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Message from Chairman

Yordan Gunawan

Chairman, International Conference on Law and Society 6,
Universitas Muhammadiyah Yogyakarta

Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfeltthanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

Foreword

Trisno Raharjo

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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Table of Content

XX	Scientific Committee
XX	Message From Chairman
XX	Foreword
XX	Committee
1	Safeguarding Patient Safety: A Need to Re-Examine the Legal Responsibilities of Medical Trainees Nur Farha binti Mohd Zaini, Puteri Nemie Jahn Kassim
14	The Nigerian Policy on Critical Information Infrastructure Mu'azu Abdullahi Saulawa, Ida Madieha Abdul Ghani Azmi, Sunny Zulhuda, Suzy Fadhilah Ismail
30	A Study on Demographic Information of the Respondent in Cross-Border Marriage: An Empirical Evidence from the State of Perlis Muhamad Helmi Md Said, Noraini Md Hashim, Nora Abd. Hak, Roslina Che Soh, Muhammad Amrullah Bin Drs Nasrul
41	The Legal and Economic Ramifications of Apology in Civil Dispute Resolution Process Muhammad Ridhwan Saleh and Puteri Nemie Jahn Kassim
52	Internet of Things: Investigating Its Social and Legal Implications in A Connected Society Sonny Zulhuda and Sidi Mohamed Sidi Ahmed
61	General Average and Jettison: The Policy Under Marine Insurance to Assist Master to Make Decision During Distress Mohd Sharifuddin Bin Ahmad, Zuhairah Ariff Abd Ghadas
66	The Protection of Endangered Animals Under Indonesian Legal System: The Case of Illegal Poaching for Trade Hanna Nur Afifah Yogar, Muhammad Hari Adipurna, and Nasrullah
71	Dynamics and Problematics of Regional Head Election Disputes Settlement in Indonesia Nasrullah, TantoLailam
88	Criminal Legality Affecting Cybercrimes in Yemen Ammar Abdullah Saeed Mohammed, Dr.Nazli Ismail Nawang, Prof. Dato' Dr.Hussin Ab Rahman
99	A Comparison on the Scope of Limited Liability in Companies and Shirkah al-Inan
107	The Implications of ASEAN Banking Integration Framework (ABIF) to Indonesia Banking Law Reform Lastuti Abubakar Tri Handayani
119	The Effectiveness of Interparty Coalition-Building in Presidential Democracy Nanik Prasetyoningsih

- 130 Strengthening Constitutional Democracy through Constitutional Adjudication Institutions: A Comparative Study between Indonesia and Australia
Iwan Satriawan, KhairilAzmin Mokhtar, Muhammad Nur Islami, Salim Farrar
- 147 Position and Acceptance of Fatwa of Council of Indonesian Ulama (MUI) by the State in Indonesian Legal System and Religious Court
IfaLatifaFitriani
- 153 Penang World Heritage Office: *Quo Vadis?*
Nizamuddin Alias
- 163 Measuring Feasibility of the Use of Chemical Castration Toward Offender of Sexual Violence Against Children in View of Human Rights And Proportionality Theory
Rusmilawati Windari
- 178 The Dynamics of Human Rights Enforcement In Indonesia: a Misconception and Political Consideration in the Formulation of Law Number 26 Year 2000 on Human Rights Court
Muhammad Iqbal Rachman&SahidHadi
- 187 The Challenges to Build the Culture of Human Rights in Islam
Martinus Sardi
- 195 International Perspective on Incorporating Good Governance Principles in Three Countries' Land Administration System: Malaysia, Turkey and Indonesia
Sunarno, Ainul Jaria Maidin
- 210 Mergers and Acquisition Law: The Need for Harmonization in ASEAN
Mushera Bibi Ambaras Khan, Ida Madieha, Nasarudin Abdul Rahman, Mohd Radhuan Arif Zakaria
- 220 The Urgency of Strengthening the Regulation And the Implementation of *Musharaka Mutanaqishah* Financing on Islamic Banking in Indonesia
Isti'anah ZA, Falah Al Ghozali
- 233 Securing the Right to Life on the War on Terror: A Comparative Analysis of Indonesia and Europe
Prischa Listiningrum, RizqiBachtiar, MohFadli
- 241 The Inconsistency of Supreme Court Decision to Annul the Arbitratral Award in Indonesia
Fadia Fitriyanti
- 246 Utilization (*intifa'*) of Unlawful Wealth Acquired by Unlawful Means from Islamic Legal Perspective
Badruddin Hj Ibrahim
- 254 The Urgency of ASEAN Human Rights Court Establishment to Protect Human Rights in Southeast Asia
YordanGunawan, Tareq Muhammad Aziz Elven

