THE SIGNIFICANCE OF BALANCING PRINCIPLE WITHIN
THE CONTRACT OF MUḌĀRABAḤ WA MURĀBAḤAḤ: A CASE
IN INDONESIA

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Abstrak

Asas keseimbangan dalam hukum perjanjian sering diabaikan karena lebih mengutamakan asas utama perjanjian, yaitu asas kebebasan berkontrak, asas konsensual dan asas pacta sunt servanda. Tulisan ini membahas pentingnya asas keseimbangan dalam perjanjian mudharabahwalmurabahah pada program linkage. Penelitian ini merupakan penelitian hukum (legal research). Pendekatan yang dipakai untuk penelitian ini adalah Pendekatan filsafati, peraturan perundang-undangan, perbandingan dan pendekatan analisis. Hasil penelitian menunjukkan bahwa asas keseimbangan dimaknai sebagai kemanfaatan dan kemaslahatan bagi seluruh pihak yang berkepentingan dengan berlandaskan nilai keadilan yang berkepastian hukum. Perwujudan asas keseimbangan dalam perjanjian mudharabahwalmurabahah adalah berbentuk manfaat yang diterima oleh seluruh pihak yang langsung berkaitan dengan perjanjian, dalam hal ini adalah antara BUS dan LKM, maupun UKM. Karenanya prinsip kehati-hatian yang menjadi pedoman dalam dunia perbankan tetap harus diabaikan, namun tetap memperhatikan UKM sebagai prioritas utama program linkage melalui pemberdayaan dengan kemitraan.

Kata kunci: Asas Keseimbangan, kontrak, muḍārabaḥwamurābaḥaḥ, program linkage.

Abstract

The principle of balance tends to be neglected for the contracts prefers the main principle, such as freedom of contact, consensual principle, and pacta sunt servanda. This article discusses the importance of the principle of balance in muḍārabaḥwamurābaḥaḥ contract on linkage program. This research is categorized as legal research using philosophical, legislation, comparison and analytical approach. The results show that the reflection of the principal of balance in muḍārabaḥwamurābaḥaḥ contract is interpreted as usefulness and benefit for all parties concerned based on the value of legal justice equity. It can be seen through the benefits gained by all parties involved directly with the contract, in this case between Islamic Bank and the MFI, as well as SME. Hence, the prudential principal that serves as the guidance in the banking world must be kept ignored, yet still pay attention to SME as the main priority of the linkage program through the empowerment with the partnership.

Key words: principle of balance, contract, muḍārabaḥwamurābaḥaḥ, linkage program

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Introduction

Linkage Program is one of policies of Small and Medium Enterprises (SMEs) proliferation through Bank Financing. The financing from Commercial Bank to SMEs is commonly managed by Micro Finance Institution (MFI) that makes this process involving three stakeholders: Commercial Bank, MFI, and SMEs. Executing is one of the schemes in linkage program. Through the scheme, the commercial bank transfers the financing to MFI to be received by the SMEs.

The guidelines of linkage program established for Islamic Banking shows that it implements the system of muḍārabah (profit and lost sharing). The contract between the MFI and SMEs will be constructed in accordance with the request of the SMEs. This results to diverse types of contract between them: musharakah (joint financing), murābāhah (trading/cost plus), ijārah (leasing), muḍārabah (profit and lost sharing), bā' imu' ajjāl (deferred payment sale), bā' īsalām (forward sale), and other means of contract.

This study focuses on the contract of muḍārabahwamurābāhah as it is acknowledged as the best practice in the implementation of linkage program in Islamic Banking. It is originally the combination of two contracts, muḍārabah (profit and lostsharing) and murābāhah (trading/cost plus). This contract binds the Islamic Bank and the SMEs in a standard contract. As a standard contract, one of the party, in this case Islamic Bank, shall determine the type of contract to bind the SMEs. In return, the MFI would transfer the financing to the SMEs limited only in one type of contract, murābāhah. The dominance and freedom lies in the position of Bank, hence it encourages Islamic Bank in determining the type of contract which results to the contract of muḍārabahwamurābāhah in linkage program.

