deliver on the lofty humanitarian goal[22]. The community has an interest that will culminate in the freedom of the individual, while individuals in the community have an interest which must be constrained his freedom in a certain boundaries, this is a form of guarantee of the implementation of Justice in Islam.

III. VARIOUS FUNDAMENTAL JUSTICE IN *MUDHARABAH* FINANCING CONTRACTS ON A CONTRACT IN SHARIA BANK

In the explanation of Act No. 21 of the year 2008 concerning Sharia Banking stated that national development goals is the creation of a just and prosperous society based on economic democracy with a developed economic system is based on market mechanisms are equitable. In order to realize these goals, the implementation of national economic development directed at an economy that favors the people's economy, equitable, just, reliable, independent, and able to compete at the forefront of the international economy.

To realize the development goals of national economic systems were developed based on the Islamic (Sharia) by lifting its principles into national legal systems. The inclusion of the principles of the Sharia legal system into a national banking laws of Sharia in particular is quite reasonable and logical because it contains values fairness, expediency, balance, and universality. With content of value, then Islamic economy system created in the Sharia banking institutions may be exempt from the usury system, then replace it with the principles for the results. The existence of principles of Sharia in the Islamic Sharia demanded all products on banking Sharia must be based on the principles of Sharia.

Mudharabah financing is based on the principles of Sharia banking products for results. Solidification of justice in *mudharabah* financing contracts on a contract can rely on John Rawls's theory of Justice and principles of Justice in Islam as stated by Sayyid Quthb. As John Rawls expressed that justice was built on two principles: first, everyone should have the same rights to freedom of the most widespread basis, to two, the lack of social and economy simultaneously must be arranged in such a way that the produces compensation which is advantageous for everyone. While Sayyid Quthb in enforcing Islam justice based on three basis: first, the absolute freedom of the soul, second, equations of humanity, and third, strong social security.

[21] Quthb, Sayyid, 1984 Social Justice in Islam, 1st ed, Bandung, Salman Library of Bandung Engineering Institute, pg. 34

[22] Ibid pg. 43

Formation of contract fairness on *mudharabah* financing contract which is based on John Rawls's theory of Justice and fundamental fairness of Sayyid Quthb can be spelled out in some fundamental law of contract construction law contracts that comply with both the theory. As for the principles of the formation of a contract which is in line with the theories of John Rawls justice or fundamental justice of Sayyid Quthb are (1). The principle of Freedom to make contracts, (2). The basis of the power to bind the contract, (3). The principle of balance, and (4). The Principle of Good Will. All of these four principles are basic staple in the formation of a contract that is believed to give birth to justice on *mudhrabah* financing contract by *Sharia* banking. As for the meaning of these principles can be described briefly as follows:

1. The principle of Freedom to make Contracts

The principle of freedom of contract or making the principle of freedom of contracts is a pillar of the system of civil law in particular legal Alliance. Even according to Rutten contract entirely based on the principle of freedom of contracts[23]. The principle of freedom of contracts is also the basis of the universal which is embraced by the law of treaties in all countries in general. In the law of treaties, the principle of freedom of contracts holds a very important role because the principle of "freedom" on the freedom of contracts is an embodiment of free will and trait of the most basic rights, namely human rights.

The doctrine of liberal individualism that flourished in the XIX century imposes directly on the birth of a new paradigm of legal contracts that are rooted in two propositions: first, any contractual agreement are held is valid, to two, any agreement contractual held freely is fair and require sanctions legislation. This doctrine also stated that the contractual obligation is the source of the merging of the will or consensus of the party who made the contract.

The main idea of freedom of contracts related to the emphasis will consent and intention or the will of the parties. In addition, the notion of freedom of contracts is also of the view that, with regard to the contract is the result of free choice. Under the idea that this is the case then embraced the doctrine that no-one was tied to a contract is not done on the basis of the existence of the free things to do.