- 266 Religiosity in Criminal Law: Islamic Perspective
Abdurrahman Raden Aji Haqqi
- 283 Assessing the Legal Protection for Farmers in the Policy Agricultural Insurance Facility
Dwiwiddy Jatmiko, Bayu, Hartini, Rahayu, Isrok, Mohammad
- 299 Reviews Juridical on Fee Arrangements in Bankruptcy Curator After the Supreme Court Decision no. 54 P/HUM/2013
Rahayu Hartini
- 310 The Causes of Terrorism in Malaysia
ZulKepli, Mohd Yazid bin
- 319 Adequacy of the Law in Protecting the Rights of Adopted Children in Malaysia
Roslina Che Soh, Nora Abdul Hak, Noraini Md. Hashim, Mohd Helmi Said
- 328 New Developments on Waqf Laws in Malaysia: Are They Comprehensive?
Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul Kader
- 336 Detention under Anti Terrorism laws in Malaysia and Nigeria: An Expository Study on Boko Haram Suspects
Babagana Karumi, Farid Sufian Shuaib
- 349 Robust Yet Fragile: Enactment of Law Number 16 Of 2011 to Promote the Role of Advocate in Implementing Legal Aid
Laras Susanti and Bayu Panji Pangestu
- 356 2017 Constitutional Reform in Turkey: What the Constitutional Ammendment Draft will Change
Murat TUMAY
- 357 Monitoring Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) at National Level: Obligations on and Options for Malaysia
Khairil Azmin Mokhtar
- 368 The Roles of KPPU on Supervision of Business Competition: A Case Study of Cartel Dispute Settlement in Indonesia
Mukti Fajar ND.; Diana Setiawati
- 376 Role of Criminal Investigation Under Malaysian Land Law
Mohd Helmi Mat Zin
- 382 The Importance of Comparatýve Law in Legal Educatýon
M. Refik Korkusuz
- 385 The Reposition of Mediation Process in Islamic Economic Dispute Resolution Trough Religious Court After Perma No. 1 of 2016
Nunung Radliyah, Dewi Nurul Musjtari

The Urgency of Strengthening the Regulation And the Implementation of *Musharaka Mutanaqishah* Financing on Islamic Banking in Indonesia

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ABSTRACT

MusharakaMutanaqishah financing (MMQ) is a financing partnership based on the principles of *Musharaka* or *syirkah*, with the characteristics of assets ownership or capital of one of the parties (*syarik*) continue to decline gradually due to purchases made by the other parties. *MusharakaMutanaqishah* financing is relatively new. It has many advantages over other types of financing schemes. However, the regulation and its implementation in Indonesia are still not optimum. The paper aims to analyze the weaknesses of the regulation and the implementation of *MusharakaMutanaqishah* financing in Indonesia. The result shows that there are some weaknesses of the regulation related to the MMQ financing, as follows: *First*, the regulation governing MMQ needs to be completed by the government. *Second*, in term of language, the regulation should follow the principle of legal drafting. *Third*, in some ways, there are conflicts of law in the regulation of MMQ in Indonesia. *Fourth*, MMQ financing is only regulated in the Fatwa of National Sharia Board, Indonesian Ulema Council (MUI). Furthermore, the implementation of MMQ financing in Indonesia has not been ideal yet, since some criteria cannot be reached, namely: *First*, not all Islamic Banking offers MMQ financing products. *Second*, the interest of customers to MMQ financing is still low. *Third*, the implementation of MMQ financing cannot contribute in the improvement of the social-economy productivity. MMQ Financing can be optimally realized with some strategic steps, i.e: amendment of MMQ financing provision is needed and continued with dissemination to the public and stakeholders. The government should strengthen the Sharia Banking capital by allocating in the state budget. Last but not least, the spirit (*ghirah*) from Muslims to do the Islamic teachings as a whole (*kāfah*), freeing themselves from the usury system in their economic activities.

Keywords: strengthening regulation and implementation, *musharakamutanaqishah* financing, Indonesian Islamic banking

I. Introduction

Musharakamutanaqishah financing (MMQ) is a financing partnership based on the principles of *Musharaka* or *syirkah*, with the characteristics of assets ownership or capital of one of the parties (*syarik*) continue to decline gradually due to purchases made by the other parties.¹ In other terms, MMQ financing also called as diminishing *musharaka*, because the ownership of assets of one of the parties has continued to decline as a result of the purchases made by the others, and at the end of *aqad*, ownership of one of the parties will move to the other parties. MMQ financing is financing partnership, in this case the bank participated as a financial partner and Islamic Bank just take a part of the capital of *musharaka*, while another part of the capital investment is the part of the customer.

The *capital* of the Islamic banks is usually far greater than the capital invested by the customer.

In the implementation of MMQ financing, it should be clearly defined about the profit-sharing ratio between the bank and the customer. Likewise, should be clearly defined the amount of installments to be paid by the customer to the bank, which is also the repayment of the funds invested by the bank. Through this way, part of the bank's capital will progressively reduce so that in the end the customer will become the full owner of the asset/project which is the object of the cooperation.

In Indonesia, MMQ financing is a form of financing that is relatively new compared to other forms of financing which is operated by the Islamic Banking. MMQ financing is not widely known to the public, many of them not even the human resources in Islamic banking, has a good understanding of this type of financing.

In other countries such as Malaysia, MMQ financing is quite long enough to be implemented, especially in Islamic home financing products. Haron and Shanmugam² stated that the products of Islamic home financing are the very competitively banking products for Islamic banks. Islamic home financing industry is very promising. There are two reasons, namely first, the financing products are generally approved by Sharia Scholars to advance Islamic financing concept which rules out the interest rates, uncertainties and other elements of fraud. Instead of conventional home loans which based on the interest rate regime, and regarded as contrary to the philosophy of Islamic business.

Interest rate products are extremely prohibited in Islamic home financing because it creates social injustice. The products of Islamic home financing are supposed to be acceptable to the customer of Islamic bank. Second, the products of Islamic home financing are based on a number of Sharia principles, that is, *baibithamanajil* and *Musharakamutanaqishah*.

