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The values for justice in the trade contract in Islamic Law

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Abstract. The trade contract made in writing has legal values that balance the right and obligation of the contracting parties. The most important in balancing the value of right and obligation, namely the values of justice. In the trade contract based on Islamic law, such as an example of the *mudharabah* contract, namely an agreement between the financier of capital (*shahibul maal*) and the recipient of capital (*mudharib*) who in the business, it can guarantee the justice of the parties. Justice is seen from the distribution of profit and losse. In the distribution of profit based on an agreement, while losse is determined if capital losse is only borne by the *shahibul maal* not by the *mudharib*. It provides justice if the loss of capital is only borne by the *shahibul maal*. It is unfair if the capital is borne by the *mudharib* since the *mudharib* in lost energy. *Mudharib* not get anything in the bussiness.

Keywords. Trade Contract, Justice, and The Contract

I. Introduction

Human as social beings who interact with each other, really needs the bond which can guarantee the interaction relationship. There are many interactions which occur between human, such as political interaction, war interaction, male and female social interaction, interaction of trade, and others. In the context of trade interaction, the basis of the legal relationship that binds it, is generally based on the contract. In the past, the contract which underlied trade transaction, it was verbal and was rarely in the contract writing. In today's modern era, the digital era that has penetrated all aspects of human life, trade interaction does not only take place face-to-face but is also carried out through the internet network. Almost all of this trade interaction is based on the written contract.

Every trade contract, whether oral or written, has the legal ideological basis which underlies the characteristic of the legal relationship contained therein. In the context of ideology, human civilization was once dominated by three major ideologies, namely Islam, Capitalism, and socialism. These three ideologies produce the legal system with different characteristics, so that it is known as the Islamic legal system, the secularist legal system based on the ideology of capitalism and the socialist legal system based on the ideology of communism.

Human civilization today, is still dominated by the ideology of secularism, so that the legal system that dominates many countries in the world is a capitalistic-secularism-based legal system. Comparison of the secular legal system with the Islamic legal system, of course, is

different, namely the secular legal system ignores religion, while the Islamic legal system is a legal system that derives divine values. The existence of Islamic law is a legal system that reflects the revelations of Allah and the Hadith of the Prophet Muhammad. This is the point of difference.

The different characteristics of the Islamic legal system and the secularist legal system also affect the contract model. Including the trade contract that forms the basis of the legal trade relationship between the parties. In this paper, the authors only review trading contract based on Islamic law, more specifically the values of justice in trading contract based on the Islamic law. The research question in this paper is whether the trading contract based on Islamic law can guarantee justice for the contracting parties?

II. Literature review

The meaning of justice according to Western experts and Islamic scholars

The discussion on the nature of justice has been coloring almost all patterns of thinking in various times and civilizations with a varied viewpoint. In general, the differences in the point of view of thinkers in revealing the nature of justice, relying on the idea of everyone's ideology. One's ideology, basically always influenced by the background of his ideology. A person's ideology is strongly influenced by his thoughts, also recognized by Stolker, that to find out the style of thinking someone, especially from legal scientists, should find out about what and how the background of his thoughts (Stolker:42-51).

The term justice in Arabic uses the word '*adl*', which according to M. Quraish Shihab by referring to several Arabic dictionaries, that the term '*adl*' in the beginning means "the same" then becomes a noun that means "equation", meaning "equation" according to M. Quraish Shihab, That is the culprit does not side with. It means that the perpetrators side with the right one because both the right and wrong parties must obtain their rights, so that the actor of justice is someone who does something "worth" and "not arbitrary".

The discussion about justice has previously been the debate of thinkers. They have put justice as a staple of studies with various points of view both morally, politics, law, social and economic. Aristotle views justice as a virtue, as stated by Delba Winthrop (1978:1201), that justice is the last of the virtues of character which Aristotle treats, and its treatment is followed by that of the intellectual virtues. This placement reflect the fact that it forms a bridge of sorts between them, not only because justice is shown to require discriminating judgement as well as good character but because the analysis reveals that the ground of the moral virtues is problematic. Aristotle's Explanation Quotes in his work Nicomachean Ethics, put justice as a moral virtue value, according to Aristotle that justice is not only in the context of treatment without discriminatory but also reveals moral issues. It was also stated by John Rawls (1999:23) that "*justice is the first virtue of social institution , as truth is of system of thought*".