According to Sutan Remy Sjahdaeni[24], the principle of freedom of contract under the Indonesian's law of the contract (Civil Code of Conduct) includes the scope as follows:

a. freedom to make or not make the contract
b. freedom to choose the party with whom he wants to make a contract
c. freedom to choose or define a causa of the contract to be made
d. freedom to define the object of the contract
e. freedom to determine the form of a contract
f. the freedom to accept or menyimpangi provisions of the legislation which is optional

Contrast of opinions above it can be concluded that the individual civil contract where the parties are free to determine the contractual deal. For those who have the ability to act have the freedom to make contracts committing yourself, determine the content, also legal consequences arising from that contract. Although in principle of freedom of contracts contained in the contract the intention that people should not compel any party to make the contract, or the person has a broad freedom to make choices, but the principle of freedom of contracts remained its boundaries.

Restrictions against the principle of freedom of contracts provided for in article 1338 civil code containing provisions Indonesian Civil Code of Conduct as follows:

1) All contracts are made legally valid as legislation for those who make it
2) The contract was not irrevocably agree than by both parties, or because of the reasons stated by law sufficient to it
3) Contracts should be implemented in good faith

As a consequence of the principle of freedom of contracts emphasis, then embraced also the dogma that the obligations in the contract can only be created by the intention or the will of the parties. It is a fundamental principle of the law of contract that binds to be implemented immediately once the parties reach an agreement.

[23] Patrik, Purwahid, 1986, Asas Itikad Baik dan Kepatutan dalam Pernjanjian, Semarang, Diponegoro University Publisher, pg. 3

[24] Sjahdeini, Sutan Remy, *Asas Kebebasan Berkontrak dan Perlindungan yang Seimbang bagi Para Pihak dalam Perjanjian Kredit Bank di Indonesia*, Jakarta, Indonesian Banker Institute pg.. 47

Islamic law as a foundation for preparing the *mudharabah* financing contract besides civil law is sourced on Civil Code of Conduct, also recognize the principle of freedom of contracts as *Mabda ' Hurriyyah at Ta'aqud*. Islamic law recognizes the freedom of berakad which is a principle of law which States that anyone can create any type of contract without attachment to the names that have been specified punctuality Sharia's laws and incorporate any clauses into the contract He made it in accordance with its importance as far as not be eating fellow treasure with its vanity[25]. However, in an environment of different sects there is difference of opinion regarding the freedom of having a very extensive.

Based on the above description it can be concluded that freedom to make contracts or contracts in freedom in the theory of contract law both in Western law or Islamic law has two main ideas, namely: (a) contracts or contract based on the agreement, (b) a contract or a contract as a product or a result of the will of a free vote.

2.Principle The Power To Bind The Contract

Any person who makes a contract bound to fulfill the contract because the contract contains the promises must be fulfilled and the promise binding on the parties as tie it laws[26]. The basic law principle of *pacta sunt* it is called stated in article 1338 *servanda* subsection (1) of the Civil Code contains a provision which Civil Code imperatives that, all contracts are made in accordance with the legislation in force as law for those who make it.

According to Budiono Herlien[27], *pacta sunt adagium servanda* recognized as rules stipulate that all human built contract with each other given the force of law contained in it, are meant to be carried out and in the end can the settings are enforced.

Imperative provisions in article 1338 subsection (1) of the Civil Code directs the Civil Code of Conduct on the understanding that any subject of the law and other legal subject fellow can do legal deeds as if combining the legislation by using the contract. Therefore, the contract is considered a source of legal Alliance in addition to act because every Alliance was born out of a contract or law. This means that every legal subject can form the law (in this case the law of the contract) as well as a founding act.

The basic law which States that a contract result in a legal obligation and the parties are bound to carry out contractual agreement, considered given and was never questioned again. Contractually binding, because it is a promise similar to laws that are seen as lawmakers. If the agreement is fulfilled, contractual certainty is removed then it would destroy the entire Exchange System (objects, services) that exists within the community. Therefore, the loyalty on the promise given is a part of the requirements demanded of natural reason.

3.Principle of Balance

The basis of the balance, according to Budiono Herlien based their efforts on achieving a balanced State that as a result of it should bring up the diversion of wealth are valid. Does not satisfy the balance of influence on strength of yuridikal contracts. In the formation of the contract imbalances can arise because of the behavior of the parties itself or as a consequence of substance (content) of a contract or the implementation of the contract. The achievement of a balanced State implies in the context of the hope of the future objective of efforts to prevent a harmful means between the two parties in the contract[28].

