Harmonization Between Sharia Economic Law and Land Law in Home Financing Credit with the Musharakah Mutanaqishah Agreement at Bank Muamalat Indonesia Surabaya

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Abstract

The high rate of population growth that is not accompanied by an increase in the availability of houses will cause a backlog. Islamic banks offer home ownership financing solutions (KPR) with a Musharakah mutanaqisah contract, namely financing based on the musharakah principle, namely: Shirkah al-'inan in which the share of one sharik capital is reduced due to gradual commercial transfers to customers. In practice, the application of the Mutanaqishah musharakah contract leaves a problem in the form of naming the certificate on behalf of the customer, even though the house is still jointly owned. This research is a field research. The data were collected through interviews and document review, then analyzed descriptively qualitatively by Hubermen and Miles model.

The results show that the naming of the customer's name on the certificate aims to simplify the process at the National Land Agency (BPN), Islamic banks and customers bind a new agreement on this matter. with the aim of finding a way out of a contract justified by shara'. The agreement namely tawatu, becomes a unity of several pre-existing contracts and promises, with the aim of carrying out what they want together. Tawatu' is also in line with the Civil Code regarding agreements. Tawatu' is a solution for harmonization between Syaria'h Economic Law and Land Law for Islamic banks for further development.

1. Introduction

House is a primary need for everyone. The high rate of population growth that is not accompanied by an increase in the availability of housing will create a backlog, namely the gap between demand and supply of available housing. According to the PUPR Ministry, the number of home ownership backlogs in 2020 will reach 11.04 million housing units. Meanwhile, the construction of new housing units is only around 400 thousand units per year.[1]

Seeing this backlog, Islamic banks offer home ownership financing solutions (KPR) with a Musharakah mutanaqisah (MMQ) contract, which is a financing product based on the musharakah principle, namely: Shirkah al-'inan with a portion (hisah) of one sharik's capital (Syar'i Bank). ah/LKS) decreased due to gradual commercial transfer to customers.2 Musharakah mutanaqisah contract is a multi-contract consisting of shirkah, ijarah, and bay' contracts. The mixing of these contracts will make the object of financing a common property between the Islamic bank and the customer. However, in practice, the house is fully owned by the customer, because the customer's name is included in the certificate, and the certificate is legal proof of someone's ownership of land and buildings.

This practice becomes a problem, because of its incompatibility with the principles of musharakah mutanaqishah and land low also with the DSN-MUI Fatwa No. 73 of 2008 and No. 1 of 2013. It is necessary to have alternative solutions. Tawatu' is an alternative solution to solve this problem. Tawatu' can also be interpreted as a secret agreement made by both parties who transact with the aim of finding a way out of a contract justified by shara' (hilah maheasy).3

M. Riza in the journal Istiqra 'which links the study of tawatu' with fiqh muamalah theoretically states that Tawatu' often occurs in the field of muamalah, especially in the Islamic finance industry. For this reason, the Islamic finance industry is required to prepare contemporary and attractive contracts so that the benefits can be directly felt by the community, in order to encourage the growth of Islamic banks and narrow the gap with conventional banks. And in the end, the harmony of the growth of Islamic banks and the legality of Islamic sharia can run simultaneously.4

This statement prompted the author to conduct further research and finally found

[1] www.kemenpupr.co.id
[2] Taufiqurrasyidin Abdillah, *Tinjauan huku Islam Tehadap Implementasi Akad Musharakah Mutanaqishah sebagai Solusi Akad Pembiayaan Kredit Pemilikan Rumah Pada Bank Syariah*, Jurnal Maliyah Vol 5 No 1 (2015)
[3] Nazih Hammad, *Qiroah Jadidah fiAl-Fiqh Al-Mu'amalah Al-Maliyah Al-Masrofiyah* (Beirut: Dar al-Qolam, 2007), 60.
[4] M. Riza Azizi, *Tawatu' dalam Kajian Fiqih dan Konsekuensinya dalam Transaksi Keuangan*, Jurnal Istiqra' Vol No 1 (2018)

the practice of naming certificates in the name of the customer in the musharakah mutanaqisah contract on home ownership financing (KPR), even though the house is still a joint property between the Islamic bank and the customer.