According to John Rawls that the theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. John Rawls argues that the social order, however neat, if it does not realize justice as a virtue, then the order must be rejected, therefore all political and social values should be based on justice (Sahaya Anggara, 2013:11).

According to Karen Lebacqz (2015:2), that there is no same conception of researchers about the nature of justice. The meaning of justice according to Frans Magnis Suseno, can be interpreted two meanings, namely first in a formal sense. In this context of meaning, justice that everyone is treated equally. Fair law means that the law must be implemented in accordance

with the principle of equality before the law (rectsgleichheit), this is what is interpreted as a law in a formal sense. Second, justice in the meaning of the material, namely the substance of the legal content imposed in the middle of the public should realize a fair life order. Fair life order, according to Frans Magnis Suseno, is a shared life order based on what according to morality is good and reasonable. The meaning of Franz Magnis Suseno's justice, basically still causes debate among western legal thinkers, even though there are differences of opinion, Raymond Wacks (1987:89), he recognizes that discussion of justice must involve moral and virtues. The same view of Aristotle and John Rawls, that justice must contain the values of virtue.

The debate on the meaning of justice in western thought, when referring to the view of W Friedmann (1967:345), divided into two thoughts, namely first, the metaphysical thought represented by Plato. Justice according to metaphysical thinking that justice comes from inspiration and intuition. Based on this metaphysical thought, the existence of justice is believed to be a quality beyond the reach of reason, so that it cannot be understood according to the consciousness of a rational human being. Second, the rational thought represented by Aristotle that justice can actually be explained through scientific principles through quasi-scientific ones that can be accepted by human reason. The rational school of thought rejects the metaphysical school because justice according to the rational school can be explained in detail and concretely accepted by human rationality, because human reason is the highest mind.

The diversity of thoughts about the formulation of justice shows that every thinker has a different point of view about the meaning of justice. John Rawls, for example, builds his theory of justice, which is not only placed in the moral framework of the individual but also questions the mechanism for obtaining justice, including legal efforts to support the achievement of justice. On that basis, John Rawls says that *These principles are to regulate all further agreements; they specify the kinds of social corporation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.* According John Rawls: *...the principles of justice are the result of a fair agreement or bargain. For given for the circumstances of the original position, the symmetry of every one's relations to each other, this initial situation is fair between individuals as moral persons, that is, as rational beings with their own ends and capable, I shall assume, of a sense of justice.*

John Rawls's explanation of justice, is an attempt to initiate a contract-based theory of justice. According to him, an adequate theory of justice must be formed with a contract approach, in which the principles of justice chosen are the result of the mutual agreement of all persons freely, rationally, and equally. Only through a contractual approach can a theory of justice be able to guarantee the exercise of rights and distribute obligations equitably to everyone. John Rawls, explicitly states that a good concept of justice must be contractual. John Rawls' view was criticized by Philip Pettit (1974:311): *My intention is to show that contractual theory of justice defended by John Rawls does not have status of a universal theory. By universal theory, I mean a theory which people in different circumstances, particular people in different cultures, would have equal reason to accept-granted that they could all understand the argument for it. I intend to show that the most Rawls can claim is that his theory explicates the sense of justice of people in a particular society".*

Philip Pettit's criticism of John Rawls' theory is that the discoursed idea of justice has not been universally accepted, the idea of justice can only be accepted in the social context of certain communities, it is less acceptable in the context of a society that has a certain culture, which does not put the principles of justice based on contract. According to Philip Pettit, if the

justice that Rawls wants is contract-based with a rational approach, then Rawls has failed to concretize the relationship between the principles of contract-based justice and what is meant in the minds of the parties in the contract. Philip Pettit, arguing that the theory of justice initiated by John Rawls, is only suitable in the context of western society, which prioritizes individualism, Philip writes that...The first is to suggest that the society for which Rawls provides a theory of justice is Western Democracy, particularly in its twentieth century. Justice according to Islam, among others, was written by Sayyid Qutb: *We cannot study the nature of social justice in Islam until we have first examined the general lines of Islamic theory on the subject of the universe life, and mankind. For social justice is only a branch of that great science to which all Islamic doctrines must revert* (John B Hardie, 2000:37).