Contract plays an essential role in economic and business activities. All the parties are being bound and their responsibilities and rights are being established in order to gain legal enforcement in achieving the goal. Its scope is not only limited to the relationship among the parties, but also among the society. Therefore, contract has the function to provide clarity, guideline, and legal evidence, as well as to sustain a conditioned business atmosphere (win-win solution, profit-efficiency).

In regard to the position of parties, there are consumer contract and commercial contract. Consumer contract assumes that each party placed in different position, one is stronger and the other is weaker, either in terms of capital, technology or capability, therefore the demand of the stronger party should be obeyed.

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yet imbalance would occur. Its difference in position is the reason why government should be involved\(^2\). The contact in linkage program is categorized as consumer contract if we see it from the different position of each party. Even so, MSEs as the consumer can also be categorized as the party who receive the financing to develop their businesses.

Commercial contract place all parties in equal position. This contract is not made merely based on the mathematical or quantitative equality, but also based on the qualitative equality, that is the continuity of a business and respect to cooperation. The dimension of commercial contract prioritizes balance in establishing the rights and responsibilities of parties. Universal principles such as good intention as well as fair transaction (equitable and justifiable), proves that the difference of concern among the parties has been managed in the mechanism of responsibilities division proportionally, aside from the proportion of final result received by each party\(^3\).

Equality and balance becomes the keyword in contract, both in commercial and consumer contract. A state when the responsibilities are being shared equally and proportionally, thus there is no any dominating element towards the other\(^4\). The principle of equality in Sharî`ah contract is similar to al-musâwâh ortaswiyah, that mean equitability or balance. In other words, there is equality among the parties involved in the contract.

Art 2 verse (3) Indonesian Central Bank Regulation number: 10/16/PBI/2008 as the amendment of PBI No 9/19/PBI/2007 about the Implementation of Sharî`ah Principle in Collecting and Transferring Financing Activities as well as in Sharî`ah Bank Service. It mentioned the principle of âdîwatawâzun (justice and equality) as one of the principle which stands as the halâl factor of a contract, and this does not only manage the balance among the parties, but also among the individual-social relationship, even up to the balance between the life and afterlife. This wide range scope is in accordance with the statement from Sjahdeini that financial product of Sharî`ah principle should prioritize the dimension that is ethical, sociable, and religious in order to enforce justice and equity for the sake of common people\(^5\).

Linkage program involves three stakeholders within, each party had its own economic power that makes principle of balance necessary for it they tend to have different position. This balance would not neglect the justice value among parties, since


\(^3\) Ibid.


the nature of a program in businesses should always be mutually profitable as well as preserving the etiquette of a healthy business management, such as prudential principle as the basic principle of banking in Indonesia.

The contact of muḍārabahwamurābahahis a combination of two contracts. Muḍārabah contract can be categorized as natural uncertainty contract (NUC), which does not provide any certainty in the income acquired both in terms of amount and time⁶. The income is distributed among the parties according to a certain ratio or proportion, yet not in a fixed amount of it. The fixed amount of income is determined based on the real result. On the contrary, murābahah contract is implemented based on margin, which means the income is distributed on the basis of natural uncertainty contract (NCC). This contract provides clarity in payment, offers permanent return, in terms of both amount and time⁷. In NCC contract, the trading object (goods or services) shall be determined clearly in the early time, each party still stands on its own, and no sharing lost.

The contract of muḍārabahwamurābahah combines two types of contract with different category, NUC and NCC. This combination in linkage program will potentially create imbalance. Firstly, because naturally the position of each party is different and not proportional, and secondly, because NUC and NCC have completely different character. The responsibilities tend to be burdened to the MSEs. Yet in fact, according to the regulation and constitution, MSEs should be the number one priority.

The guidelines of linkage program emphasize that MSEs stand as partner, business practitioner, not as the final customer, and the purpose of linkage program is to empowering or proliferate business person through financing. The freedom in choosing the type of the contract encourages the dominant parties to pick the most beneficial contract for them, even force their interest through the contact in which is determined one sided, change certain clausal, or combine the main contract with wa˚d (promise) for their own sake.

