

# The Difference of the Mudharabah Agreement (Akad) Concept based on the Sharia Banking Act and the Implementation of Kaffah and Istiqamah Principles in Indonesia

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Abstract: This study aims to formulate and determine the *ratio legis* of Sharia Banking Act. It also aims to examine the Sharia Banking Act in comparison to the existing Sharia norms. The Sharia Banking Act provides different definition on the concept of mudharabah agreement (akad) which is stated on the explanation of Article 19 paragraph (1) letter b and c. Meanwhile, the implementation of *kaffah* and *istiqamah* principles in the Explanation of Article 3 of the Sharia Banking Act deviate from mudharabah agreement (akad). This research employs doctrinal methodology. This study finds that mudharabah agreement contain fair and equal principle to between the owners of capital and managers, as well as the daring responsibility of taking risks. It is necessary for conducting judicial review related to profit and loss sharing particularly Article 19 letter b and c of Sharia Banking Act.

## 1 INTRODUCTION

The establishment of sharia banking is due to the preference of non-interest banking system from the Moslems in Indonesia who want to enforce sharia economy. Indonesia is one of the countries with the largest Moslems population, but they get to know of the sharia bank quite late, which was in 1991 pioneered by Bank Muamalat Indonesia. Islamic banking was just regulated seven years later based on the Law Number 10 of 1998 on the Amendment of Banking Act Number 7 of 1992. Then, the government released the Sharia Banking (Islamic Banking Act) Number 21 of 2008. Article 1 number 3 states that "Commercial Bank is a bank conducting conventional business activities and / or based on Sharia Principles of which its activities provide services in the payment traffic." Furthermore, Sharia Principles clause referring to sharia banking system are mentioned in the following articles.

To some degree, Muslim customer go to sharia bank is not only for economic reason but also for ideological reason (Agus Triyanta, 2009). The obedience of Muslims in carrying out religious orders is not merely worship, but also *'hablumminannass* relationship (horizontal relationship among human as

fellow creatures) is equally important in social interaction as the way of life.

Article 3 of the Sharia Banking Act is not aimed at supporting the implementation of national development but also at holding sharia banking so that it does not deviate from the substance of 'sharia' which is thorough (*kaffah*) and consistent (*istiqamah*). In the Islamic Banking Act, the author encounters an inconsistency in the Explanation of Article 19 paragraph (1) letter b and c in which one of sharia banking products namely financing and collecting funds use the same agreement (*akad*) that is *mudharabah*. However, in the Explanatory Article section there are different treatments.

Explanation of Article 19 Paragraph (1) Letter b, "*Mudharabah Agreement*" in collecting funds is a cooperation agreement between the first party (*malik, shahibul mal*, or the Customer) as the owner of the fund and the second party (*amil, mudharib*, or Sharia Bank), which acts as a fund manager by dividing business profits in accordance with the agreement set forth in the Akad. Letter c, referred to as "*Mudharabah Agreement*" in financing is a contract of cooperation between the first party (*malik, shahibul mal*, or Sharia Bank) which provides all capital and serves as the second party (*amil, mudharib* or Customer) acting as managers of funds

by sharing business profits in accordance with the agreements set forth in the Agreement, while the losses are borne entirely by the Sharia Bank unless the second party makes a deliberate mistake, negligent or in violation of the agreement.

Therefore, the issue of this study is the legis ratio of sharia banking act to distinguish the definition of *mudharabah* concept on the Explanation of Article 19 paragraph (1) letter b and c and the implementation of kaffah and istiqomah principles in the Explanation of Article 3 of Sharia Banking Act in Indonesia.

## 2 MATERIALS AND METHOD

This paper uses two information sources. The first one is primary legal material (Al-Qur'an, Al-Hadiths, and the Act of Sharia Banking) and secondary legal materials (legal entities from the analysis of experts available in literary books and scientific articles).

