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THE JUSTICE ORIENTATION IN THE COURT DECREE: The Judge Legal Reasoning in Compensation Imposition of *Musharakah* Agreement

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Abstract: This research explores the law consideration used as the foundation of the appearance of the obligation of compensation due to default in the *musharakah* verdict agreement. In practice, the bias between Islamic and conventional banks often occurs, especially regarding the *musharakah* agreement, which is sometimes interpreted as a debt agreement, as commonly occurs in traditional banks. Using a normative law research approach, the writer analyzes the internal works of law standards by using decisions of the first level of Religious Courts judges and the cassation level as the object. Based on the analysis, there are two types of law approaches of the judges: formal justice and substantive justice. The judges at the first level of the judiciary used a traditional method by comparing the sound of agreement and the facts of the court. Meanwhile, the substantive justice approach was taken from the cassation level judges who consider not only the agreement's validity but also the agreement's substantial. In this case, the judges on the cassation level managed to explore the substance of equality and partnership principles in the *Musharakah* agreement. Considering the precautionary principle in the implementation of financing by Islamic banking and the legal relation between the participants of the *musharakah* agreement, the deficiencies in this agreement will be burdened to each party as the fund deposited proportionally. This research contributes to the conflict resolutions of the *Musharakah* agreement proportionally.

Keywords: justice; compensation; default; musharakah; proportional.

INTRODUCTION

Islamic banks still got the spotlight from various circles. The difference between Islamic banks and conventional ones still needs to be questioned. Research by Khan revealed that most Islamic banks are not functionally different from traditional banking. He stated that there are still some more functions of Islamic banks that have a similar role to conventional banks in general. Khan firmly said these Islamic banks could not provide genuinely Islamic-compliant products and services. They looked for Islamic schoolers willing to certify traditional instruments as Islamic-compliant instruments.[1]

In line with Khan, Saqib describes people who need help to fully differentiate Islamic and conventional banking since Islamic banks cannot fully explain the social goal of Islamic banking functionally or operationally. So, in the further, Saqib suggests the social purpose as the main focus of the campaign process in improving public literacy on Islamic banking. For non-Muslims, the explanation of the beneficial aspects of Islamic banking could be presented. Aside from the religious factors, the profitability factor is the point of Islamic banking acceptance by the public.[2]

In Majeed and Zaenab, the focus is on the agreement. Islamic banking nowadays mostly left the profit-sharing deal, while the profit-sharing system is the foundation of Islamic banking as it distinguishes them from conventional banks.[3] In practice, many Islamic banks adopt non-participatory financing agreements like ijarah and murabahah. Both contracts are the most significant modes of financing in

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1 Feisal Khan, "How 'Islamic' Is Islamic Banking?," *Journal of Economic Behavior & Organization* 76, no. 3 (2010): 805–20, https://doi.org/10.1016/j.jebo.2010.09.015.

2 Azam Anwar Khan, Saqib Ghias, and Syed Irfan Hyder, "Islamic Banking Prospects, Challenges, and Criticism-A Systematic Literature Review," *Journal of Accounting and Finance in Emerging Economies* 7, no. 4 (2021): 921–30.

3 Muhammad Tariq Majeed and Abida Zainab, "How Islamic Is Islamic Banking in Pakistan?," *International Journal of Islamic and Middle Eastern Finance and Management* 10, no. 4 (2017): 470–83, https://doi.org/10.1108/IMEFM-03-2017-0083.

Islamic banks.[4] This is also the reason for ambiguity, considering that all deals in Islamic banks are the same as the conventional ones.

Agreement in Islam is a crucial matter that has to be respected by all parties. The agreement's substance could create, change, transfer, and even terminate the rights or benefits of all parties.[5] Islam also sees an agreement not only for its secular between parties but also as a part of religious theory. The agreement is that Islam is a sacred law to the parties where the direction and sharia protect all the consequences simultaneously. This spiritual dimension distinguishes the implications of an agreement in Islamic and civil law. As in civil law, the validity of an agreement only has worldly consequences; Islam sees the agreement's impact as including both this world and the hereafter.[6]

In Indonesia, the development of Islamic economics has been quite extensive. As the various Islamic financial institutions increase, Islamic economics law has also been confirmed as a part of the national law system in constitutional norms. This relates to the muslim's aspirations where the implementation of Islamic economic law has been considered a human rights protection in terms of freedom of religion.[7] The concept of bureaucratization by adopting religious law into constitutional law is not the first in Indonesia. In the earlier era, the exact condition was conducted in the context of family law, zakat, and waqf. The main objective is to create certainty and justice law for all Muslims.[8]

However, in practice, improving Islamic economics still faces many obstacles. Islamic banking, for instance, still needs more public knowledge and understanding of the agreements of Islamic banking product services.[9] Islamic agreement is still considered the same as conventional agreement. The ambiguity of this agreement

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4 Muhammad Nouman, Karim Ullah, and Saleem Gul, "Why Islamic Banks Tend to Avoid Participatory Financing? A Demand, Regulation, and Uncertainty Framework," *Business & Economic Review* 10, no. 1 (2018): 1–32, https://doi.org/10.22547/ber/10.1.1.