However, in operating these products, one bank with another has their own way depending on the policy of the related Islamic bank. Amin et al (2012)³ gives an example, Bank Islam Malaysia Berhad (BIMB) and Public Islamic offering home financing products based on *baibithamanajil*. The first bank offers a holiday payment⁴ for home financing using *baibithamanajil*, while the second bank does not do so. This explains why each Islamic bank has a competitive advantage in attracting new customers while retaining existing customers.

Newell and Osmadi⁵ stated that Islamic finance is becoming more popular in many countries. This is shown by the diversity of financial products of sharia-compliant as well as increased demand for investment opportunities that is in accordance with Sharia to Muslim investors in the Middle East and Asia, among others operationalized based on *musharakamutanaqishah*.

BaiBithamanAjil (BBA) is one attempt to provide Islamic-based home financing products. This concept is widely used by financial institutions in Malaysia. According to Rosly⁶, BBA is based on the concept of selling by installments where the bank buys the house and then sell it to customers at a price covering the profit margin. Banks earn profits determined in advance on the property. In turn, clients are required to pay a sum of money that has been set up to the expiry of the agreement. It's the same with debt financing resulting in high costs and posing a burden on the family finance.

The critics to the concept have alleged that the existing BBA in Malaysia is not in accordance with the principle of Sharia, since the bank does not share the risk of ownership and does not take responsibility for the property. Relying on the interest to determine the profit margin is contrary to the concept of 'free interest'. The concept of *musharakamutanaqishah* or Diminishing Partnership (DP) was introduced to address the criticism over the BBA.

Usmani⁷ DP models are based on practices that already carried out by the Islamic Cooperative

Housing Corporation (ICHC) in Toronto, Canada which was established in 1981 to prevent the Muslim community from usury. This model is based on the equity model which is different from the model of traditional mortgage-based debt. The DP focuses on the purchase of property shared between customers and banks. There are four sections in the contract. First, the customer entered into a partnership (*musharaka*) with the concept of "*Shirkah-almilk*" (joint ownership) with the bank (Usmani, 2007). Customers pay, for example, 10% of down payment, the bank was paid an advance of 90%.

Second, the customer has promised to buy the unit. Third, the bank divest its shares amounted to 90% in the ownership of the house to the customer with the concept of *ijarah* (leasing), which set the rent and the customer agrees to pay the rent to the bank in exchange for use of the property. Periodic rental amount will be shared between the bank and in accordance with their own percentage. Lastly, customers pay off part of the 90% of ownership by purchasing all of the remaining shares until the bank was actually owned by the customer. Bank co-owns and bears responsibility on the property until the loan amount has been fully carried out by the customer and the customer takes over the ownership of the property.

The DP concept is in line with Sharia and encourages the spirit of Islamic banks with emphasis on the welfare of people and society (Ahmad, 2000; Siddiqui, 2001; Rosly and Grill, 2003). Because the DP relies on for profit and loss sharing and not on debt as the BBA, and the DP is considered not to cause trouble and losses on customers. Banks have and bear responsibility over the property up to the amount of financing is fully completed and the customer takes over the ownership of the property. This is in accordance with the principles of Islam which requires the seller has the goods and takes responsibility before selling it to buyer. The use of rental fee for the cost of interest, however can also cope with the criticism addressed to the BBA.

The main difference between DP and BBA is that the customer does not owe the bank for a long time and the basis for setting the rent is the value of the property. No interest is allowed in Islam. The DP is also flexible and customers can discount the house by buying faster by paying off a part owned by the bank.

MMQ financing is initially one of various types of financing that is absolutely very beneficial, both for the Islamic banking, as well as the customer. In MMQ financing, the magnitude ratio can be changed, depended on the situation at hand, for example, depending on the situation of economic growth, inflation, exchange rate and so forth.

It is not so in other types of financing that is imposed on the Islamic Bank. For Islamic banking, this phenomenon is certainly provide benefits without having to operationalize its own capital of the bank and can be a way out in the Islamic banking when facing difficult situations as a result of the economic crisis. Islamic Banking can also develop business activities that are more varied and applying the teachings of *maqashid ash-Sharia* in the business, not just for profit, but also can contribute to the welfare of the society and the customer treats equitably.

For customer, MMQ financing is also considered quite beneficial for customer to meet its economic needs as well as to develop economically productive activities by the guidance of religion and at the end of the agreement (contract), the customer can have the object of the contract in a way that is easy, namely by buying capital owned by Islamic Bank in installments. The implementation of the agreement is also commonly performed in quite a long time, so that the customer is not too heavy to make payments in installments. MMQ financing also considered more in line with Islamic principles and in line with the purpose of the convening of Sharia banking (*maqashid ash-Sharia*).

Anwar⁸ considers that the concept of MMQ financing has Islamic identity that reflects the philosophy, values and perceptions of Islam such as promoting the welfare of individuals and communities. In support of this view, Kuran⁹ said that the purpose of Islamic banking is to strengthen the Islamic identity.

MMQ financing is a type of financing that has many advantages over other types of financing, but the regulation and implementation in Indonesia until now has not been realized optimally, so it requires various strengthening measures. This paper intends to study the various regulatory weaknesses and constraints in the implementation of MMQ financing in Indonesia and offers a strengthening solution.

II. Discussion

a. *MusharakaMutanaqishah* Financing Characteristics

Development of Islamic transactions based on MMQ happens for two contracts that are executed in parallel. First, the customer and the bank do *musharaka* contract through equity participation in the management of a business that will be profitable. It is indicated clearly as *syirkahamwal*, the two sides include the capital in an amount not to be the same. Second, customers do business with joint capital and the results of operations are divided according to the agreement between the bank and the customer. Additionally, the customer buys bank-owned capital goods in installments so that the capital owned by the bank in the *syirkah* gradually reduced. The reducing of capital bank, that's so called *mutanaqishah*.