The method applied is normative juridical legal research, which relates to the prevailing norms and legal principles. The approach taken is statute approach (Peter Mahmud Marzuki, 2017) in the form of Explanation of Article 19 paragraph 1 letter b and c with Explanation of Article 3 of Sharia Banking Act and conceptual approach (Peter Mahmud Marzuki, 2017) in the form of *mudharabah*, kaffah and istiqamah concept.

## 3 RESULT AND DISCUSSION

### 3.1 Scope of Mudharabah Agreement (Akad)

The term *mudharabah* literally derives from the expression of Arabic *fial-'ard* which means "making a journey" (Amir Shahrudin, 2010). *Mudharabah* is from the word *dharb*, which means 'hit', the process of an individual in starting a business. Technically, according to Syafii Antonio, it is an agreement between the parties; the first party (*shahib al-mal*) provides all the capital, while the other party becomes the manager (Zainuddin Ali, 2008).

According to the *fatwa* or edict of the National Sharia Counsel (DSN) Indonesia Ulama Board Number 07/DSN-MUI/IV/2000 on *Mudharabah* Financing (*Qiradh*), *mudharabah* financing is financing distributed by Shari'a Finance Institute (LKS) to a certain party for a productive business. Based on Fatwa (decrees) of *Majelis Ulama*

*Indonesia* (Indonesian Council of Ulama) *mudharabah* is the first and the main key in sharia banking, which is an alternative to avoid usury solutions that are generally found in the interest of conventional banks.

*Mudharabah* is a relationship between two or more persons, such that one or more persons supply capital and the other run the business on his or their behalf at an agreed rate of profit (Trisadini Prasastinah Usanti and Abdul Somad, 2016). Legal aspect of *mudharabah* is in the Qur'an Surah Muzammil verse 20 which means, "And some of them people who walk on earth seek some of God's gifts .."; Al-Maidah verse 1 "You who have believed, fulfill all contracts .."; Al-Anfal verse 27, "You who have believed, do not betray Allah and the Messenger or betray your trusts while you know (the consequence)."

The history of Tabarani Hadith narrated by Ibn Abbas said that Abbas bin Abdul Muttalib did give funds to business partners through *mudharabah*. Abbas required that the funds were not brought across the ocean through a dangerous valley or buying livestock. Breach of such rules is the responsibility of the business partner. The condition was submitted to the Messenger of Allah and he allowed it (Zainuddin Ali, 2008). This hadith then gave rise to two types of *Mudharabah* agreements, consisting of (Zainuddin Ali, 2008):

1. *Mudharabah Muthlaqah* (restricted), is a form of cooperation between *shohibul maal* and *mudharib*, which scope is very wide and the specification is not limited by business type, time, and business area.
2. *Mudharabah Muqayyadah* (unrestricted), *mudharib* is limited by small scope of business type, time, or place of business.

Abdurrahman Al-Jaziri suggested that *mudharabah* is a giving of property(s) to others as venture capital. However, he added that the gain will be shared among the parties if the loss is borne by the owner of the capital (Zainuddin Ali, 2008). The executioner of capital will lose their time, mind, and effort, as well as their managerial (Mahmudatus Sa'diyah dan Meuthiya Athifa Arifin, 2013). Under the principle of *mudharabah*, the share of profit should be stated as ratio of the total profit. Profit can not be expressed as percentage of the capital invested (Mohammad Ghufron Az, 2015).

M. Yazid Afandi explained that the value of equality justice in *Mudharabah* is the profit and risk sharing of each party who cooperate in accordance with the portion of involvement. The risk of the financiers is the loss of investment. The *mudharib* party accepts the risk of loss of energy and mind in

the management of the capital (Popon Srisusilawati dan Nanik Eprianti, 2017).