Sayyid Qutub's view that puts his argument in an Islamic perspective, the meaning of justice must be placed within the framework of Islamic doctrine as its basis, which is also agreed upon by the majority of scholars. As stated by M. Quraish Shihab, that the meaning of justice from an Islamic perspective, always refers to the Qur'an as the main source of sharia doctrine. M. Quraish Shihab in explaining the meaning of justice according to sharia, namely by referring to the Qur'an as an important dogma which is the main source of Islamic thought. The Qur'an when explaining justice, in a number of verses uses several terms, namely, 'al-adl, al-qisth, al-mizan. A number of these terms, essentially refer to the same meaning, namely justice but in a different context. The term 'Adl refers to the same understanding between two parties. The term qist means a person gets a fair share which does not have to be equal. The term mizan means "a tool for weighing". That is, every Muslim in dealing with a case must prioritize fair qualities.

M. Quraish Shihab describes the meaning of justice from an Islamic perspective by referring to the opinions of the scholars, as follows: First, justice means equal. Second, justice which means proportional. This type of justice does not require that there is an equality of all units in order to be balanced. It could be that one part is small or large, then the size of the large and small is accepted by each party according to its function. For example, the instructions in the Qur'an, which distinguish one portion from another, such as the distinction between men and women in heirloom. Third, justice in its respective place. The opposite is tyranny, which means violating the rights of the others. For example, the government's obligation to provide health insurance to its people is justice but ignoring obligations, it can mean that the government has done injustice to its people. Fourth, justice is attributed to the nature of God. This justice emphasizes the Glory of God, who does not do injustice to his servants.

III. Methodology

The principle of the legal research cannot be separated from the use of the type of research used, any research must use a type to analyze it. According to Soerjono Soekanto (1984:200), an Indonesian sociologist that research is a scientific activity based on certain methods, systematics and thoughts aimed at studying legal phenomena. Based on the legal issues, this research focuses on the perspective of legal science which is supported by legal concepts and legal theories that are relevant to the legal issues being studied. For this reason, according to the author, this study will use the type of normative legal research. This paper is a legal research. The method used as an analytical tool is a normative legal research method using a conceptual approach, which is philosophical in nature by the description of Islamic legal theories.

IV. Result and discussion

The Contract In Islamic Law

The term contract according to Islamic law uses the term contract in the Qur'an, namely *al-'Aqdu*. The definition of a contract according to Islamic law is linguistically binding. It is said that the bond (*al-rabth*) means to gather or collect the two ends of the rope and tie one of them to the other until the two are connected to become like a single rope. The word *al-'aqdu* is found in the Qur'an Surah al-Maidah verse 1 that a human being is asked to fulfill his contract (Pasaribu, 2004:2). According to Fathurrahman Djamil in Ghufron (2002:75), the term *al-'aqdu* is the same as the term *verbintennis* in the Indonesian Civil Code (*BW*), while the term *al-ahdu* is the same as the term agreement or *overeenkomst*, which is a statement from someone to do or not do something. This term is contained in the Qur'an Surah Ali Imran verse 76, Sharia reviewers provide a definition of a contract as an agreement relationship justified by sharia which causes legal consequences for the object (Ahmad Basir, 2004:247).