5 Izzuddin Muhammad Khaujah, *Nazhariyyah Al-Aqd Fi al-Fiqh al-Islamiy* (Jeddah: Majmu'ah Dallah al-Barakah, 1993). 13.

6 Muhammad Syafi'i Antonio, *Bank Islamic; Dari Teori Ke Praktik* (Jakarta: Gema Insasi Press, 2001). 29.

7 Bambang Iswanto and Miftah Faried Hadinatha, "Sharia Constitutionalism: Negotiating State Interests and Islamic Aspirations in Legislating Sharia Economic Law," *Ahkam: Jurnal Ilmu Islamic* 23, no. 1 (2023): 235–58, https://doi.org/10.15408/ajis.v23i1.32899.

8 Asep Saepudin Jahar, "Bureaucratizing Sharia in Modern Indonesia: The Case of Zakat, Waqf and Family Law," *Studia Islamika* 26, no. 2 (2019): 207–45, https://doi.org/10.15408/sdi.v26i2.7797.

9 Abbas Arfan and Iklil Athroz Arfan, "A Strategy for Strengthening Public Perception Toward Sharia Banking," *Banks and Bank Systems* 16, no. 2 (2021): 170–81, https://doi.org/10.21511/bbs.16(2).2021.16.

less or more implicates the accusation of a dispute of Islamic economics as it is the absolute authority of Indonesia's Religious Court (RC).[10]

In some accusations submitted, especially the allegation of default in Islamic agreements,[11] the petitions are similar to debt and credit agreements in conventional banks. The contract is based on participatory understanding, such as *mudharabah* and *musharakah*. If the ambiguity is ignored, it is feared that it may reduce public trust in the Religious Courts in deciding Islamic economic cases. The inability to distinguish between conventional and Islamic agreements becomes a sign of the lack of competence of Religious Court judges on Islamic economic law.[12]

For instance, in the decision of RC No. 1225/Pdt.G/2017/PA.Smn, where the panel of judges decided that the defendant bears the entire deficiencies of the agreement. Even the agreement between both parties is *musharakah*, with no debt and credit. The same decision is found in RC Tanjungpandan No. 0126/Pdt.G/2018/PA.Tdn, where the defendant was required to pay the complainant the principal of the disbursed financing, along with arrears of profit sharing and late fees. Not so far from the decision of RC Yogyakarta No. 262/Pdt.G/2020/ PA.YK. Islamic banking, as the complainant agreed on the musharakah agreement, requested the defendant to pay the remaining principal of the financing, margin, and compensations. Specifically, the decisions corroborate the opinion of Nur and Aziz, who conclude that judges at the first level still tend to interpret laws and regulations textually and still need to reflect the progressive law implementations.[13]

Some parties argue that an agreement or contract is the principle of *pacta sun sevanda.* This principle relates to all deals. Clause 1338 of the Civil Code states that the valid agreement becomes the constitution for agreed parties. This means the value becomes the law binding to the parties. Even the third parties have to respect the clauses and substances of the contract made. Then, it is not allowed to intervene

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[10] Hasanuddin Muhammad, "Efektifitas Dan Efisiensi Penyelesaian Sengketa Ekonomi Islamic Di Peradilan Agama," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 7, no. 1 (2020): 35, https://doi.org/10.29300/mzn.v7i1.3192.

[11] There are 3 (three) forms of default of a contract. First, doing things that according to the contract clause should not be done *(ta'addi)*. Second, failing to perform previously agreed contractual achievements *(taqshir)*. Third, violating the terms and conditions stated in the contract *(mukhalafah al-syurut)*. See Armansyah, *Hukum Perikatan (Akad) Dalam Kompilasi Hukum Ekonomi Islamic* (Jakarta: Prenada Media, 2022). 184; R Subekti, *Hukum Perjanjian* (Jakarta: Pembimbing Masa, 1970).

[12] Erie Hariyanto, "Public Trust in the Religious Court to Handle Dispute of Sharia Economy," *Ahkam: Jurnal Ilmu Islamic* 22, no. 1 (2022): 185–208, https://doi.org/10.15408/ajis.v22i1.26216.

[13] Nur Hidayah and Abdul Azis, "Implementation Of Progressive Law In Sharia Banking Dispute Settlement: Case Study of Religious Court Decisions in Indonesia," *Ulumuna* 27, no. 1 (2023): 227–57.

in the sense of the contract.[14] If necessary, the contract could be enforced with the help of law enforcement, such as courts and other law enforcers.