The concept of *mudharabah* funding adopted from *mudharabah muthlaqah* type where the customer fund of the capital owner is fully managed by shariah bank. Customers wait for the profit only, because they are not involved in the financial management. Unlike the case of *mudharabah muqayyadah*, which is then adopted by *mudharabah* financing, the agreement of a bank or funder and the beneficiary of the same funds are in the attachment of type of business, time, and place. Thus, the loss is charged to the bank or funder to appreciate the exit of the mudharib's efforts which should be limited by type of business, time, and place.

### 3.2 Purpose of Sharia Banking Act

The principle of the establishment of good legislation include: clarity of objectives, institutional or proper forming officials and suitability between the categories, hierarchy, and workable material content and usefulness, as well as usability, clarity of formulation, and disclosure (Article 5 Act Number 12 of 2011 on the Establishment of the Regulation Legislation).

The implementation of sharia law as the implementation of Article 29 Paragraph (1) and Paragraph (2) of the 1945 Constitution is about the freedom in carry out religion for its adherents and of Article 28 letter E of the 1945 Constitution, in that religion and practise the religion is the right of human (Mardani, 2013).

Based on Article 20 of the 1945 Constitution of the Republic of Indonesia, the Legislative Assembly is authorized to formulate and regulate the law. In its journey, formulating the Sharia Banking Act also involved such as the Association of Indonesian Sharia Banking, National Sharia Board (DSN)-Indonesian Council of Ulama (MUI), Sharia Economic Community (Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia, No Year,).

Sharia banking is recognized when the Act Number 10 of 1998 on Banking Article 1 Figure 3 alluded to the principles of sharia. Commercial Bank is a bank conducting business in a conventional and or based on Sharia Principles which in its activities provide services in the payment traffic. It seem that Indonesia applied dual banking system, namely conventional system that uses the interest system and sharia system which is based on the provisions of Islam (Titik Triwulan Tutik, 2016).

Article 1 paragraph 12 states that the principle of sharia is the islamic principle law in banking

activities based on decrees (fatwa) issued by the institution that has authority in determining fatwa in the sharia area. Sharia compliance is not only on positive law compliance in Indonesia, but also fatwa (decrees) by Majelis Ulama Indonesia (Indonesian Council of Ulama) that has an equal role in the context of sharia economy. Ulama fatwa generally enforces sharia principles that avoid *riba* (interest), *gharar* (uncertainty), *maysir* (gambling/speculation) and other haram activities. Further affirmed in Article 3, it aims at supporting the implementation of national development in order to improve justice, togetherness, and equity of the people's welfare. Then the explanation mentions about obligation to conduct the sharia principles thoroughly (*Kaffah*) and consistency (*Istiqamah*).

Protection of customers are reinforced in the contents of the law as well as the principles, objectives, and functions of sharia banks including the actualization should be felt comfortably by the bank's customers (Gunarto Suhardi, 2003).

### 3.3 Fundamental Concept of Profit-Loss Sharing of Mudharabah Agreement (Akad)

By the definition, profit sharing is defined as the distribution of profits and some part of earnings of employees of a company (Muhammad, 2005). The distribution occurs not only when the company earn the profit but also when it experiences the loss. It will cause the agreement called profit and loss sharing agreement (Fahrurrozi, 2016).

Some of important things in the profit and loss sharing is that the profit distribution for each party should be proportionate; the capital owner (*sahibul maal*) is not responsible with the loss outside the capital given; *Mudharib* (partners) does not share the loss except for the loss of time and energy. This occurs when the loss is not come from an error of mudharib. Proportional is defined as the suitability of the profit sharing with the amount of paid up capital. Besides, the amount of profit must be an agreed percentage.

In mudharabah agreement, the principle of justice will actually be realized because both sides feel the benefits and bear the loss. Investors bear the loss of capital, while business the loss of energy, mind, and time. Hence, in mudharabah, no one will be justified to make profits without having to bear the business risks (Trisadini Prasastinah Usanti and Abdul Somad, 2016).