MMQ financing is a derivative of *musharaka* contract, so that all the provisions are applicable to the *musharaka* contract will automatically applies to MMQ financing agreement. Other terms are also commonly used to refer to the MMQ financing is *musharakamumtahiyyah bit tamlik*, which means cooperation between a number of *syarik* (in this case the customer and the bank) to include a property to be used as venture capital, and venture capital of *syirkah* are then purchased by the customer gradually, so until the appointed time, the ownership of the bank's capital runs out and the whole venture capital of *syirkah* belongs to the customer, that's when actually *syirkah* ends. Thus it is called as *musharakamumtahiyyah bit tamlik* because of the ownership status of joint venture capital at an agreed time belonged to the *syarik* (the Customer) in full.¹⁰Dusuki and Abozaid describe Funding MMQ as:¹¹

"Musharakamutanaqishah is one of the equity-based models of financing in Islamic microfinance scheme. Argue that the provision of equity based financing by Islamic financial institutions will facilitate toward achieving the Islamic socio-economic objectives include social justice, economic growth and stability efficiency."

As *Bendjilali*, Khan and TaqiUsmani expressed opinions related MMQ financing with the following statement¹²:

"Islamic scholars are basically in agreement on the implementation process of musharakahmutanaqishah. For example, agreed that the musharakahmutanaqishah can help people to rely less on other financing facilities such as the Bai-Bitthaman-Ajil, Murabahah etc. Islamic scholars agree that musharakahmutanaqishah is best implemented for house or machinery financing where both assets can be leased out according to agreed rental. Joint ownership of a house or asset is accepted by all schools of Islamic fiqh since the financier sells its share to the client".

The *fatwa* of National Sharia Board, Indonesian Ulema Council (DSN-MUI) No. 73/DSN-MUI/IV/2008 on *musharakamutanaqishah* stated that actually *musharakamutanaqishah* is allowed.¹³

MMQ financing has special characteristics that distinguish it from other financing models in Islamic banking. The main character of MMQ financing products are as follows:

- 1) *Hishshah* (portion), the business capital of the parties must be expressed in the form of *hishshah* which is divided into a number of units of *hishshah*.
- 2) Constant, the total nominal amount of capital stated in the *hishshah* should not be reduced during the contract takes effectively.
- 3) *Wa'd*, Islamic banks pledged to divert commercially and gradually the whole *hishshah* to the customer.
- 4) *Intiqal al-milkiyyah*, namely every money deposit by the customer to Islamic banks, with the value of an amount equal to the value of the units of *hishshah*, as sharia is declared as a diversion unit of *hishshah* of Islamic banks commercially to the customer, while the amount of the value is more than the value of the unit of the *hishshah*, expressed as the results-sharing which are being the rights of the Islamic banks.

Hishshah is one of the main characters of MMQ financing. MMQ venture capital must be expressed in the form *hishshah*, which is divided into units of *hishshah*. For example, if a bank business capital is IDR 80 million, and from the customer is IDR 20 million, the venture capital of *syirkah* is IDR 100 million. If each unit of *hishshah* agreed worth IDR 1 million, the venture capital of *syirkah* is 100 units of *hishshah*. Venture capital has been revealed in the *hishshah* should not be reduced during the contract applies effectively.

The statement in the form of *hishshah* required the following reasons: 1) Venture capital of *syirkah* of each *syarik* must be combined in such a way, that of mixing into an asset of *syirkah* and should not be sorted out. 2) For the sake of diversion, *hishshah* which has become an asset of *syirkah* are then broken down into units of *hishshah* as a way to facilitate the transfer, as is done in the securitization process. 3) As an illustration of the implementation of *musharakamutanaqishah*, when capital of *syirkah* has been used for business activities in the form of home or property, then for the customer's payment in installments to the bank, concluding the ownership of customers increasingly to be more dominant and the ownership portion of Islamic banks will be on the wane.¹⁴

The objects of MMQ financing must be agreed upon and set forth clearly, which include: 1) The term of delivery of the object. 2) The quantity and quality of the object. 3) The availability of the object, ie, most of the objects if in the form of building/physical must already exist at the time of the contract, even if the overall delivery is done in the future according to the agreement.¹⁵

MMQ products can be applied in the form of the productive and consumptive financing, though the real expectation is to develop and increase the productivity of the economic efforts. This type of financing can be applied to financing vehicles, and financing of residential property, flats, the home store (shop), home office, apartments and condominiums.

b. The Urgency of *Strengthening* the Regulation of MMQ Financing In Indonesia

Regulation concerning on MMQ financing in Indonesia in substance is still too minimal, so as a legal umbrella, the operational of MMQ has not been sufficient yet. The legal basis that had been used as guidance in implementing the MMQ financing is only the Fatwa of National Sharia

Board (MUI) or DSN MUI No. 08/DSN-MUI/IV/2000 which regulates *musharaka* financing in general and DSN MUI No. 73/DSN-MUI/XI/2008 on the *musharakamutanaqishah* financing. DSN No. 73/DSN-MUI/XI/2008 was then followed up with MUI Decree No. 01/DSN-MUI/X/2013 on the Guidelines for the Implementation of MMQ.