This principle also means that even the court must respect the freedom and independence of the drafting contract parties. They are free to determine the contents of the contract, the validity period, and the requirements to fulfill, and decide which will be used as the standard on the contract. This is a manifestation of the highest respect for the right of autonomy of the parties (*partij autonomie*) and the pattern of human relation to trust each other.[15] This becomes the basis of the court's position not to interfere with the agreement's content between the Islamic bank and the customers. However, the clauses do not include the principles of the deal, which become the principles of the contract.[16]

The cassation decision released by Supreme Court No. 624 K/AG/2017 provides another perspective on the case of default in Islamic agreement. By the agreement between debtor and creditor in a Muslim bank in North Sumatra, the panel of judges decided that the deficiency of dispute object was the burden of the debtor and creditor to pay proportionally. Previously, at the appeal court level, it was agreed that the weaknesses incurred were on the complainant. By the argument of the complainant, who received funds from the creditors, it becomes the debtor's obligation to return these funds to the creditors. The first level of court considered the default by the defendant, so the deficiencies of the agreement should be burdened fully by the defendant. Then, the final cassation panel gave a different opinion. They decided that the lack of the case should be loaded to both the complainant and the defendant.

This research explores the decision of the Religious Court Judge in the case of default of the *musharakah* agreement by the main object of Cassation decision research No. 624K/AG/2017, which then compared to 3 (three) decisions with similar backgrounds; 1) RC Sleman Decision No. 1225/Pdt.G/2017/PA.Smn, 2). RC Tanjungpandan Decision No. 0126/Pdt.G/2018/PA.Tdn, and 3). RC Yogyakarta Decision No. 262/Pdt.G/2020/PA.YK. The difference between the cassation decision and other decisions is then used to deepen how law reasoning conducted by the cassation panel could produce a proportional deficiencies pattern, which is

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[14] Salim H.S., *Hukum Kontrak; Teori Dan Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2010). 10.

[15] Agus Yudha Hernoko, *Hukum Perjanjian; Asas Proporsionalitas Dalam Kontrak Komersial* (Jakarta: Prenadamedia Group, 2010). 128-129.

[16] Amran Suadi, *Penyelesaian Sengketa Ekonomi Islamic; Penemuan Dan Kaidah Hukum* (Jakarta: Prenada Media, 2018).

different from the additional finding that is ambiguous between musyarakah and debt and credit agreements.

Using constitutional research, this study grouped as normative law *genre* research, analyzing the work of internal law as the law standard becomes the subject. The standard consideration is doctrine, agreement, court agreement, legislation, and norms (theory).[17] This is an *istinbat ahkam* research, an Islamic law research methodology, exploring how a Muslim jurist comes to the doctrinal conclusion (law opinion) on a legal case.[18]

Analysis conducted on four documents, the cassation decision No. 624K/AG/2017 and three other religious court decisions, RC Sleman Decision No. 1225/Pdt.G/2017/PA.Smn, RC Tanjungpandan Decision No. 0126/Pdt.G/ 2018/PA.Tdn, and RC Yogyakarta Decision No. 262/Pdt.G/2020/PA.YK. Aside from those documents, this research collected several supporting documents such as primary, secondary, tertiary, and non-legal sources. In detail, the steps taken by the researcher are analyzing legal materials related to the problems and objectives. The researcher tried to explore how the Cassation Council can reach the decisions. In the end, obtaining *legal reasoning* is the basis for the appearance of the proportional principle in bearing compensation when there is a default in the musyarakah agreement.

LAW DEVELOPMENT AND THE PRACTICE OF THE MUSHARAKAH AGREEMENT

Musyarakah (partnership; profit and loss sharing) came from the word *al-shirkah*, which has two meanings. The first meaning is the same as *al-ikhtilath,* which means mixing and merging. The second meaning is *al-hishah,* which means part or portion. The word *al-shirkah* is used in those two situations. The first situation is when several people actively combine their assets for a joint venture use. The second situation is when a merger of assets without the parties' active role is not intended for business capital and profit. The first situation is known as *shirkah al-uqud* in Fiqh. Then the second situation is known as *shirkah al-milk*.[19] Similar to the meaning explained by

[17] Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Penelitian Hukum Empiris* (Yogyakarta: Pustaka Pelajar, 2010). 34.

[18] Faisar Ananda Arfa and Watni Marpaung, *Metodologi Penelitian Hukum Islam: Edisi Revisi* (Jakarta: Prenada Media, 2018).