Due to inequalities in war contracts back is an imbalance, the absence of balance in contract resulted in injustice. Therefore, if the condition is an imbalance in the contract resulting in the onset of loss for one party, this may be the reason for a party aggrieved to file charges of contract invalidity. All the promised war achievements behind presupposes equality, then if there is an imbalance of attention will be given to equality in the formation of a contract is not on the final outcome of the war offered for achievements behind.

The emergence of the imbalance in the contractual war turning occurs because the parties own factors that lead to the formation of the contract way by involving the parties that his position is not equivalent. so the determining factor the basic tegaknya balance not only equality of achievement that became the object of the agreement of the parties that make the contract, but also the equality of the parties in making the contract. The equivalence of the position of the parties are balanced in determining the content of the contract or the occurrence of a contract should be able to reflect the will to realize the Justice of economic interests over the exchange of goods and services exchanged in the contract.

[25] Anwar, Syamsul, 2007, Hukum Perjanjian Syari'ah, Jakarta, Raja Grafindo Persada Inc. pg. 84

[26] Miru, Ahmad, 2014, Hukum Kontrak dan Perancangan Kontrak, Jakarta, Raja Grafindo Persada Inc. pg. 4 - 5

[27] Budiono, Herlien, 2006, Asas Keseimbangan bagi Hukum Perjanjian Indonsia, Hukum Peerjanjian Berdasarkan Asas-Asas Wigati Indonesia, Bandung,Citra Aditya Bakti, pg. 102.

[28] Ibid pg. 317 - 318

4.The principle of good faith

The implementation of the agreement in the contract requires the principle of good faith, it is as expressed by article 1338 paragraph (3) of the civil code which States: KUH "contracts should be implemented in good faith". However, Civil Codes gives no sense of what being meant in good will.

The doctrine of good faith derives from Roman law rooted in social ethics about the obligation of obedience and faith will be comprehensive of a citizen or not. In the context of the implementation of the contract, in good faith in the Roman law refers to the three forms, namely: first, the parties must hold fast to the promise or word. Second, the parties should not take profits with misleading conduct toward one party. Third, the parties comply with their obligations and behave as honorably and honestly even though it was not explicitly exchanged.

From a short blurb above it can be concluded that the common meaning of good faith in the execution of the contract by reference to the standard of rational behavior, is that (the parties) have to adhere to a promise or Word in all circumstances. Subekti[29] states that principle of good faith is one of the most important joints of the law of treaties. Good faith means honesty or clean in the sense pelaksnaan an agreement or contract should heed the norms of propriety and morality, an objective measure in the implementation of the Covenant should walk on the right rail.

The point of view used by Agus Yudha Hernoko proposed that the understanding of good faith in article 1338 paragraph (3) of the civil code must be interpreted non-grammatically that good will only appear limited at this stage of the implementation of the contract. Good will should be meant in the contractual process, meaning all parts in good will must base the relationship of the parties at the pre-contractual stage, contractual, and execution of contractual. Therfore, the function of good will in verse 1138 paragraph (3) of the Indonesian Civil Code is dynamic[30].

Enclosing the contract process in the Shariah or Islamic law the embodiment of the principle of good will is the mandate which means reliable, *sidiq* or true, and honestly that is the Basic ethics in Islamic teachings. Each *akad* or contract that will made by the parties should be based on the correct intention, contain the correct intention, as well as containing the correct agreement anyway. The truth that underlying the contract must be presented honestly without an element of trickery and lies by the parties publicly appropriate terms and get along well akad. After the contract is formed on the basis of an agreement and the intentions are correct, then the contract as a mandate for the parties should be implemented as a mandate for those who agreed upon it. *Sidiq* (true), trustful, and honestly is the personality of the values inherent in a person who can affect the validity of the contract.