Sharī’ah contract shall pay attention to the balance between parties, between “two partners in contract”, not between “two opponents in contract”, thus it shall not come into any force, including economic issues. Economic oppression from one party to the other is unjustifiable in contract⁸.

Contact is a “constructed law”⁹ contains concrete law norms and is individual, with the principle of freedom of contract as its main basis. This principle states that the positions of all parties are equal and proportional. The freedom of contract is the core of a

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⁷ Ibid, p. 279.
⁸ Sutan Remy Sjahdeini, ibid p.135.
⁹ Muhammad Syaifuddin, ibid p.8.
contract, under the notion that all parties are equal and in balance. Yet, it seems that the implications of the main principles, such as freedom of contract, consensual, as well as pactasunservanda, are not yet efficient. In fact, it is essential to associate the contract policies and the main principles to the principle of balance in order to achieve harmony in a contract.

Principle of balance also has a broad definition. It is not only about a micro balance between the parties, but also the macro balance between the interest of the parties and the society. This macro interest is presented in MSEs constitution and Banking constitution, especially in terms of prudential banking principle. Therefore, a study in analyzing the principle of balance within mudārabahwamurābāhah contract in linkage program is important to be conducted.

This research is categorized as legal research. The legal materials of this paper are primary and secondary legal materials. As a legal research, the method used is analyzing the statutory regulation, contract, the principles of contract, literature, as well as the legal opinion about the principle of balance and mudārabahwamurābāhah contract in linkage program to proliferate MSEs. The approach used in this study is philosophical approach, statute approach, comparative approach, and analytical approach. The legal material is being analyzed through grammatical, theological, and systematical interpretation.

**Discussion**

In order to define the principle of balance within the contract of mudārabahwamurābāhah, it needs to be analyzed based on several perspectives. Each perspective relates to the other to establish the overall meaning of it. First, it will be based on legal perspective. The analysis would be started from its legal purpose under the assumption that in the contract of mudharabahwamurahbahah, the parties fail to establish balance purposes. The contract prioritizes more on the legal certainty rather than on the justice and benefits.

The second perspective goes from the principle of law. Basically, principle of law represents the values of legal purposes: justice, benefit, and legal certainty. The result of the analysis is used to define the principle of balance within the contract of mudārabahwamurābāhah, especially in the context of linkage program in order to proliferate MSEs.

**A. The Urgency of Balance from the Perspective of Islamic Law Purpose**

Principle of “balance” or tawāzunas one of the principles of Shari‘ahBank in Indonesia, it is mentioned in Article 2 paragraph (3) PBI No 10/16/PBI/2008 that balance, in a broad point of view, is “the balance between the aspects of material and spiritual, private and public, financial sector and real sector, business and social, as well as the balance between utilizing and preserving”.

The objective of Islamic law is to achieve *maslahah*, which means the prosperity both in the lifetime and afterlife time or the hereinafter, through attaining benefits and avoiding *muqarah* (disadvantages). Therefore, the *maslahah* within the life of human kind rests in both physical and spiritual life, as well as in personal and social life\(^\text{10}\). The benefits gained are not to be acquired only for the individual but also the society in common. The spiritual aspects are also including the spiritual aspect, not only about the benefits within the lifetime period but also for the hereinafter, both terrestrial and transedental. The balance between private and public sector is presented from the benefits gained for both individual and society in a broader context, or in other words, for social importance. The balance between financial and real sector is shown from the management of financial investment, both in direct or indirect investment. Islamic banking indeed provide real sector-based product, and it really is suitable for the character of MSEs. However, Islamic banking is still a financial institution in which the conduct of financial activities is inevitable, e.g. investment in money market and capital market. In addition, in terms of the balance between business and social activities as well as the balance of utilizing and preserving, both lies on the continuity and sustainability.

The main objectives above construct a distinct character. One of the characters of Islamic law is *wasatiyah*, or balance. The purpose of Islamic Law in avoiding disadvantages and acquire *maslahah* is to obey the instruction from Allah (One God), and the benefit later on would not only be dedicated to the personal level, but also to the society, and in a broader context, to gained *maslahahin* life and the hereinafter.