[19] Muhammad Ubaidillah 'Atiqi, *'Uqud al-Syarikat; Dirasah Fiqhiyyah Muqaranah Ma'a Muujaz Fi al-Qanun al-Kuwaiti* (Kuwait: Maktabah Ibnu Katsir, 1996). 12.

the scholars of Fiqh Madzhab about *shirkah*. They use the exact keywords such as *al-ikhtilath* (merging), *al-ijtima'* (combining), and dan *al-idzn* (authority/permission).[20]

Classic Fiqh books stated that the types of *musharakah* agreements are still essential. Those are: a). *Shirkah mufawadhah* is a syirkah where each partner contributes equal value, whether capital or work. b). *Shirkah 'inan* is a widely practiced partnership. In this syirkah, there is no requirement for equal nominal contributions. c). *Shirkah 'abdan* is a syirkah that involves the contribution of work only, not the contribution of capital. And d). *Shirkah wujuh* is a business partnership where one partner does not contribute money or labor but is trusted by the seller. Therefore, trust is seen as a contribution.[21]

Along with the times and business needs, the types of *musharakah* agreements evolved. Among the types of contemporary *musharakah* is: *Shirkah mutanaqishah* and s*hirkah musahamah.* First, *Shirkah mutanaqishah is a cooperation or partnership to buy an item, where the article takes a shared profit. From the profit, one partner buys* the ownership of the item from the other, as he wholly owns it.[22] That's why it is called *mutanaqishah*, which means depreciation. It is a shortening of the ownership of one partner to another.[23]

In Indonesia, the *shirkah mutanaqishah* partnership has been permitted through the fatwa of the National Islamic Council No. 73/DSN-MUI/XI/2008 concerning the *Musharakah Mutanaqishah* agreement. Islamic banking then adopts this agreement as the customer's primary financial product of home ownership.[24] S*hirkah mutanaqishah* agreement becomes one alternative for the customer, not only for its homeownership financing scheme based on *murabahah* and *ijarah muntahiya bi al-tamlik* understanding but also its flexibility of contribution for every month, rather than using murabahah agreement.[25] In the Financial Services Authority Regulation (POJK) No. 31/POJK.05/2014 concerning the Implementation of Islamic Financing

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20 Sayyid Sabiq, *Fiqh Al-Sunnah* (Beirut: Dar al-Fikr, 1983). 300.

21 Abdurrahman Al-Jaziri, *Al-Fiqh 'ala al-Madzahib al-Arba'ah* (Beirut: Dar al-Kutub al-Ilmiyyah, 2003).

22 Nazih Hammad, *Fi Fiqh Al-Mua'amalat al-Mu'amalah al-Mashrafiyyah al-Mu'ashirah; Qira'ah Jadidah* (Damaskus: Dar al-Qalam, 2007). 82-84.

23 Muh Turizal Husein, "Telaah Kritis Akad Musyarakah Mutanaqisah," *Al Maal: Journal of Islamic Economics and Banking* 1, no. 1 (2019): 79, https://doi.org/10.31000/almaal.v1i1.1775.

24 A Amin and M W Abdullah, "Musyarakah Mutanaqishah, Innovative Product for Islamic Banking Financing in Indonesia," *International Journal of Innovative Science and Research Technology* 5, no. 12 (2020): 374–80.

25 Muhammad Rafi Ashsiddiqqy, Hilda Monoarfa, and Aneu Cakhyaneu, "Implementation of Aqad Musyarakah Mutanaqisah (MMQ) Take Over Financing on KPR Products in Sharia Banks," *Review of Islamic Economics and Finance* 1, no. 1 (2020): 32–42, https://doi.org/10.17509/rief.v1i1.23745. Memet Agustiar, "Musyarakah Mutanaqishah (Diminishing Partnership) Pada Pembiayaan Perumahan," *Jurnal Muamalat Indonesia - Jmi* 1, no. 2 (2021), https://doi.org/10.26418/jmi.v1i2.50643.

business, the *shirkah mutanaqishah* agreement is included in the understanding of financial investment in Islamic financial institutions.[26]

Second, s*hirkah musahamah* is one type of *shirkah amwaal*. Still, it is not defined as the number of partners (legal subject) rather than the amount of equity participation in the form of shares. Since the amount of shareholders, they may not know each other. Therefore, *shirkah musahamah* does not end due to the in and out of the shareholders (in the case of buying and selling shares on the stock market) and does not end due to the death of one of the shareholders. Many scholars allow this agreement as long as the business does not involve haram objects and the business method is not something haraam, such as gambling. The reason for this goes back to the previous fiqh rule, stating that the original law of muamalah is mubah, and we are bound to the agreed-upon agreement.[27]

In Indonesia, *Shirkah Musahamah* exists as a Limited Liability Company (PT). The intersection of shirkah is stated in Law Number 40 of 2007 concerning Limited Liability Company, noting that a company is established by two or more people with a notarial deed made in Indonesian, and each founder is obligated to take shares when the company is based. In the concept of a Limited Liability Company, the responsibility of shareholders is in proportion to the number of shares owned. Likewise, the profit and deficiencies received by the shareholders are proportional to the number of shares owned.[28]

VARIOUS ORIENTATION OF JUDGES'S DECISION

Justice is the central point of the law itself. Both aspects of law certainty and utility must be placed within the justice framework. The elements of justice have to dominate the color of law to create goodness in human life. Justice in a judge's decision has to consider three parts: legal, moral, and *social justice.* Legal justice obtained by the constitution exists due to the juridical part of a judge's decision. Meanwhile, the moral and social justice aspects are based on the provisions of Clause 5 of Law Number 48 of 2009 concerning Judicial Power. The terms justice, procedural justice, and substantial justice are known from the three sides above. Procedural justice is justice that comes only from existing laws and regulations.