The Fatwa of MUI No. 08/DSN-MUI/IV/2000 governing the *musharaka* financing is generally only includes the notion of *musharaka*, the argument underlying the *musharaka* financing, the provision of the contract, the provisions regarding the parties do *syirkah*, *syirkah* object and the provision of operational costs and disputes.

The MUI Fatwa No. 73/DSN-MUI/XI/2008, which is the legal umbrella of MMQ financing, also just set five things, namely general provisions, legal provisions, contract provisions, special provisions and closing. The MUI Fatwa DSN is confirmed that, first, the *akad* of MMQ consists of the *akad* of *syirkah* contract and the *akad* of *bai/sale-purchase*.

Second, the *syarik* relevant provisions, in the form of guidance that *syarik* obliged to include assets to be used as working capital, and labor agreements in deed, *syarik* entitled to make a profit based on the agreed ratio at the time of the *akad*; *syarik* bears the advantage according to the proportion of capital; *syarik* obliged to promise to sell the entire of its *hishshah* gradually, and other *syarik* obliged to buy it. Sale and purchase is done according to the agreement and after the entire process of buying and selling, the entire *hishshah* of Islamic banks turned to other *syarik*/customers.

Some of the specific provisions set out in the DSN MUI No. 73 Year 2008 were minimal substance as follows: first, MMQ asset can be leased (*ijarah*). Second, if the MMQ asset be the object of *ijarah*, then *syarik* or customer can hire these assets with a value of *ujrah* (lease) based on the agreement; third, the benefits of these efforts are divided according to a ratio agreed in the *akad*, while the loss-sharing should be based on the portion of capital/ownership; benefit of *nisbah* follows the proportion of capital/ownership as agreed by the *syarik*.

Then the fourth, grade or size of the part/portion of *musharaka* asset ownership of the *syarik*/bank reduced due to payment by *syarik*/customer, must be clear and agreed upon in the contract; fifth, the acquisition cost of the MMQ asset would be borne jointly, while the cost of transfer of ownership into the buyer's expense. In closing provisions, the Fatwa of MUI is set for dispute settlement, namely any disputes between the parties, the settlement of disputes carried out by the legislation in force and according to the principles of sharia.

If the Fatwa of MUI No. 08/DSN-MUI/2000 on *musharaka* financing, compared with DSN Number 73 Year 2008 on *musharakamutanaqishah*, then the Fatwa No. 73 Year 2008 positioned as *lexspecialis derogate legigenerali* against the Fatwa of MUI No. 8 Year 2000. However, if examined in depth, the Fatwa of MUI No. 73/DSN-MUI/XI/2008 is actually more repeat the provisions already made in the Fatwa of MUI No. 8 Year 2000, while regulations that specifically regulate the MMQ is just a few only.

Therefore, understanding and interpretation of the community towards the rules on MMQ is very diverse, so as to overcome these problems later on November 4th, 2013, the DSN MUI issued Decree No. 01/DSN-MUI/X/2013 on Guidelines for the Implementation of *MusharakaMutanaqishah* Financing Products. This decision is not a new Fatwa, but is intended to clarify the Fatwa of MUI No. 73/DSN-MUI/XI/2008. The decision therefore is not framed in the form of Fatwa or even Fatwa Modification.

In the Consideration considers, the Decree referred to affirm that the DSN-MUI No. 73/DSN-MUI/XI/2008 on *MusharakaMutanaqishah* understood vary by community, including practitioners

of Islamic financial and financial services authority, which can cause unevenness implementation in financial products and banking sharia. Though, society requires clear and certain guidelines to implement the Fatwa regarding the MMQ.

MMQ financing regulation is basically in term of legal drafting is too complicated and difficult to understand by the common people. It was recognized in the DSN MUI Decree No. 01/DSN-MUI/X/2013. However, the issuance of Decree DSN-MUI No. 01/DSN-MUI/X/2013 as the rule of a technical nature, it is also not enough to help providing a clear picture of the rules governing the MMQ financing, so that in February 2016 the Financial Services Authority felt the need to publish Standard Products of *MutanaqishahMusharaka* Financing Book, in order to provide clearer and more detailed guidance to the public. In substance, the various provisions governing the MMQ financing used too many languages that are less familiar, difficult to digest and it indeed results to multiple interpretations.

Indonesia has laws that specifically regulate the procedure of forming legislation, namely Act No. 12 Year 2011 on the Establishment of Legislation. Article 5 of the Act confirmed that in shaping the legislation should be based on the principle of formation of the legislation that is good, which further stated in letter f, namely the clarity of the formulation. Elucidation of Article 5 letter f outlines that the reference to the principle of the clarity of the formulation is that any legislation must meet the technical requirements of the preparation of legislation, systematize, the choice of words or terms, as well as the legal language that is clear and easy to understand so as not to cause a wide range of interpretation in its implementation.

In the content, the regulations governing the MMQ financing also not meet the legal needs of the rapidly growing community. For instance, there has been no way out related to the ban on Islamic banks in issuing debt acknowledgment, nor are the rules relating to the procedures for putting a security interest in the transfer of ownership. Then the rules concerning on the *akad* of MMQ consisting of two *akad*, namely *akad* of *syirkah* and *akad* of *bai* (sale and purchase), even three *akad* in terms of the object of the contract are hired by the customer itself, there is no regulation that answers questions about should least two or three such *akad* formulated into one *akad*, for making the operation easy.