2. RESEARCH METODE

This research is a type of field research (field research) on the application of the musharakah mutanaqisah contract in mortgage financing at Bank Muamalat Indonesia Surabaya. Data that has been collected through interviews and document review, then analyzed descriptively qualitatively.5 the process of data analysis is inductive in nature which is carried out through a process of systematically searching and collecting data from interviews, field notes, and documentation, then analyzed by the interactive method of the Huberman and Miles model.

This research is expected to be able to find solutions to the problems mentioned above and tawatu' becomes a harmonic between the progress of the Islamic banking industry and the legality of the accompanying sharia contracts.

3. RESULT AND DISCUSSION

a) Definition of Tawatu'

Tawatu' is an agreement to carry out something that is done by one person to another.[6] While in terms of fiqh, Nazih Hammad defines tawatu' in several senses, first, an agreement that occurs between two parties, either implicitly or explicitly, not to clearly show the intention of the transaction, by means of engineering (hilah) through justified contracts. by shar', with the aim of justifying something that has been forbidden by shara' (hilah madhmumah). Second, a secret agreement made by both parties who transact with the aim of finding a way out of a contract that is justified by shara' (hilah mahmudah). Third, the agreement desired by the two parties on several contracts and the accompanying promises as an integral transaction that cannot be separated, with the aim of carrying out what they want in accordance.[7]

Tawattu' can occur in contracts that are spoken orally or in writing as well as agreements based on habits ('urf) accompanied by things that are indicated in that direction. An example of the occurrence of tawattu' as conveyed by Ibn Taimiyah: "If someone sells a commodity that contains elements of usury at a certain price, then wants to buy it back, based on a verbal agreement at the beginning of the contract, or on habit ('urf), then it is canceled for the sake of syara'. Because in essence they do not want to transact (do not move prices and goods completely) and just make prices and commodities only as intermediaries to enter the practice of usury. If there is no tawattu 'between the two, but the buyer knows that the seller wants to buy and sell at usury,

[5] Sutrisno Hadi, Metodologi riset (Yogyakarta: Gajahmadada University, 1985), 16.
[6] Ibn Faris, *Maqayis Al-Luqhoh* (Mesir: Dar al-Fikr, 1979), 164.
[7] Nazih Hammad, *Qiroah Jadidah*, 60.

then it is also invalid for the sake of syara' because it is classified as a bad habit (muwata'ah al-'urfiyah al-fasidah).8

b) Meaning of Musharakah Mutanaqishah

musharakah mutanaqisah is a form of cooperation between two or more parties for the ownership of an item or asset. This cooperation will reduce the ownership rights of one party while the other party increases. This transfer of ownership is through a payment mechanism for other ownership rights. This form of cooperation ends with the transfer of the rights of one party to the other party.9

Whereas according to the National Syariah Council of the Indonesian Ulema Council, musharakah mutanaqisah is musharakah or partnership in which the ownership of assets (goods) or capital of one party (sharik) is reduced due to the gradual purchase by the other party.10

The principles and conditions of the contract were confirmed by the National Syariah Council of the Indonesian Ulama Council (DSN-MUI), with DSN-MUI fatwa No.73/DSN-MUI/XI/2008, about Musharakah Mutanaqis}ah, in its provisions it is mentioned that Musharakah Mutanaqisah follows the provisions in the Musharakah contract, namely fatwa DSN-MUI No. 08/DSNMUI/IV/2000 about musharakah financing, in the fatwa the principles and conditions of Musharakah are mentioned, which includes:11

c) Statements of acceptance and acceptance must be stated by the parties to show their will in entering into a contract by paying attention to the following matters:
   a. The offer and acceptance should explicitly indicate the purpose of the contract.
   b. Acceptance of the offer is made at the time of the contract.
   c. The contract is entered into in writing through correspondence or by using modern means of communication.
   d. The contracting parties must speak the law.
   e. Competent in giving or being given power.
d) Each partner should provide funds and work, and each partner perform work as a representative.
e) Each partner has the right to arrange musha>rakah assets in the normal business process.
f) Each partner gives authority to the other partner to manage the assets and each is considered to have been authorized to carry out musha>rakah activities by paying attention to the interests of his partner, without committing negligence and intentional wrongdoing.