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[26] Departemen Perbankan Islamic OJK, *Standar Produk Perbankan Islamic; Musyarakah Dan Musyarakah Mutanaqishah* (Jakarta: Otoritas Jasa Keuangan, 2016). 113-118.

[27] Rafiq Yunus Al-Mishri, *Fiqh Al-Muamalat al-Maliyah* (Damaskus: Dar al-Qalam, 2007). 269.

[28] Maulana Hasanudin and Jaih Mubarak, *Perkembangan Akad Musyarakah* (Jakarta: Kencana, 2012). 70-71.

Meanwhile, substantial justice is justice that comes from legal values that live in the community.[29]

In law enforcement practice in Indonesia, some judges' decisions focus on compliance with the formal rules of the game. For example, prosecutors have conducted investigations, prosecutions, and judicial proceedings in court in criminal cases stipulated by the current law. The lawyers have completed the function of defending and protecting the rights of the accused. The judge listens to both sides, and thus, a court decision is made. All relevant legal provisions have been considered and applied. For judges, if justice seekers are dissatisfied with the verdict, they are welcome to apply for existing legal remedies, such as appeal and cassation. Thus, formally, it has been carried out, and the role of the judge looks pretty dominant in determining how "black and white" a decision is.[30]

The formal decision approach is also known as the legal school of legalism. Legalism believes the only source of law is the Constitution, which is clear, complete, and owns all the answers to all legal problems. Judges are only obliged to apply legal rules to specific facts with the help of interpretation methods, especially grammatical interpretation.[31] In its implementation in the case of Islamic economic disputes, legalism-oriented judges only see written law in their decisions, namely the Civil Code and other favorable laws, including the agreements agreed by the parties. So, in the end, the judge's consideration only matches the sound of the contract with the facts of the trial. No wonder there is an expression that judges are only the mouthpiece of the law.

On the other side, some judges also adhere to the *begriffsjurisprudenz*. *Begriffsjurisprudenz* is a flow-on legal philosophy focused on understanding and analyzing legal concepts as a central element in understanding the law. This approach attempts to understand the law by examining and clarifying the underlying legal concepts, such as rights, justice, or responsibility. *Begriffsjurisprudenz* considers that to understand the law deeply, and we must understand these concepts clearly and systematically. In the context of judicial decisions, this school of law is the basis for substantive justice. Because basically, justice is not just a juridical issue. Therefore, the judge's decision only accommodates

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[29] Yunanto Yunanto, "Menerjemahkan Keadilan Dalam Putusan Hakim," *Jurnal Hukum Progresif* 7, no. 2 (2019): 192, https://doi.org/10.14710/hp.7.2.192-205.

[30] Bambang Sutiyoso, "Mencari Format Ideal Keadilan Putusan Dalam Peradilan," *Jurnal Hukum Ius Quia Iustum* 17, no. 2 (2010): 217–32, https://doi.org/10.20885/iustum.vol17.iss2.art5.

[31] Sudikno Mertokusumo, *Penemuan Hukum Suatu Pengantar* (Yogyakarta: Liberty, 2009). h. 195.

the applicable constitutions. From here, Luthan and Syamsudin define substantive justice as the result of a judge's decision based on honest, impartial, objective, and logical considerations. From these four characteristics, it will be illustrated and measured whether the judge's decision contains substantive justice or not.[32]

Several decisions of Islamic economics are focused on substantive justice. In the process of legal discovery, the orientation of substantive justice gives more freedom to the judge. Judges are not only bound by the text of the law but can also draw arguments from the legal provisions implied in the law. Therefore, the judge can also look at the substantial agreement if it is considered that the dispute's source originates from an unfair deal or is considered contrary to Islamic principles. If, during the trial process, it is found that the signed contract is contrary to Islamic principles. Then, the judge dares to make legal discoveries by exploring the values that live in the community. The values in question are Islamic principles derived from Islamic law. Thus, the parties will get the protection of their rights, both the interests of customers and Islamic banks.[33]

TYPOLOGY OF DEFAULF DECISION OF MUSYARAKAH AGREEMENT

A judge's decision is a product of authority that the judge has subjectively. The decision is strongly influenced by the judge's way of thinking, including the culture of decency surrounding the judge. By this, judges must understand the existing positive legal norms and the meaning of the positive law. In principle, it does not mean judges can change a positive law. However, judges must make their decisions with considerations of justice based on the development of life in society.[34]

In practice, a judge's decision can be classified into 2. First, decisions that focus on formal justice (legal justice). This means that justice is the same for everyone based on the standard regulations. Second are decisions that focus on substantive justice. This means that a judge digs more deeply than just formal regulations and is supported by the value of justice that the public can generally accept. As Arto said, since justice is a relative and subjective value, judges, with their techniques and

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[32] Salman Luthan and Muhamad Syamsudin, *Kajian Putusan-Putusan Hakim Untuk Menggali Keadilan Substantif Dan Prosedural* (Yogyakarta: Direktorat Penelitian Universitas Islam Indonesia Yogyakarta, 2013).