In conclusion, justice is not the main objective in Islamic law. Yet, it does not mean that it would be neglected. Justice is the base, start from being fair to oneself, others, society and the world as a whole. Goal would only be successfully achieved through laws that bring justice. Justice is the source of *maslahah*. Therefore, justice and *maslahah* are strongly correlated to each other.

This is what makes Islamic law different from the western law (civil or common). Logically, justice plays a significant role in everyday life. The statement of “law is the way of justice” by Gustav Radbruch (rechstistwillezurgerechtigkeit) is one of the evidence. Justice and propriety are the goal of law. Justice is one of the main objectives of law which has been discussed along the great history of the philosophy of law; even so it cannot be separated from other objectives, such as clarity and advantage. An ideal law should be able to accommodate and balance all those three at once.

Etiquette is closely related to justice, for justice is one of the most important topics in

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etiquette. Etiquette is what associate Islamic law and common law. Etiquette in attitude helps to differentiate between the good and the wrong in a community, and it can be taken from a define source, such as religion. Hadisumarto and Ismail in their conclusion of their research state that to improve the effectiveness of Islamic microfinancing in Indonesia needs not only provision of an interest free-based system, but also a holistic approach the spiritual development, especially via internalizis islamic moral values as an entrepreneurs consciousness\textsuperscript{11}.

The significance of justice is stated clearly in Qur’an(42:17), which means. “It is Allah who has sent down the Book in truth and [also] the balance”. Several other verses encourage people to act in justice. The justice in Islam is the justice of “Ilahi”, it is directed by Allah, it sticks to morality, based on the absolute value, and must be obeyed. Islamic justice in the descendent of tawhid (the believe in one God).

Justice, as the base to achieve ma\textsuperscript{\textit{\textit{slahah}}, cannot be separated from transedental aspect, as the part of faithfulness. The faith of Moslems in obeying the instruction in Al-Qur’an lies within their hearts, it is deep down there, it provides the motivation to follow the guidelines from Allah, along with sins for disobedience and rewards for the implementation. This is applied as the rights and responsibilities of one self, family, society, and to other broader scale of community.

In the Islamic economic system, balance is not only the way to preserve the sustainability of economic aspects, but also to reallocate the resources to those who are in need according to the Shar\textsuperscript{i}ah law, so that both economic efficiency and justice can be achieved at the same time. Finally, the perfect environment for the society would become reality\textsuperscript{12}.

Islam provides the guidelines and rules as the basis of daily life system. This basis is known as Shar\textsuperscript{i}ah. Shar\textsuperscript{i}ah contains the rules of attitude in every aspect of life, goal of life, as the as the strategy to achieve the goal. This goal is established based on the concept of the prosperity of human (jalal) and good life (hayatan\textsuperscript{t}ayyibah). In Islamic wisdom, it is mentioned that prosperity is about not only the fulfillment of material needs, but also the spiritual needs\textsuperscript{13}.

In regards to ma\textsuperscript{\textit{\textit{slahah}}, as the objective of Islamic law, Al-Ghozali exemplified it further as ma\textsuperscript{\textit{\textit{slahah}}}, means something that bring benefits and keep mu\textsuperscript{\textit{\textit{darah}}}(disadvantages) away. The essence of ma\textsuperscript{\textit{\textit{slahah}}} is maintaining the purpose of shar\textsuperscript{a}’ in enacting law. Related to businesses, as the goal is to seek for and establish law, maslahah is also known as munasibor the harmony between ma\textsuperscript{\textit{\textit{slahah}}} and

the goal of law. This is the main principle as said by Muhammad Sa’id Ramadhan al-Buthi, “where there is maslahah, there is law.”