Truth's values exert influence on parties who do contract or contract not to lie, cheat and forgery. At the time of this principle does not run then it will ruin on the legality of the contract made. The parties who feel aggrieved because at the time of the agreement of the other party do not base it on this basis can stop the process of contract or the contract[31].

IV. APPLICATION OF THE PRINCIPLES OF CONTRACT TO CREATE JUSTICE ON *MUDHARABAH* FINANCING

Each contract or *akad* that is created has a purpose in accordance with the will and agreement of the parties that created the contract. Legally, the contract has three functions, namely, the first function of the philosophical, juridical function, secondly, to the three functions economically. Philosophically the contract serves to bring about justice for the parties to make the contract, or on behalf of the three interested parties against the contract. As for the Juridical function of contract is manifest legal certainty for the parties to make the contract against all third party which has legal interests against a laid contract. The contract gives the answer to the needs of the concrete economic law in society at the same time intended to assure the realization of legal certainty.

As for the economic function of the contract described by J. Beatson, as quoted by Muhammad Syaifuddin[32] is as follows:

[29] Subekti, 1991, Hukum Perjanjian, 13th ed. , Jakarta . Intermasa Inc. , pg.

[30] Hernoko, Agus Yudha, Op. Cit, pg. 121

[31] Djamil, Fatturrahman, 2012, Penerapan Hukum Perjanjian dalam Transaksi di Lembaga Keuangan Syariah, Jakarta , Sinar Grafika, pg. 51

[32] Syaifuddin, Muhammad, 2012, Hukum Kontrak, Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik dan Praktik Hukum, Bandung, Mandar Maju, pg. 51

a. Ensure expectations are exchanged among the parties will be fulfilled or will remain a compensation in case of tort.
b. Make it easier to plan future business transactions from a variety of possible harm.
c. Set the standard implementation and responsibility of the parties
d. Allow business allocated risks in a more proper (minimizing the business risk of the parties)
e. Provide a means for the parties' dispute.

Based on the function of the contract, the contract law principles which are abstract and will be implemented in *mudharabah* financing contract in hopes of generating an equitable contract for the parties. Philosophical values and ethical nature abstract and objective contained in these legal principles will be positioned as a basic value of the formation of the contract so that the contract can fulfill its function either in philosophical, juridical, as well as economical

The concretization of the principle of freedom of contract in the law of contracts in Indonesia embodied in open system adhered on the law of treaties or the law of contract as illustrated in Book III of the civil code. Clearly this open system as defined in article 1338 Civil Code, where in it is contained the teachings based on the laws of nature or laws of nature and theory of fiction who regard all people have the same economic social standing strong so everyone is free to make contracts for himself, although in fact it is not always the case. With the development of the contract and law of contract today many business contract drawn up by businessmen in the form of standard contract or raw is no exception contract or *akad* on *mudharabah* financing by bank of Sharia. On the mudharabah financing contract, bank as binding *shahibul al maal* with customer as the *mudharib* created and determined unilaterally by the bank, as a result the mudharib disenfranchised and his freedom in determining the content of the contract because the contract in There is no process of negotiation and bargaining is against the content of the contract. Therefore the principle of freedom of contracts as if not relevant to be applied on the *mudharabah* financing contract.

However, if examined aspects of the achievements and risks that may arise in the presence of *mudharabah* financing contract, the standardized contract is required by several reasons, namely: first, the financing of *mudharabah* contract is the contract of partnership that combines consumer finance and investment.Second, on *mudharabah* financing achievements made by the bank at the beginning of the contract validity period is not offset by the cons achievement by *mudharib*, Third,, if there is a failure in this partnership, financial risk borne by the bank as *shahibul al maal*. Fourth, the standardized contract is created in order to protect the investments managed by *mudharib*.

With these reasons, although the mudharabah financing contract is standardized contract but his position as contract remain valid. *Mudharabah* financing contract legitimately incidental at this state because qualified agreement (1). The existence of the word agreed, (2). The existence of the competence of the parties to perform the Act of law, (3). The existence of a specific object, (4). The presence of halal reason, *mudharabah* financing contract hereinafter also does not conflict with the law, public order, and morality. Thus on the *mudharabah* financing contract are partnerships prefer the end goal of contract from the inception of contract in negotiations, all the parties agreed to it. Therefore the question of the apportionment and distribution of the rights and interests of liabilities in the contract can be ruled out for the ultimate purpose of the contract still achieved fairly.