The problem of incomplete regulations governing the MMQ financing also be recognized and be the legal issues in the Standard Products of *MutanaqishahMusharaka* Financing Book stating that the Fatwa of MUI is not yet adequate regulating the substance of the agreement required by the notary and Islamic banks as well, so the clause of the agreement used by the notary still refers to the full concept of the conventional banking.¹⁶

In some cases, a controlled substance under the technical regulations also seems inconsistent. An example is the provision which confirms that the object of MMQ financing should be vested in the customer directly on the approval of Islamic banks/Sharia Financial Board as stipulated in the MUI Decree No. 01/DSN-MUI/X/2013, this provision is actually not set on the Fatwa of MUI No. 73/DSN-MUI/XI/2008. If the function of MUI Decree No. 1 Year 2013 is to further clarify the Fatwa of MUI No. 73/DSN-MUI/2013, then in the MUI Decree should not be created new rule, and vice versa if such new rule was necessary for the perfection of the regulation of MMQ, it should also stipulated in the regulations framed 'Fatwa' and is not in the frame of the Decree that is technical in nature.

If it viewed as a hierarchically, regulations governing the financing of MMQ is also not ideal yet because it has not placed yet in the position as stipulated in Article 7 of Act No. 12 Year 2011. Article 7 paragraph (1) of the Act stated that the type and hierarchy of legislation consists of:

- a. The 1945 Constitution of the Republic of Indonesia
- b. People's Consultative Assembly Decree
- c. Law/Government Regulation in Lieu of Law
- d. Government Regulations
- e. Presidential Regulations
- f. Provincial Local Regulations, and
- g. District/Municipalities Local Regulations.

Paragraph (2) of Article 7 of the Act No. 12 Act Year 2011 explicitly stated that the legal force of legislation is in accordance with the hierarchy as referred to in paragraph (1).

In connection with this, the Fatwa of MUI as principal regulation governing the MMQ, has many questions on the strength of its law. Chairman of the MUI, K.H. Ma'ruf Amin stated that Fatwa of MUI is not a positive law that can be the basis of the regulation. But the Fatwa of MUI is a living law as like as sharia economic law. K.H. Ma'ruf Amin wanted such Fatwa can be upgraded to the Act in order to have binding force for the entire nation.¹⁷

Indonesian National Police Chief, Police General Tito Karnavian also found that Fatwa of MUI is not a positive law, so it cannot serve as a legal basis for issuing further rules¹⁸. Meanwhile, Chairman of Muhammadiyah, BusyroMuqoddas confirmed that the Fatwa of MUI is a positive law. BusyroMuqoddas stated that law there are four, one of which is the religious law and the Fatwa issued by MUI are religious Fatwa I mean, so the Fatwa of MUI is a positive law.¹⁹

Opinion on the legal position of the MUI Fatwa also stated by AgusRiewanto, which states that the positive law is a law made by the state official institutions under Article 20 of the 1945 Constitution of the Republic of Indonesia, is by the Parliament and the Government and is implemented by the legal apparatus and bureaucracy.

AgusRiewanto argued that in the concept of a constitutional state should not be any other applicable law, other than the legal procedure of preparation set forth in Article 20 of the 1945 Constitution, whereas the regulations made outside the state institutions cannot be recognized valid and cannot be used as the basis for the legal apparatus and bureaucracy in taking legal action on behalf of the state. In this connection AgusRiewanto considered that the MUI Fatwa is not a positive law. MUI Fatwa position in the context of the country according to law is simply an informal law that has no binding and sanctions.²⁰

Position and power of the MUI Fatwa, in the perspective of legislation can be assessed based on Act No. 12 Year 2011 on the Establishment of Legislation. Article 7 of the Act referred to, as already noted above, including seven types of legislation in the hierarchy. However, in Article 8 of Act No. 12 Year 2011 outlining the status of the various rules that are not included in the hierarchy, namely in paragraph (1) affirmed that the type of legislation other than those referred to in Article 7 paragraph (1) includes rules established by the People's Consultative Assembly, House of Representatives, Regional Representatives Council, the Supreme Court, the Constitutional Court, the State Audit Board, the Judicial Commission, Bank Indonesia, the Ministers, the Agencies, the Bodies or Commissions that is equivalent.

Then, it should be established by law or government at the behest of the Act, the House of Representatives at Province, Governor, the House of Representatives in District/City, Regent/Mayor, Head of Village or its equivalent. Then in paragraph (2) of Article 8 affirmed that the legislation referred to in paragraph (1) recognized and binding legal effect as long as ordered by legislation that is higher or established by the authority.

The MUI Fatwa governing the subject of Islamic banking have binding legal force and be recognized as the birth of the MUI Fatwa in the field of Islamic banking ordered by Act No. 21 Year 2008 concerning on the Islamic Banking. Article 26 paragraph (1) says that the business activities referred to in Article 19, Article 20 and Article 21 and/ products and services of sharia, shall be subject to Islamic principles. In paragraph (2) states that Islamic principles referred to in paragraph (1) will be formulated in fom of Fatwa by the Indonesian Ulema Council (MUI). This Article 26 paragraph (2) basically gives binding force to the MUI Fatwa in the field of Islamic banking.

However, in paragraph (3) Article 26 also confirmed that the Fatwa referred to in paragraph (2) shall be set forth in the Regulation of Bank of Indonesia (since the promulgation of Act No. 21 Year 2011 on the Financial Services Authority, Bank of Indonesia Regulation is transformed into the Regulation of Financial Services Authority). The provision is very clearly shows that Article 26 paragraph (3) has mandated that the MUI Fatwa forth in the Regulation of Bank of Indonesia/ Regulation of Financial Services Authority. However, in reality, quite a lot of MUI Fatwa which is not followed by Bank of Indonesia Regulation and the Regulation of the Financial Services Authority, including the financing of *musharakah* and *musharakamutanaqishah*.