[8] Ibn al-Taimiyah, *MajmuAl- Fatawa* (Mesir: Daar al Wafa', 2005), 132.
[9]Wahbah al-Zuhaily, *Al-Muamalah Al-Maliyah Al-Mu'asirah* (Dar Al-Kutub Al-'Ilmiyah, t.th), 436-437.

[10]DSN-MUI fatwa No.73/DSN-MUI/XI/2008
[11] Syahrudin, Ridwan, *Implementasi Musyarakah Mutanaqishah sebagai Alternatif Pembiayaan Murabahah di Perbankan Syariah*, Jurnal taqafah Vol 9 No 1 (2013)

g) A partner is not allowed to liquidate or invest funds for his own benefit.
h) Contract object (capital, work, profit, and loss)

a. Capital

1) The capital given must be cash, gold, silver, or something of equal value. Capital consisting of trading assets, such as goods, property, etc. If the capital is in the form of an asset, it must first be valued in cash and agreed upon by the partners.

2) The parties may not borrow, lend, donate or gift musha>rakah capital to the other party, except on the basis of agreement.

In principle, there is no guarantee in musha>rakah financing, but to avoid deviations, the Syariah Financial Board (LKS) can ask for a guarantee.

b. Work

The participation of the partners in the work is the basis of the implementation of musha>rakah, but the equality of the work portion is not a condition. One partner can perform more work than the other, and in this case he can claim an additional share of the profit for himself.

Each partner performs work in musha>rakah on behalf of the person and representative of his partner. Each position in the work organization should be explained in the contract.

c. Profit

1) Profit must be clearly quantified to avoid differences and disputes at the time of profit allocation or termination of musharakah.

2) Each partner's profits must be shared proportionately on the basis of all profits and no pre-set amount is assigned to a partner.

3) A partner may propose that if the profit exceeds a certain amount, the excess or percentage is given to him.

4) The profit sharing system must be clearly stated in the contract.

d. Loss

Losses must be shared among partners proportionally according to their respective share in the capital.

6. Operational Costs and Disputes

a. Operational costs are charged to joint capital.

b. If one of the parties does not fulfill its obligations or if there is a dispute between the parties, then the settlement is carried out through the National Sharia Arbitration Board after no agreement is reached through deliberation.

In the musharakah mutanaqisah contract there is also an element of ijarah, therefore the provisions of the pillars and conditions of ijarah must be fulfilled as well. As contained in the fatwa of the National Sharia Council No. 09/DSN-MUI/IV/2000 regarding ijarah,[12] covering

a. Sighat Ijarah, namely consent and qabul in the form of statements from both parties to the contract (contract, either verbally or in other forms).

b. The contracting parties consist of the lessor/service provider and the

[12]fatwa of the National Sharia Council No. 09/DSN-MUI/IV/2000 regarding ijarah

lessee/service user.
c. The objects of the Ijarah contract are:
1) Benefit of goods and rent.
2) Service benefits and wages.
d. Ijarah Object Provisions:
1) The object of ijarah is the benefit from the use of goods and/or services.
2) The benefits of goods or services must be assessed and can be implemented in the contract.
3) The benefits of goods or services must be permissible (not forbidden).
4) The ability to fulfill the benefits must be real and in accordance with sharia.
5) Benefits must be identified specifically, in such a way as to avoid jaha>lah (ignorance) which will lead to disputes.
6) Benefit specifications must be clearly stated, including the time period. Can also be identified by specifications or physical identification.
7) Rent or wages is something that is promised and paid by the customer to LKS as payment of benefits.
8) Payment of rent or wages may be in the form of services (other benefits) of the same type as the object of the contract.
9) Flexibility in determining rent or wages can be realized in terms of time, place and distance. The amount of the lease must be clear and can be known by both parties. Therefore, the amount of installments and the amount of rent within a certain period of time can be re-agreed.

i) B Muamalat mortgage financing with musha>rakah mutanaqisah contract at Bank Muamalat Indonesia Tbk Suarabaya Mas Mansur.