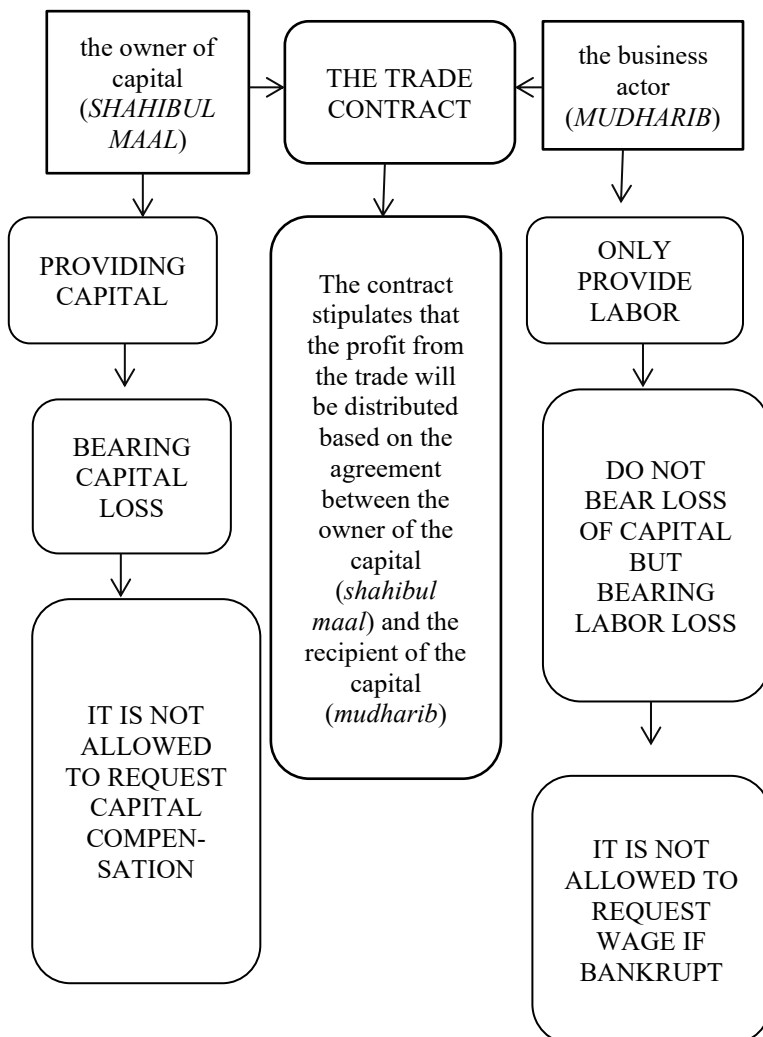
The implementation of the contract according to Islamic law contains elements for the fulfillment of the contract. According to Rahmat Syafe'I (2004:45) that in an Islamic engagement, there are three elements for the fulfillment of the contract, namely: 1) the parties to the contract (*al-'aqidan*); 2) the Substance of Contract (*Shighat al-'aqd*), namely *ijab* and *qabul*; and 3) Contract Object (*al-ma'qûd 'alayhi*). The same opinion was also expressed by Yusuf as-Sabatin (2011:37), that There are three elements of the contract or the so-called pillars of the contract: (1). Two contracting parties (*al-'aqidaan*); (2) the object of the contract (*mahaal al-'aqad*); (3) The editor of the contract (*shighaath al-'aqad*), but according to Yusuf as-Sabatin, there are certain types of contracts which even though the three pillars have been perfected, for example, the *ijab-qabul* has been carried out, but has not been carried out before the handover of the assets that have been transferred. be the object of the contract. Examples of these contracts are grant contracts, *al-qardh* (debt) and *ar-rahn* (collateral), and others. If the elements of the contract have been fulfilled, then there are several aspects that become an important point of attention regarding the terms of the validity of the contract. Ahmad Azhar Basyir, explained that the conditions for the occurrence of a contract include everything, which is fulfilled by the requirements for the formation of a contract according to sharia standards, if it does not meet these conditions, the contract becomes void.