*Maslahah* has a similar meaning to advantageous as one of the values in the goal of law in western perspective. Advantageous in the goal of law mean legal advantage, that is advantages which are gained under the law. Law must contribute some advantages. One of the most radical utilitarian is Jeremy Bentham (1748-1832). He was a philosopher, economist, jurists, and law reformer who succeed in formulating utilitarian principle as etiquette doctrine. The principle from Bentham then being composed in his monumental writing *Introduction to the Principles of Morals and Legislation* (1789). Bentham defined his theory as “property in any object, whereby it tends to produce benefit, advantage, pleasure, well, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered”. Bentham and other *utilitarian* agreed that the existence of nations and law is to gain the true benefit, which is the happiness of the majority of society. From its terminology, utilitarian comes from the word utility that means “benefit”, and its theory is called utilitarianism or theory of theologies. In Greek, telos means purpose. According to this theory, the quality of etiquette of attitude is measured from the achievement to the goal.

The best action, according to the ethical perspective of Bentham, is enacting a policy, which provides the greatest utility among other policies; the measurement is using ordinal numeric number. When justice is achieved and goes hand in hand with business, thus the benefits will also be correlated with economic and business world. Practically, a property is considered advantageous if it can be measured using the profit and lost calculation. There are so many criticisms towards the theory of Bentham if the ethical quality of an action is measured according to the goal accomplishment. The biggest disagreement arose for it is failed to embrace the concept of justice. If the focus is only about gaining benefits as much as possible, the position of the minority who are incapable of gaining benefits or justice will be neglected.

John Rawls tried to respond to the problem and established new theory in order to solve the problem that utilitarian failed to manage. This theory is called Rawls theory or “Justice as fairness”. In his book, A Theory of Justice, Rawls proposed an alternative theory about justice by putting utilitarianism aside yet still maintain the core essence, which is accommodating the individual without neglecting the prosperity or rights of other people.

In the theory of Rawls, benefits go together with justice as the main goal, as mentioned

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above. Related to balance, Lebacqz concluded the theory of Rawls as “justice as equality”. If the principle established is fair, then there should be no one dominating or exploiting any chances, or even at least having bigger portion of opportunities than others. This results to justice within an equal opportunity. As what we have discussed earlier, the concept of equality from Rawls is defined as the equality in position and rights not equal in the results acquired by each individual. Equality of results is not the excuse to justify any procedure whatsoever.

Rawls proposed the opposite principle of utilitarianism. Justice does not occur from the evaluation of accomplishment, but from the rational chances in a fair environment. Rawls tend to support the macro aspect rather than the micro one. Rawls protects the weak. There is no any “trade” of freedom or prosperity to other stakeholders possible. Each party should gain balanced profit. In other words, the strong party shall wholeheartedly release the opportunity to gain their greatest profit for sharing it in order to create equality for the weak to achieve justice.

In regard to legal clarity, as one of the objective of law in western perspective, law must give benefits to all stakeholders. According to Sharīʿah, the greater benefit may be prioritized over the clarity for public interest (maṣlaḥah) and avoid disadvantages (maṣlaḥah mursalāh).

This benefit task must be shouldered by the political institution which is the government. The legal assurance needs the support from the authorities. The role of the country in upholding the economical principal is to keep and realize the justice among the members of society and preventing the lost that might be affecting the member of society due to violation of other members. In creating the justice and prioritizing the public needs, the country/government has the duty to use the power and authority also as the duty of the country morally to help in realizing the prosperity for all the member of society by ensuring the balance between personal necessity and the social one. Also by protecting the foundation agreed by everyone, preventing the misuse based on the principal of maṣlaḥah in economical activity, the country must uphold the justice, the equal distribution for all the people in order to achieve prosperity.

Seen from the juridical aspect, indeed that legal assurance is the most realistic goal rather than only the usefulness. The positivists thought tend to see law as an independent

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16 Abu Ishaq-Syatibi, in Naskah Akademik Rancangan Undang-Undang Perbankan Syariah, Dewan Perwakilan Rakyat Republik Indonesia (Academic Paper of Constitutional Draft about Shariah Banking, Dewan Perwakilan Rakyat Republik Indonesia), *ibid.*, p.31-32.

entity, law is only a mere collection of rules, and its goal is to ensure the realization of a mere legal assurance. Legal assurance is gained from a rule, which is general as well as its characteristic which only make a rule, which is also general. Yet justice remained agreed as the main entity, as “summumius, summa injura, summa lex, summa crux” (law that is harsh and violent, except that justice can save and help it). Although justice is not the only main value or goal in law, yet the goal of law that is most substantive is the justice. Radbruch even position the legal assurance in the last order after the value of justice and usefulness.