The application of the musha>rakah mutana>qis}ah contract in the iB Muamalat KPR financing product at Bank Muamalat Indonesia Surabaya Branch Mas Mansur goes through five stages, namely:13 the financing application stage, the analysis stage, the decision stage, the financing realization stage, and the ownership transfer stage. At the stage of applying for financing, the customer must first determine the specifications of the desired occupancy, the submitted to the bank muamalat accompanied by the required administrative files. Meanwhile, in the analysis stage, Bank Muamalat will analyze the customer's financing capability. Broadly speaking, the analysis carried out is an analysis of the customer's ability to pay (cash ratio) and guarantee coverage. If the results of the analysis of the customer are declared capable, then the next stage is the stage of financing decisions. At this stage the bank muamalat and the customer will agree to the provisions that must be obeyed by both parties. These provisions concern the contribution of capital between Bank Muamalat and its customers, the

[13]Wangsa wijaya, Musharakah Mutanaqishah Agreement: Overview from the perspective of Islamic Law, Paper presented in a workshop on Housing Financing Programs in Sharia Principles, especially related to Musharakah Mutanaqishah, Jakarta 29 November 2010.

promise of BMI to sell the portion of its ownership of the house which is the object of shirkah to the customer in stages, and the customer is obliged to buy it in monthly installments. Then the customer promises to occupy (rent) the house and pay the rent (ujrah), and the obligation to maintain the house is carried out by the customer in full. Further provisions, installments and rent paid by customers are accumulated in installments using the yield method.

After the terms are agreed, the next stage is the realization of financing. The financing realization stage is marked by the signing of a financing agreement letter (contract clause) by both parties and the realization of the shirkah capital contribution. The last is the transfer of ownership stage. This stage is carried out by the customer by making regular installment payments until the portion of ownership owned by Bank Muamalat runs out. At maturity, Bank Muamalat issues a letter of roya to revoke the covernote, so that the house which is the object of the Shirkah ownership becomes the full property of the customer.

After the conditions, requirements, and realization of the iB Muamalat mortgage financing process are met and approved, the next process is financing realization. The stage is the delivery of goods (houses) from the developer to the bank or customer, after the bank and customer pay the house price to the developer. Then the bank and the customer receive the house in question, then the bank hands over the house to the customer, by first signing the musharakah mutanaqisah financing agreement. There are three contracts (hybird contracts) that must be carried out so that this musharakah mutanaqis}ah contract can run. The first contract is a musharakah / shirkah 'inan contract between the bank and the customer, to jointly own a house, each party depositing shirkah capital with the amount according to the agreement. In this study, the paid-up shirkah capital were respectively 20% of the customers of Mrs. Sofia and 80% of BMI. The second contract is a lease agreement (ijarah), in which the customer's share of the profit sharing is paid directly to the bank as a gradual purchase of the customer's portion of the bank's ownership of the contract object. Then the last contract, namely the bay contract, is carried out with a wa'ad (promise) from the first party (sharik BMI) to sell the entire hisah in stages and the second party (sharik customer) promises to buy it. The sale and purchase is carried out in accordance with the agreement. After completing the shirkah, BMI sells its entire portion to partners, provided that this sale contract is carried out separately which is not bound by the shirkah contract. These contracts are the main official contracts, because they are made by a notary and the signature is also in front of a notary directly.