[33] Zaidah Nur Rosidah and Lego Karjoko, "Orientasi Filosofis Hakim Pengadilan Agama Dalam Menyelesaikan Sengketa Ekonomi Islamic," *Jurnal Hukum Ius Quia Iustum* 28, no. 1 (2021): 163–82, https://doi.org/10.20885/iustum.vol28.iss1.art8.

[34] Pandu Dewanto, "Rekonstruksi Pertimbangan Hakim Terhadap Putusan Sengketa Perdata Berbasis Nilai Keadilan," *Jurnal Ius Constituendum* 5, no. 2 (2020): 303, https://doi.org/10.26623/jic.v5i2.2307.

capacities, should be able to enforce the law by uniting an intersubjective between the Complainant and the Defendant.[35]

1. Orientation of Formal Justice

Several default decisions of the *musharakah* agreement are oriented to formal justice, which means they focus on the ceremonial law and the contracts agreed by the parties, reflected in RC Sleman Decision No. 1225/Pdt.G/2017/PA.Smn, where this decision was due to a lawsuit filed by one of the Islamic Financial Institutions (IFI) against one of its financing customers. The posts explained that IFI and the customers had signed a *musharakah* agreement, with the provision of disbursement of funds to the customer amount IDR.16.000.000,- (sixteen million rupiahs), which then have to be returned to the IFI in monthly installments of IDR.1.654.000 (one million six hundred fifty-four thousand rupiahs) within 18 (eighteen) month. On its way, the customer defaulted on the agreement by not paying the agreed-upon installments.

From the cases above, the judges' panel handed down a decision on December 11, 2017, which determined that the customer had defaulted on the agreement and then punished the customer for paying all material deficiencies demanded by IFI. In consideration, the Panel of Judges argued that the musyarakah contract signed previously was by the norms of the validity of an agreement, as stipulated in the provisions of articles 20 to 25 of the Compilation of Islamic Economic Law. The imposition of the compensation agreement, the Panel of Judges believed that because the musyarakah contract had fulfilled its terms and conditions, the customer's reluctance to pay the installments was an act of default and caused deficiency to the IFI. The Panel of Judges considered the installments as debt payments. So, the cessation of installments causes defects to the IFI. The Panel of Judges then decided that the deficit was entirely bue=rdened to the customer, even though the agreement was a musyarakah agreement, not a debt and credit contract.

This includes RC Tanjungpandan Decision No. 0126/Pdt.G/2018/ PA.Tdn, where the complainant was an Islamic bank, which filed a claim for compensation against the defendant by the musyarakah agreement signed by the defendant. The agreement stated that the Islamic bank provided equity to the defendant in the amount of IDR.100.000.000 (one hundred million rupiah) as counted as 61% of the total capital required by the defendant. The defendant has to return the money plus the projected profit of IDR.8.000.000 (eight million rupiahs). On the

[35] A.Mukti Arto, *Mencari Keadilan; Kritik Dan Solusi Terhadap Praktek Perkara Perdata Di Indonesia* (Yogyakarta: Pustaka Pelajar, 2001).

implementation, the defendant could only pay an amount of IDR.4.075.423 (four million seventy-five thousand four hundred twenty-three rupiah). Then, the remaining could not be fulfilled by the defendant until RC Tanjungpandan heard this lawsuit.

The panel of judges then decided on June 21, 2018, as requested by the complainant. By determining that the defendant has committed the default of the musyarakah agreement, as the defendant deserves to be punished for material deficiencies of the complainant, in the form of principal financing in the amount of IDR100.000.000 (one hundred million rupiahs), plus arrears of profit sharing and late payment compensation. In consideration, the panel of judges did not discuss the parties' position in the musyarakah agreement, such as the consequences of deficiency and the pattern of deficiency coverage in the musyarakah agreement. The judges only considered the validity of the agreement signed by the complainant, and the defendant punished anyone who did not implement the agreement clause.