Related with the justice thought that based on the business contract, Rawls strictly stated that the concept of good justice must be contractual. The consequence of each concept of justice is not based on contractual must set aside for the sake of the justice itself. It shows that the justice must be supported by the legal assurance that is written in a contract.

B. The Principle of Balance in the Muḍārabahwa Murābaḥah Contract

According to Indonesian’s law system, muḍārabah wamurābaḥah contract in linkage program obeys to two system, Islamic Law and KUHPerdata (Civil Code). The Islamic contract is realized by ḫāb-qabil to show the voluntary attitude, feedback and the approval upon the content of the contract, as well as the obligation that needs to be done according to the terms of Allah in Qur’an(5:1): “O you who have believed, fulfill [all] contracts......”

If it is compared, there are some similarities and differences between the principles of contract inside the Islamic Law and the Civil Code. The meeting point of both systems of law is used as the connection, especially related with the material of contract. The principle of freedom with some contract as on the chapter 1338 is the basic principal of Book III of Civil Code that using the open-system similar to the mu‘āmalah system in the Islamic Law. There also are some of the principles that have some similarities, such as the principles of freedom (al-hurriyah), which is similar to the freedom of contract principle, also the equality principles (al-musāwah) that is similar to the principles of balance.

Such differences begins from the difference of the philosophical ground: contract Law of Islam is transcendental religious, the religious value from Allah, Civil Code is free from the religious value. The difference can influence the scope of the law. Islamic contract Law is

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18 Riduan Syahrani, Rangkuman Intisari Ilmu Hukum (Summary of Law Essence), (Bandung: Penerbit Citra Aditya Bakti, 1999), p.23.
vertical and horizontal as well, Civil Code only govern the relationship between human and other human. Also in the legitimacy of the contract, it covers the “rukun” and the requirement of the contract.

The freedom of contract principles is a universal principle, followed and recognized by every country in general. Hence, this principle is the one that has the similarity between the two systems of contract law. This principle gain the important spot in the contract. It reflects the human right and individual freedom through the spirit of liberalism, especially on the belief of individualism that supports everyone freely gaining what is needed and can be realized in the contract.

The principle that represent justice and usefulness is the principle of good intention and the decency. Both balance the principle of freedom of contract. The principle of freedom here has adopted in the law of contract of Indonesia. Herlien Budiono mentioned that Article 1338 verse (1) of Civil Code is the representation of principle of Freedom of contract that adopt the principle of balance.

According to J Satrio, Article of 1320 of Civil Code does not contain the balance of ‘achievement’ or principle of “jutum pretium”, that is a teaching that mention the legitimacy of a cocontrat must fulfill the requirement that is mutual between the achievements and counterproductive. Thus, by not containing the principle of balance needs the presence of verification of act of misuse of condition, in the form of economical pressure as well as psychological that cause the imbalance achievements. This is what causes the importance of ‘equity’. Equity is the keeper of practices of the Constitution; it gives the chance of evaluation in completing the general characteristics of constitution, whether adding or reducing, yet merely correcting or completing in certain condition as well as on certain condition. So, the existence is as the completion for justice in order to support the balance.

Seen from the principle of Islamic Law, the benefit as the goal of law fulfilled if it based on the justice. The principle of justice is the barometer in anticipating all form of violation that possibly happen. The violation will never happen if the values of justice can really be applied in mu‘āmalah. The substance of the value of justice protects the right and obligation of each human as well as directing to the path which is correct and blessed by Allah (God). The role of justice in the context of this research related to the justice in term of dividing the profit on profit sharing according to the nisbah (ratio) that is promised in the determination of margin or fee.