From the explanation above it can be concluded that the principle of freedom of contracts do not always give birth to injustice when implemented on raw or standard contract. On the contract nature of partnerships and investment as the *mudharabah* financing contract, with the implementation of the principle of freedom of contracts in limited turned out to be able to create an equitable contract with terms of contract drafting process more give priority to the negotiations for the final result of the negotiation process at the inception of the contract.

The inception of the contract in addition to require freedom in contracts owned by the parties, also required a balance equivalent to the parties that are bound in a contract. The question that often arises in the application of the principle of balance in contracts is the existence of inequality of the parties that caused the negotiation position in the contracts becomes unbalanced. But in business contracts instead of the differences of interest then try reunited through the contract. Through these differences be accommodated and the contract subsequently framed with device law so as to bind the parties. According to Agus Yudha Hernoko[33] in the contract business questions on the side of certainty and fairness thus will be achieved when the differences that exist among the parties through contractual relationships mechanism is accommodated and working proportionately.

[33] Hernoko, Agus Yudha, Op. Cit. pg 2.

The phenomenon of the existence of an imbalance in the contracts can be observed from several models of contracts especially raw in the form of contracts/standard which contains a clause-a clause that the contents tend to be one-sided. However for commercial contracts should be examined thoroughly and carefully so as not to immediately declare the contract clause is disproportionate or one-sided text based solely on the substance of the contract. *Mudharabah* financing contract involving the Sharia bank as *shahibul al maal* and the customer as *mudharib* if read clause-a clause in the existing *mudharabah* financing contract as unbalanced and more in favor of Sharia bank.

When examined from the inception of the contract or the formation of the contract, implementation of the principle of balance on *mudharabah* financing contract still in progress although in a certain boundaries. This can be observed from the following:

a. at the beginning of the preparation of the contract occurs a difference of interests among the parties, but through a process of negotiation which put the parties in a position of equals can be reached though the contract agree to funding already prepared beforehand in the standardized form.

b. Negotiations by placing the parties in a position to be a key achievement of a balanced Word agreed against the contents of the contract without changing the substance of the standardized contract, this can happen because the bank first describes the contents of the contract before the contract is signed. In this context how important information in the formation of the contract. As expressed by Muhammad[34] in the financial transaction that the problem was asymmetric information can arise because of adverse selection and moral hazard. *Mudharabah* contract is a financial contract laden with asymmetric information even asymmetric information is something that definitely happened in the *mudharabah* contract. Submission of information by the bank regarding the contents of the contract to the Sharia *mudharib* is an attempt to reduce the inequality of information among the parties will facilitate the achievement of business agree.

c. Although there is a difference of positions and the number of differences that need to be identified in the process of formation of the contract, but only one objective to be accomplished by the parties through the mudharabah contract that is for the results. For that matter the principle balance can refined the implementation, all in for results to happen in a fair manner and does not cause any harm to either party.

d. The case of *mudharabah* financing contract's standardized contract was already be set when offered to *mudharib* with no denial, then when it comes to the stage of signing the contract the parties position is well balanced even though the substance of the contract does not accommodate the interests the parties are evenly matched. In such case there is agreement secretly against the provisions of the Covenant.

e. The absence of a petition for annulment of marriage due to reasons of injustices is proof that the parties may accept the contract on his own *mudharabah* financing without any coercion or pressure from any party. An aborted or suspension of the contract by reason of injustice can be done on the basis of: first, do not satisfy the elements of an agreement of will. Second, the contract violated public order. Third, the contracts violate decency.