At the time of the realization of the financing, it was found that the certificate was already in the name of the customer, even though in fact it was still jointly owned by the bank muamalat and the customer. When confirmed to the Head of the Branch, it was said that all of this was for the sake of simplifying the process at the National Land Agency (BPN), because Land Law

does not recognize dual ownership in certificates. Then the customer is also bound again with an agreement under the hand or not before a notary whose contents state that the house is still jointly owned even though the certificate is in the name of the customer.

The additional agreement mentioned above can be justified by sharia economic law with the concept of tawatu', which is a secret agreement between two people with the aim of finding a way out of a contract justified by sharia'. The agreement becomes a unity of several pre-existing contracts and promises, with the aim of carrying out what they want together.

The freedom to make agreements related to this is in line with article 1338 of the Civil Code, namely: "all agreements made legally in accordance with the law, apply as law for those who make them". The diction 'all' shows the freedom for everyone to make any agreement and with anyone, as long as it is not prohibited by law. This means that all provisions in the agreement agreed by the parties are binding and must be implemented by the parties who made it. If one of the parties does not carry out the agreement, then one of the parties can claim compensation from one of the parties who do not carry out the agreement. While the diction "lawfully made" means that what is agreed upon, applies as law if it does not conflict with the law, public order, and decency. If it contradicts, the agreement is null and void.14

4. CONCULISON

Musharakah Mutanaqishah (MMQ) contract can be used as a contract agreement for Islamic banks in financing home ownership (KPR), in order to assist the community and the government in unraveling home ownership issues. There are problems in the practice of MMQ in mortgage financing, there is already a solution, namely Tawatu', an additional contract that is inseparable from the main contract, which is the purpose of this research. Tawatu be an instrument of harmony between sharia economic law and land law, this harmony have positive implications for the development of sharia banking in Indonesia.

Finally, a suggestion of the concept of tawatu 'can be applied to other Islamic banking contracts, it is necessary that there are further studies.

5. BIBLIOGRAPHY

Faris, Ibn, *Maqayis Al-Luqhoh,* Egypt: Dar al-Fikr, 1979.

Hadi, Sutrisno, Research methodology, Yogyakarta: Gajahmadada University, 1985.

Hammad, Nazih, Qiroah Jadidah fiAl-Fiqh Al-Mu'amalah Al-Maliyah Al-

[14] Priyono, Zaenuddin Islami, *Economic Theory* (Surabaya: Zifatama, 2016), 56.

Mas}rofiyah, Beirut: Dar al-Qolam, 2007.

M. Riza Azizi, Tawatu' in the Study of Fiqh and its Consequences in Financial Transactions, Istiqra' Journal Vol 4 No 1 (2018)

Syahrudin, Ridwan, Implementation of Musyarakah Mutanaqishah as an Alternative to Murabahah Financing in Islamic Banking, Taqafah Journal Vol 9 No 1 (2013)

Taufiqurrasyidin Abdillah, Overview of Islamic Law on the Implementation of Musharakah Mutanaqishah Contracts as a Solution for Home Ownership Loans in Islamic Banks, Maliyah Journal Vol 5 No 1 (2015)

Taimiyah, Ibn, Majmu Al-Fatawa, Egypt: Daar al Wafa', 2005.

Wijaya, Wangsa, Musharakah Mutanaqishah Agreement: Overview from the perspective of Islamic Law, Paper presented in a workshop on Housing Financing Programs in Sharia Principles, particularly related to Musharakah Mutanaqishah, Jakarta 29 November 2010.

Zaenuddin Islami, Priyono, Economic Theory, Surabaya: Zifatama, 2016.

Zuhaili, Wahbah, Al-Muamalah Al-Maliyah Al-Mu'asirah, Dar Al-Kutub Al-'Ilmiyah, t.th.

DSN MUI Fatwa No: 73/DSN-MUI/XI/2008 Musharakah Mutanaqishah

DSN-MUI Fatwa No. 08/DSN-MUI/IV/2000 regarding Musharakah

DSN-MUI Fatwa No. 09/DSN-MUI/IV/2000 on Ijarah