Islamic Law also follow the principle of freedom of contract. This freedom principle is the reflection of specification that is built upon the principle of ‘ibāḥah’ or the allowed

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in doing the *mu‘āmalah*. The principle of “principally, a contract is a deal between both sides and the implication on law and is due to what they have agreed”. Freedom of contract due to a contract is based on the approval as well as the implication of law. However, in Islamic teaching, the freedom in making contract, not a contract that gives unlimited absolute freedom. Qur’ān(4:29) forbids us to use the wrong wealth, which means gaining wealth from others in a not acceptable manner and illegal according to syari’ah, whether those directly banned in the *nash* of Al-Qur’ān, in *ḥadīth* and based on *ijtihād* (the result from the process of deriving the laws of shariah from its sources).

A contract based on the feeling of sincere and whole-hearted (*ridā*) will give a benefit. Since sincerity is the soul of the Islamic Contract. If the contract does not have the element of whole-heart, then the contract made is wrong (*al-‘aql bi al-bāṭil*). Whole-heart (*ridā al-tarādī*) is an abstract mental attitude (*amr khaft*). To show that in a contract gained the element of whole-heart, it needs the indicator to reflect it in the form of ijab and qabul from both sides. Based on the study above, it can be concluded the meaning of the principle of balance is the usefulness by all sides, by using the value of justice and Law assurance as the bases, in the context in Indonesia is according to the Islamic Law and Civil Code.

In the context of linkage program, the benefit of *muḍārahah wamurābahah*contract is not only for both sides, but also for all sides that has importance in it, in micro and macro scope. Giving benefit for all sides that interact on the transaction, for other parties that is not directly involved, such as the shareholder, owner of financial office, deposal, central bank, Financial Service Authority and so on.

The position of 3 (three) sides on the linkage program or equal. SME as the partner, not as the consumer. The principle of freedom of contract must be treated wisely so that it will not add the distance of the gap between the two parties. The contract of linkage program is not only based on the freedom to express the willingness in a contract.

The economic potential of SME side in the linkage program is weaker compared to the two other sides. Bank as the facilitator of fund located on the strongest position, so that it is not supposed for it to use this chance. There is no doubt that based on a wide pattern of linkage program, the relationship between Islamic bank, MFI and SME is business. Yet since the three of them are below the same constitution, then they must obey to the concept of economic democracy mandated by the by the constitution and enlisted in the Constitution of Syariah Banking Number 21 year 2008, that is the economic activity containing the values of justice, togetherness, equal distribution, and benefit, economic democracy does not intend the occurrence of asset piling and centralization of economic power on someone, a group of people, or a company not suitable with the principal of justice and equal distribution.
However in order the linkage program, the principal of freedom of contract will keep holding the important role, yet with some limitations because: first, development of society in the social economy field; second, The participation of government in protecting weak parts or for the sake of social in general; and third, The belief in society that wants the presence of social prosperity.  

The declining power of principal of freedom of contract in the linkage program seen on the guide of linkage program as well as the rules of constitution exist above it, such as: Financing Funding Limit, kinds of contract on each pattern or schemes, and the requirement of MFI cooperating with the Islamic Banking. Hence, it can be interpreted as the freedom of contract is basically giving the freedom to create a contract or not; with who they make it; determine or choose the causa of the deal; determine the object of the contract; determine the form of contract; and accept or violate the terms of constitution that is optional (aanvullend).  

The needs of SME as the recipient of funding through the linkage program should consider the different characteristics of SME and its needs. The Academic Text of the Planning of Constitution about the SME, the State Ministry of Cooperatives and Small Medium Enterprises of the Republic of Indonesia mention the characteristics of SME and its empowerment of each kind business. For the Micro Enterprises that focused on the countermeasure the poverty due to the social gap in accessing resources. The correct type of financing is mudārabah because the majority of the micro business actors have the issue of capital gaining. For the Micro Business focusing on the approach of empowerment to realize the strength of the small businesses and the openness investment and independence in market competition. This needs can be fulfilled by the musharakah (joint financing), since the business already operating so that to push the development of it, it needs the cooperation that investing each other and sharing the risks together as well. Murābahahandijārahcan also be done, especially if the micro business actors need to fulfill the needs of goods in order to expand its production. Hence, the micro business actors according to their necessity can use the mudārabah financing which commonly used for the consumptive funding. So Islamic financing schemes are argued as having moral and ethical attribute that can be effectively motivate micro-entrepreneurs to thrive. Different schemes can be used for different purpose depending on the risk profile of the mico entrepreneurs.