Therefore, maintain the authority of the MUI Fatwa, then the compliance of MUI and Financial Services Authority of the order of the Article 26 paragraph (3) on Islamic Banking Act must be enforced. However, a violation of the rules of law is a behavior that inappropriate to left.

In connection with the explanation above, the financing arrangements for the MMQ is still not comprehensible in substance and is not in accordance with the rules of Islamic Banking Act, so it is necessary to strengthen to be more ideal and has the power and legal certainty. MMQ regulations governing the financing would be ideal if the principal provisions stipulated in legal umbrella framed as Act. Certainly, not actually to be in the law that specifically regulates the MMQ financing, but it is enough to be accommodated in the legislation governing the Islamic Banking in general, for example, contained in an Amendment of Law No. 21 Year 2008 concerning on Islamic Banking, which at this point, the existence of the law has to be modified to suit with the development of society.

c. The Urgency of Strengthening the Implementation of MMQ Financing In Indonesia

Regulation which is not ideal of course also affects operational practices. Implementation of MMQ Islamic bank financing or worksheets can also be said is not capable of running both as expected. It can be seen from some indication as follows: First, the percentage of public interest against MMQ financing is still very low. In the records of the FSA, the data in December 2015, *musharaka* financing realization (which is the parent of MMQ) recorded only has its share of 28,50% of the total of Islamic banking financing. While the MMQ financing is just accounted for 15% of the overall realization of *musharaka* financing. The MMQ financing supposed to be the flagship products of Islamic banking because it has very different characteristics to conventional bank products.

Second, in the general practice of MMQ financing, the customer does not use the object of financing as a means of doing productive business but is used to meet the needs of residential houses. While the original purpose of the implementation of the MMQ financing is to increase the economic productivity of society. This can be seen for example on the MMQ financing of Bank Muamalat, which operationalize MMQ financing on financing for Housing Loan (KPR) of

Muamalatib or KPR iB at Bank SyariahMandiri.

Home as the object in the Housing Loan (KPR) of Muamalatib financing is the fulfillment of a means of living, not as a means of business activities. Implementation mechanisms of KPR iB financing done by participation of joint capital between the bank and the customer with the portion as mention in the agreement (usually the bank's capital is greater than the customer), then the customer buys a bank-owned capital by way of installments. Furthermore, the object of financing in the form of the house rented by the customer itself, and the rental money over the object of joint venture between the bank and the customer divided by agreement or divided proportionally according to the amount of capital, and after the customer pay the installments in keel, the house which was the object of MMQ, the ownership changed fully belongs to the customer.

Third, the implementation of the MMQ financing can just be realized for the fulfillment of any form of residential property. Though in theory, MMQ financing could be applied to vehicle financing, home stores, business flats, houses offices, apartments, condominiums or other business in accordance with Islamic principles. From some indications as noted, it is understandable that the implementation of the MMQ financing has not been able to run properly.

From the discussion, then we could conclude that the regulation governing the financing of MMQ is necessary to strengthen, because some of the following: First, Substantially is not complete yet and therefore need to be refined to reflect the changes and social needs. Then, the regulation of the MMQ financing also still use language that is complex and difficult to be understood by ordinary people, so it needs to be formulated in accordance with the rules of legal drafting, and in some ways, there are content that is still not synchronized between the one term with another term, so that it is necessary doing alignment.

Second, hierarchically, if the review is based on the theory of the hierarchy of legislation in force in Indonesia, the regulations governing the financing of MMQ still occupies a weak position, because it is regulated by MUI Fatwa. Islamic Banking Law mandates for MUI Fatwa poured into FSA regulation has not been fully complied with. The regulation on the financing of MMQ would be ideal if it is poured in the frame of law, even though the legal source of the content of the law still has to refer to the MUI Fatwa.

Implementation of MMQ financing in Indonesia has not been able to run optimally, with the indication: First, not all Islamic Banking provides financial services of MMQ. Second, the interest of customers towards the financing of MMQ is still low. Third, the implementation of MMQ financing is more dominant used to meet the financing needs of the consumer so that the MMQ has not been able to contribute in improving the productivity of the economy.

MMQ financing in Indonesia actually can be realized more optimal if it is taken strategic steps as follows: first, necessary to improve regulations governing the financing of MMQ. Secondly, it is necessary to conduct a massive socialization, in order to be understood by all stakeholders. Thirdly, there should be a legal breakthrough which did not deviate from the principles of sharia to eliminate any technical obstacles of its operational to make it financing more attractive MMQ Islamic banking industry and the Customer. Fourth, the need of the high religious consciousness (*ghirrah*) from the Muslims to implement the teachings of Islam as a whole (*kaffah*), and also freeing themselves from the usury system in developing productive economic activities.

Based on the theory of *Maqashid Ash-Sharia*, MMQ Financing should be able to provide the greatest benefit to mankind, since the purpose of the revelation of the true Islamic sharia is to realize human welfare and happiness both in this world and in the hereafter. Based on this theory

all the obstacles encountered either in regulation or in operation can be solved and find the solutions. In theory of *Maqashid Ash-Sharia*, there are rules of fiqh which states "*Al-haajatuqodtanzilumanzilataadloruuroti*", namely that a need can occupy the position of emergency. Then the principles of *fiqh in muamalah* also confirmed that "*Al-ashlufilmuaamalaati al-ibaahatuillaanyadulladaliilualaatahriimihaa*" namely that essentially all forms of *muamalah* could be made unless there is proof (*dalil*) that forbids it.