Value of Justice in Trading Contract Based on The Islamic Law

The perspective of justice in Islamic law, is to put the rights and obligations of the parties in the contract based on what has been regulated in the Qur'an and the Hadith of the Prophet Muhammad. Islam has laid down balanced rights and obligations in trade contracts. It is the balance of rights and obligations that embodies the values of justice that are accepted by all parties. Trade contracts in Islam are known as *syirkah* which means alliance or association. *Syirkah* in Islam uses several models, namely *mudharabah*, *inan*, *abdan*, *Wujud*, and *Mufawadah*. In general, the trade contract model takes place by involving the investor and the party running the business. The authors describe one example of a trade contract, namely the *mudharabah* trade contract. *Mudharabah* trading contract, there are two parties who cooperate with each other trade, namely the party providing capital called *shahibul maal* and the recipient of capital who works to carry out business activities called *mudharib*. The parties, namely the capital provider and the recipient of capital, then make a business activity contract in which the contents of the contract, the capital provider will hand over the capital to the recipient of capital who will carry out business activities. Usually the financier will provide requirements to the recipient of capital regarding business activities.

Investor and recipient of capital as business actor enters into the contract for a business or trading activity. The contract stipulates that the profit from the trade will be distributed based on the agreement between the owner of the capital (*shahibul maal*) and the recipient of the capital (*mudharib*). If in the *mudharabah* agreement there is no profit sharing agreement (profit), then the profit sharing is determined based on the share of each party, namely the energy expended and capital. Likewise, in the implementation of the *mudharabah* contract, it causes losses, so the distribution of losses is not based on the ratio, but based on the amount of capital of each party. That is why it is called the profit ratio, because the ratio can be applied if the business is profitable. As for the losses incurred, the capital loss is only borne by the *shahibul maal* while the *mudharib* does not bear the capital loss. if in the implementation of the *mudharabah* contract, there is the loss in the destruction of capital. Of course, it is the owner of the capital who will bear the capital losses, not the business actor. When calculated mathematically, it appears that those who suffer losses in *mudharabah* is the owner of capital while the business actor does not have to bear the capital losses.

In the following section, the authors present the diagram of the *mudharabah* contract:
Diagram for *Mudharabah* contract



The content of the contract, provides the values of justice. The perspective of justice contained in the contract can be explained that if we look at the nomenclature of the position of the parties in the *mudarabah* contract using the lens of the principle of proportionality, then actually the loss is not only experienced by the owner of the capital but also by the business actor. Proportionally, financial losses are the burden of the owners of capital. On the other hand, business actors still suffer losses. The location of the losses experienced by business actor, namely in terms of the outpouring of energy that he expends and the amount of time he sacrifices. It is true, business actor is not charged with capital losses. However, with the losses in the implementation of the *mudarabah* contract, business actor does not get anything in its work. Moreover, if the work it does is only concentrated on the bonds of the *mudarabah* contract, then it is certain that the business actor will get psychological suffering because it has to fulfill his need, especially if this need is also related to the needs of its family.

For comparison, the authors describe the comparison of *mudharabah* contracts with contracts under Indonesian civil law regulated under the *Burgelijk Wetboek* (BW), in the following table:

No	Contract Format	The <i>Mudharabah</i> Contract	BW Contract
1	The Substance of Contract	Agreed by the Parties to the Contract	Dominance is determined by the Capital Owner
2	Loss Sharing	Capital Loss Only by Capital Owner	Loss of Capital by the Parties in Contract
3	Contract Nature	Consensus	Standard

So it is actually fair and proportional according to Islamic law if the loss of capital is not a burden that must also be borne by business actors. Thus, it is disproportionate and unwise if in *mudarabah*, capital losses must also be borne by business actors or recipients of capital. It is an injustice, if business actors are also required to bear capital losses, especially to the point of having to compensate for capital losses. Likewise, it is very disproportionate if the owner of the capital has to provide financial compensation or replacement money to business actors in the event of a loss. This is because the legal relationship between capital owners and business actors is not a legal relationship between employers and workers, but is a legal relationship of the partnership nature.

V. Closing

Each party, gets the loss and profit based on the proportion in the perspective of Islamic Law. Profit is divided based on the percentage in the agreement, while losses are borne according to the portion included in the agreement, such as capital losses borne by *shahibul maal* while losses of the work, time and thought is borne by *mudharib*. This has provided the values of justice for the parties to the trade contract according to the Islamic law.

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