### 3.4 Kaffah and Istiqamah Principles

The efforts to implement Islam in a kaffah and istiqomah are closely related to the meaning of various provisions of law in Al-Qur'an and Sunnah. Kaffah according to the explanation of Sharia Banking Act is thorough, while istiqomah is consistent. Sulastomo stated that the provisions of the law based on the definite verse require Muslims to run the business in totality based on the rules of *ushul al-fiqh* (Moh. Zahid, 2008).

The concept of kaffah is based on the word of God in sura al-Baqarah verse 208: "O believers enter into Islam Kaffah, and do not follow the steps of shaitan. Surely shaitan is a real enemy to you". According to Ahmad Musthafa al-Maraghi, the word '*al-silm*' means language of peace and salvation, which is used also with the meaning of Islam. While *kāffah* means thoroughly without exception (Moh. Zahid, 2008).

Embracing and practicing in kaffah is the command of Allah and it must be implemented by every believer in any condition. In the same paragraph, we are prohibited from following the *syaitan*, because of the attitude to follow the traces of *syaitan* is contrary to Islam (Sovia Mas Ayu, 2015).

According to Ibnu Jarir al-Tabari, Imam Al-Tabri explains the meaning of Kaffah in his *tafseer* as "the command to carry out all His Shariah (Islam) and His hudud which is an Arabic term that refers to Islamic penal law or Quranic punishments through not reducing some of them and practicing some of them." This is because kaffah is a characteristic of Islam, so it can be counted "Enter you by practicing all the teachings of Islam, and do not you subdue a bit of it the Imam master with Muhammad and with some that he came with" (Wahib Akmal, 2017). Therefore, Salim Segaf al-Jurfi stated the necessity of Islam in kaffah is because Islamic Shari'a is believed to have more value. The value is that it includes the dimension of the world and the hereafter. Islamic law contains provisions that are preventive and solutive (Moh. Zahid, 2008).

The implementation of Islam *kāffah* can be measured when Islamic values become an inherent part of life on earth. The intended Islamic values are the implementation of *maqāsid al-shari'ah al-khamsah* in the five *shari'ah*'s daily life, namely, *Hifz al-Dīn* (protection of religious belief), *Hifz al-Nafs* (protection to the salvation of the soul), *Hifz al-'Aql* (protection of the existence of reason), *Hifz al-Nasl* (protection of offspring), *Hifz al-Māl* (protection of property). Muamalah is closely related to the protection of property (*hifz al-Mal*). The reference of

protection of property are Qur'an Surah Al-Baqarah verse 275 and QS. An-Nisa' verse 29 (Moh. Zahid, 2008).

The implementation of Islam as the way of life is consistently applied in any aspect of life for the achievement of a good life order (QS An-Nahl: 97) and the denial will only create a bad order, both for life in the world and in the hereafter (QS Thahaa: 124-126) (Muhammad Syafi'i Antonio, 2001). HR. Muslim no. 782, from Aisyah r.a, the Prophet SAW said, "O people, do practice according to your abilities. Because God is not bored until you feel bored. (Know that) God's most beloved practice is a little continuous practice."

## 4 CONCLUSION

The regulations on the principle of *mudharabah* under the law Number 21 of 2008 on Sharia Banking in Indonesia, as it turns out, find that there are inconsistent (*istiqamah*) stipulations and non-kaffah, that is between the norms found under the Explanation of Article 19 paragraph (1) letter b and c with the norms found under the Explanation of Article 3 on *kaffah* and *istiqamah* principle. Inconsistency in regulations will lead to legal uncertainty and the effort of establishing sharia compliance as mandated under the Sharia Banking Act is difficult to implement in Indonesia. Certainly, it will be unjust for customer who wants to implement sharia clearly and get advantage fairly. The concept of *mudharabah* has a positive value, which is a fair equality among owners of capital and managers, as well as the equal responsibility in taking the risk. Judicial review is necessary for the Explanation of Article 19 paragraph (1) letter b of Sharia Banking Act on the relation of *mudharabah* with kaffah and istiqomah principles.

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