The principal of freedom of contract is not only already fulfill the requirement of legitimacy for the contract, but also containing non-illegal cause, not against the appropriateness, decency, and public order, also full of good intention. The one-sided determination of the type of the contract will bound the SME to the strong parties (Islamic Banking and MFI) through the muḍārabahwamurābahahcontract indicates the lacking of awareness on SME, even tend to protect Islamic banking.

In the Islamic banking practices, the NCC type contract especially murābahah is indeed dominant. Musamah create money supply that can warrant better monetary stability. Funds from this financing contract are the biggest component in islamic banking financing25. Yet it does not mean that the whole needs of the SME will be good if funded by this funding because each of the contracts has the different characteristics if used correctly can support the success of a program. It means that the trade of importance (right and obligation) must be done proportionally.

Thus the application of the principle of balance the truth is election agreement Murābahahthat binds SMEs did not determine at the beginning, but it chosen by SMEs as the best and in accordance with their need. As a dominant contract, Imronuddin and Hussain in their research conclusion state that although many Islamic scholars are on the view that muḍārabahis an advantage of islamic banks, but people prever use mark-up principles. The preference is based on that these type of contract are relatively simpler than profit and lost sharing principles26.

Deal is the main thing, yet still has to pay attention to the other principals. The principal of balance also function to balance between the main principals in the contract. The principal of balance in law of contract emphasize the same position between parties. Starting from the weakness of the principal of freedom of contract that potentially creating injustice, then this principal is said as the refusal upon the principal of freedom of contract that is treated improperly. Based on the requirement of legitimacy of the contract that has no consensus can lead into the cancellation of the contract.

The balance also covers the usefulness materially and spiritually: the benefit according to the Sharī‘ahlaw. In it relation with the social function, then it is emphasized not only as the business benefit, but also considering the use and the conservation for the sake of business continuity. All parties need to participate to be responsible upon this.

There are 2 (two) aspects of the concept of responsibility in Islam. First, the responsibility

that united with the errancy of human being as the God’s Represent on earth, which limit people from the greediness from the others especially business partners. Second, the concept of responsibility that is voluntary, which requires sacrifice. The voluntary on taking responsibility is the reflection upon the implementation of faith of one from their awareness of faith as a Muslim who surrender all the affairs under the bless of one’s God. If it is correlated with the business activity (mu’āmalah), then all objects involved in the business are basically the bless from God, where humans as the business actors only doing the activity according to the terms set by God and the responsibility of human to their business partners is to respect the right and obligation of it. This is the location of the importance of responsibility that must be fulfilled by the business actors. So that there will be bless not only in achieving the benefit and profit in the world, but also in the afterlife, as well as the benefit physically and spiritually, individually and socially.

From the western perspective, doing good deeds to people for the sake of oneself is called as altruistic. Jensen classified altruism into the category of attitude non-individual importance. In the individual importance, the focus is oneself and ignores the other parties; they do not have the sense of altruistic to sacrifice time or resources for others. The core of altruistic here shows that the human behavior is basically dualistic, human has the rational and non-rational component.

Conclusion

The principal of Freedom interpreted as the benefit and bless for all the parties involved with the bases of the value of justice with the law assurance. The reflection of the principal of balance in contract of mudārahawamurābahahis as a benefit that gained by all the parties involved directly with the contract, in this case between Islamic Bank and the MFI, as well as SME. Besides, other parties such as the shareholders, fund saver, monetary monitor authorities. Hence, the principal of careful becomes the guidance in the baking world must be kept ignored, yet still paying attention to the SME as the main priority of the linkage program through the empowerment with the partnership.

The imbalance of justice especially for the SME can be minimized. It is done by giving freedom to the MFI as the fund distributor from the Islamic Bank, to distribute the funding with the needs of the SME. Which is through the additional of terms on the linkage program that the type of the contract bound the SME in the executing pattern determined based on the deal between the MFI and the SME.

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