MUI as an institution that is mandated to issue a Fatwa, need to find a solution to the obstacles encountered in the implementation of the operations of Islamic banking, including MMQ financing, so that the Muslims can meet its economic needs comfortably, without the burden of misgivings due to imperfect rules and regulations that should have to be the guidelines.

III. Conclusion and Recommendation

a. Conclusion

Based on the discussion as described above, it can be concluded that actually, the regulations governing the financing of MMQ is necessary to strengthen, because some of the following: First, Substantially is not complete yet and therefore need to be improved, the regulation of the MMQ financing is also still a lot of languages which are complicated and difficult to be understood by ordinary people, so it needs to be formulated in accordance with the rules of legal drafting, and in some cases the regulations on MMQ financing still there is a content seems inconsistent so needs to do the alignment. Second, hierarchically, the regulations governing the MMQ financing are still weak, because it is regulated by MUI Fatwa.

The MUI Fatwa governing the financing of MMQ has not set forth in the Regulation of the Financial Services Authority as mandated by the Islamic Banking Act. The regulation of MMQ financing would be ideal if it is poured in the frame of law, although the legal source still has to refer to the MUI Fatwa which serves as the main source of law.

The implementation of MMQ financing in the Islamic bank can also be said that it has not been able to run properly in accordance with the expectation with some indication as follows: *First*, the percentage of public interest against MMQ financing is still very low. *Second*, generally in practice of MMQ financing, the customer does not use the object of financing as a means of doing productive business but is used to meet the needs of residential houses. Third, the implementation of the MMQ financing can just be realized for the fulfillment of any form of residential property. Though in theory, MMQ financing could be applied to vehicle financing, home stores, business flats, houses offices, apartments, condominiums or other business in accordance with Islamic principles.

MMQ financing in Indonesia actually can be realized more optimal if it is taken strategic steps as follows: first, necessary to improve regulations governing the financing of MMQ. Secondly, it is necessary to conduct a massive socialization, in order to be understood by all stakeholders. Thirdly, there should be a legal breakthrough which did not deviate from the principles of sharia to eliminate any technical obstacles of its operational to make it financing more attractive MMQ Islamic banking industry and the Customer. Fourth, the need of the high religious consciousness (*ghirrah*) from the Muslims to implement the teachings of Islam as a whole (*kaffah*), and also freeing themselves from the usury system in developing productive economic activities.

b. Recommendation

a. To the Indonesian Ulema Council, the Financial Services Authority, the Government and the

Parliament, which has regulatory authority in the field of Islamic banking, are expected to more optimally initiate proposed Amendment to the Law No. 21 Year 2008 concerning on Islamic Banking. The completion of the Act referred to at once be a momentum to strengthen regulation in the field of MMQ particularly and programs of Islamic banking as a whole.

- b. MUI and the Financial Services Authority recommended that the provisions governing the MMQ financing as formulated in the form of MUI Fatwa needs to be actionable, set forth in the Regulation of the Financial Services Authority as mandated by Act 21 Year 2011 concerning on Islamic Banking, in order to force the law of these provisions become stronger and more binding, since the violation of the Islamic Banking Act is inappropriate and should not be allowed.

ENDNOTES

- ¹MUI Fatwa No. 73/DSN-MUI/IV/2008 on *MusharakaMutanaqishah*.
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- ³Amin et. al., 2003, "Determinants of Customers' Intention to use Islamic Personal Financing: the Case of Malaysian Islamic Banks", *Journal of Islamic Accounting and Business Research*, Vol. 2 No. 1, pp. 22 - 42.
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- ⁵G. Newell and A. Osmadi, 2009, "The Development and Preliminary Performance Analysis of Islamic REITs in Malaysia", *Journal of Property Research*, Vol. 26 No. 4, pp. 329 - 347.
- ⁶S.A. Rosly, 2005, *Critical Issues on Islamic Banking and Financial Markets*, Kuala Lumpur, Dinamas Publishing.
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- ⁹T. Kuran, 1996, "The Discontents of Islamic Economic Morality", *The American Economic Review*, Vol. 86 No. 2, pp. 438 - 442.
- ¹⁰Muhammad Abd al-Moneim Afar, Al-Iqtishad al-Islami, 1985, *DirasatTathbiqiyah*, Jeddah, Dar al-Bayan al-Arabi, Vol II, p. 17.
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- ¹³Sutan Remy Sjahdeini, 2014, *Islamic Banking, Products and LegalAspects*, Jakarta, Kencana, p. 270.
- ¹⁴Otoritas Jasa Keuangan, 2016, *Standar Produk Musyarakah dan Musyarakah Mutanaqishah*, Jakarta, Departemen Perbankan Syariah, pp. 11-12.
- ¹⁵*ibid.*
- ¹⁶*ibid.*, p 6.
- ¹⁷<http://www.viva.co.id/>, accessed on Tuesday, December 20th, 2016, at 6.04pm.
- ¹⁸*ibid.*
- ¹⁹<http://www.cnnindonesia.com>, accessed on Tuesday, December 20th, 2016, at 11.35am.
- ²⁰AgusRiewanto, "Positive Law", Christmas and MUI Fatwa, Solo Pos, Thursday, December 22nd, 2016.

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