For instance, a decision oriented to formal justice is RC Yogyakarta Decision No. 262/Pdt.G/2020/PA.YK. This is a case of a musyarakah agreement between one Islamic banking and housing *developer* company in Yogyakarta. Islamic Bank explained that initially, both parties agreed to build a housing cluster. Housing *Developer* then proposed musyarakah financing with a nominal value of 1.5 billion rupiah, and the Islamic bank approved the proposal. The Islamic bank required a financing period of 24 months, with a profit-sharing ratio of 63.25% for the *developer* as the Defendant and the remaining 6.75% share for the Islamic bank as the complainant. However, the Defendant did not make installment payments smoothly along the way. Based on records in the Complainant's system, the remaining outstanding financing is approximately IDR714,000,000 (seven hundred and fourteen million rupiahs), which consists of the remaining principal debt, remaining margin, and penalty fees.

The decision of the Panel of Judges handed down on June 9, 2021, partially granted the Complainant's petition. Among those given was the return of the remaining financing to the Complainant for IDR 714,000,000 (seven hundred and fourteen million rupiah). With the consideration that the agreement contains the principle of *pacta sunt servanda*. That all contents are binding on the parties to be carried out correctly. Regardless of the type of musyarakah agreement, Clause 6 paragraph (1) of the musyarakah agreement between the Complainant and the Defendant states that the debtor (Defendant) is required to pay the entire credit,

including interest, arrears ratio, and other fees charged by the Bank. Therefore, the Panel of Judges determined that the Defendant had been negligent in carrying out the contract clause so that all deficiencies were the full responsibility of the Defendant as the debtor.

2. Orientation of Substantive Justice

Substantive justice is the consideration of the Panel of Judges that focuses on validating the agreement and the substance of the contract itself. This is illustrated in Cassation Decision Number 624 K/Ag/2017, related to the *musharakah* agreement deficiencies caused by the bank disbursed financing funds before obtaining the life insurance policy. In general, the *Musharakah* agreement was valid because there was no requirement for life insurance coverage. On the other hand, the financing funds have also been disbursed and used by the customer. Moreover, in the subject matter of the case, there is no violation of the agreement's principles, the deal's conditions, or the things that invalidate the agreement as specified in the Compilation of Islamic Economic Law (clauses no. 21 to 26). Therefore, the musyarakah contract is binding on the parties and cannot be canceled.

However, the cassation decision decided that the deficiency was not only a burden to the customer. However, it is a burden proportionally between the customer and the Islamic bank, according to the proportion of capital deposited. The Cassation Council generally based its decision on 2 (two) focuses. First, consider the musyarakah agreement's substance and the legal relationship between Islamic banks and musyarakah agreement financing customers. Secondly, there are concerns regarding the principle of prudence in implementing financing by Islamic banks.

The purpose of the substance consideration of the agreement is the cassation panel, which can distinguish the legal position of customers in Islamic and conventional banks. In general, in traditional banks, the relationship between customers and bank institutions is the relationship between debtors and creditors. As the distributor of loan funds, the traditional bank is in a higher position than the debtor customer. Things are different in Islamic banks. With the various agreements offered, there are also various legal relationships between customers and Islamic banks. The musyarakah agreement, for example, illustrates equality and partnership. The musyarakah agreement is a form of cooperation in which both the

bank and the customer contribute funds with an understanding that every profit and deficiency is a burden together.[36]

The fiqh scholars state that at least 3 (three) things constitute the pillars of a musharakah agreement. First, there is *ijab kabul* from each party. In this *ijab kabul* sentence (solemnization), a statement should authorize the agreementing parties to manage the object of their *shirkah*. Second, there is the subject of the agreement. The agreements must be intelligent, pubescent, accessible, and not under duress. Third, there is the object of the contract. That is in the form of capital and work. In this case, the money must be cash, gold, silver, or equal value. Likewise, if it is an asset, the purchase must first be agreed upon by the agreementors. As for the work, it is a form of participation of the partners in the *musharakah* agreement. Equal shares of work are not a requirement. It is permissible for one party to ask for a more significant portion of the work to get a larger share of the profit.[37]

To be considered for this cassation decision, the terms and conditions of the *musharakah* agreement need to be explained. Legally, the *Musharakah* agreement is valid. Likewise, the capital participation of each party has been carried out. Thus, the relationship between the complainant and the Defendant became equal since they were both business partners. If there is a later depreciation of *musharakah* capital, in this case, amounting to IDR.752,000,000.00 (seven hundred and fifty-two million rupiah), then this is an agreement deficiency. It is not a form of customer default to Islamic banks.

As these considerations, the deficiencies incurred are burdened by each party due to the proportion of capital deposited. By the Musharakah Financing Agreement No. 120/KCSY02-APP/MSY/2011, the money deposited by the customer is 53.22 (fifty-three point twenty-two) percent, and from the Islamic bank is 46.78 (forty-six point seventy-eight) percent.

The second consideration is the principle of prudence in implementing financing by Islamic banks. On the decision, the Cassation Council underlined that the disbursement of musharakah financing before the insurance policy was issued indicated (*Karina*) the lack of prudence of Islamic banks. Before giving the insurance policy, the Islamic bank should not have given the musyarakah agreement. Legally, the deal is still valid without a policy because insurance is not a condition for

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[36] D. Nugraheni, "Asas Kesetaraan Dalam Akad Pembiayaan Musyarakah Pada Bank Islamic Di Yogyakarta," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 22, no. 1 (2010): 127–39.