The strength of the binding contract that has resource work was limited to the parties to make the contract shows that the right of individual rights is born and is relative. The realization of this principle in the preparation of the contract financing *mudharabah* begins when bargaining through negotiations among the parties to bring their interest in the contract. The promise and the words spoken at the inception of the contract binding process. The substance of the contract made by the parties, so any spaces in scope and their implementation are all determined on the basis of an agreement. This means that the attachment to the contract contained in the promises made by the parties themselves. However, the power to bind a contract depends on the validity of the contract is the law. If the contract is made legitimate by law (meet the provisions of article 1320 of Indonesian Civil Code and other articles that are related and relevant in Civil Code of Conduct then the contract will be valid and binding as law for the parties that make it.

Mudharabah financing is a partnership contract which contains fundamental principles for investment with results, therefore in this contract contains a considerable risk. Based on the terms of the financing contract implementation in good faith in order to demand the *mudharabah* achieved justice for the parties that are bound up in it. R. Wirjono Prodjodikoro[35] mentions the term in good faith as the "honestly" or "honestly". Good faith is distinguished into two: first, the subjective good faith that is someone's honesty in performing an act of law lies in a person's inner attitude at the time of holding of the deeds of the law, second, good faith objective i.e. the

[34] Muhammad, 2008, Manajemen Pembiayaan Mudharabah di Bank Syariah, Jakarta, PT. Grafindo Persada Jakarta, pg. 4-5.

[35] Prodjodikoro in Syaifuddin, Ibid. pg. 95

implementation of an agreement that is based on the norms of propriety or what ought to be perceived in the community.

With regard to the meaning of an objective good faith dynamic Arthur .S. Hartkamp [36] in Muhammad Syafiuddin was quoted as stating the existence of two model testing about the presence or absence of good faith in contract i.e., a first objective testing associated with propriety means one party cannot defend himself by saying that he had acted honestly when it turned out that he didn't act in proper, second, subjective testing associated with the State of ignorance.

The implementation of the principle of good faith in contract *mudharabah* financing is subjective it should come from the inner act of the parties themselves that is being honest at the time of the contract, be pre mandate at the time of execution of the contract, and showed the attitude ought to be in the post contract. In this way then the substance of justice become a destination contract will be able to materialize even though justice achieved remains within the boundaries of Justice relative. At least in the contract which was built on the principle of freedom of contracts, the principle of balance of power, principles, and the basic contract tied it in good faith does not give birth to injustice to the parties.

V. CONCLUSION

Shove off from the explanation above the *mudharabah* financing contract embodiment of Justice on Sharia bank can be done mainly by the parties that are bound in a contract such as *shahibul al maal* (as a provider of funds, namely bank of Shari'ah and *mudharib* as the user or client funds). The principle of freedom of contracts directs the parties to mutually cherish the rights of each sides to freely make a choice in choosing or not choosing to contracts. Thus everyone would be treated fairly by having the freedom to determine the attitude.

The principle of balance pushing to reposition the Party on equivalent position in drafting the contract. Positions of the parties which will have implications for the parties are equivalent in against fresh positions are balanced in determining the content of the contract, Division of rights and responsibilities, as well as in the Spanish interest in the contract through negotiations. Although the application of the principle of the balance does not give the "same" position for the parties, but with the principle of the balance of the distribution of rights and obligations of the parties can be done proportionately.

Mudharabah financing contract practices in the form of standard contract is often meant as a contract that is not fair and is not valid. However, if examined in the context of the power contract did not tie it in principle. Although its shape standard contract in *mudharabah* financing continue to be valid and legally binding power has for the parties since the inception of the contract based on the will of the parties, a transparent, there is no rejection and a lawsuit against the contents of the contract, and not conflicting as to the law, public order, and morality. Thus the parties can create a fair contract with this principle.

The principle of good will encourages the parties to be honest, reliable and transparent form the stage drafting stage, execution of the contract, and post contract. The values of good faith can come from propriety, fairness, and the custom prevailing in the society.

Departing from the conclusions, in order to improve and refine the *mudharabah* financing contract drafting justice on the future it is recommended that: first, there is the intervention of the Government in order to protect the weak party position in the contract. Second, there are special rules regarding the drafting of contract-based Sharia's *mudharabah* financing contract practices since it is still refers to the Indonesian Civil Code of Conduct.

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[36] Ibid. pg. 96

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