[37] Mahmudatus Sa'diyah and Nur Aziroh, "Musyarakah Dalam Fiqih Dan Perbankan Islamic," *Equilibrium* 2, no. 2 (2014): 310–27.

disbursing the agreed funds. However, the insurance policy is critical to secure future financing for unwanted things.

Moreover, such actions are considered incompatible with the spirit of Islamic economics and violate the economic principles of Islamic principles. Therefore, the bank must know the consequences. The fact is, these actions have caused deficiencies and unrest. Thus, the Syariah Bank has committed negligence by leaving Mr. A as a consumer unaware of the consequences that will burden him and his heirs in the event of the risk of death in the future, as intended in the provisions of Clause No. 21 letters (e) and (j) of the Compilation of Islamic Economic Law (KHES).

In general, non-performing financing is the most significant in Islamic banking. Therefore, it has become a provision of the regulator that regulates how Islamic commercial banks must have a bank financing policy that includes prudential principles in a financial, financial organization and management, financial approval policies, financial documentation and administration, financial supervision, and the process of resolving problematic finances.[38] This aim is to keep Islamic banks in a healthy and stable condition.

Moreover, the Islamic Supervisory Board (ISB) also supervises the prudential principle application in Islamic banking. The role of ISB does not exist in conventional banks. With the existence of ISB, Islamic banks are supported in implementing bank compliance in general and ensuring that Islamic values become the foundation of the bank's operations and risk control principles. Therefore, the supervisory system of Islamic banks is much more comprehensive because it involves many parties and norms in it. The development of *Islamic prudential banking* has also begun to be encouraged to pay attention to business risks and ensure the application of Islamic principles. By implication, applying *Islamic prudential banking* can minimize problematic financing in Islamic banks.[39]

The purpose of this prudential principle is so that banks always protect public funds. Banks are always in a healthy state to run their business correctly and comply with the provisions and legal norms that apply in the banking world, as referred to in Clause 2 and Clause 29 paragraph (2) of Law Number 10 of 1998 concerning

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[38] Financial Services Authority Regulation Number 42/POJK.03/2017 Regarding the Obligation to Prepare and Implement Credit or Bank Financing Policies for Commercial Banks 2017.

[39] Binti Nur Asiyah, M. Ridlwan Nasir, and Muhamad Ahsan, "Islamic Prudential Banking Concept to Reduce Non Performing Financing: Literature Review," *Iqtishadia* 12, no. 2 (2019): 173, https://doi.org/10.21043/iqtishadia.v12i2.5641.

Banking. Therefore, by disbursing even though the insurance policy has not been issued, the Supreme Court, in its cassation decision, thinks that Bank Syariah has committed an unlawful act.[40]

In this case, since the bank committed a legal act, the Cassation panel did not charge the entire financing deficiency of IDR.752,000,000.00 (seven hundred fifty-two million rupiah) to be the customer's responsibility. Because the bank, in this case, has made a mistake, the cassation panel considers that the bank must also be charged with the same thing regarding the liability for the deficiency of musyarakah financing.

CONCLUSION

This research found various typologies of Religious Court decisions on the default of *musharakah* agreements. There are at least two types of legal approaches reflected in the consideration of the decision. First, judges are oriented toward formal justice, meaning they focus on traditional law and the agreement agreed upon by the parties. The judge only matches the sound of the contract with the trial facts. Regardless of the type of agreement arranged, when the deal is valid, all parties must implement all of its clauses. Second, judges focus on substantive justice where not only the validity of a contract is considered but also the agreement's substance.

Cassation Decision No. 624K/AG/2017 has deeply explored the *musharakah* agreement's substance. Where the lawsuit of default between Islamic banks and their customers is no longer seen as a deficiency of one party. With consideration of the principle of prudence in the implementation of financing by Islamic banks and a review of the legal relationship between the perpetrators of the *musharakah* agreement, where this *musharakah* is a form of the cooperation agreement, both the bank and the customer contribute funds, the Panel of Judges decided that the deficiency occurred in the *musharakah* agreement were burden by each party, according to the proportionally deposited capital.

This research is limited to exploring the differences in legal approaches regarding compensation due to default in musyarakah agreements. Further empirical studies are needed to examine the factors that cause differences in legal reasoning more comprehensively. This additional study is required to capture the complexity of legal decisions in religious courts regarding agreement defaults. By

[40] Panji Adam Agus Putra, "Konsep Perbuatan Melawan Hukum Perspektif Hukum Ekonomi Islamic," *Gorontalo Law Review* 4, no. 1 (2021): 57–74.

understanding these complexities, efforts to provide justice in safeguarding the rights of customers and the interests of Islamic banks can be maximally achieved.

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