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Research paper



The Implementation of Musharakah Financing in Indonesia; a Legal Regulatory Perspective

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Abstract

Since the inauguration of Law No.21 Year 2008 re. Shariah Banking, the assets of shariah banking has grown to 267.944 billion Rupiah in August 2017. It meant that it is not only important to make a good and sound regulation on shariah banking but also its implementation according to the shariah banking concept. One among them is musharakah financing. Therefore the regulation and implementation of musharakah financing in Indonesia must comply with the concept of shariah banking. This research tried to find out whether the implementation of Musharakah in Indonesia according to the legal and regulatory perspective had complied with the shariah banking concept. This research is a normative legal research. It used secondary data, which included primary legal sources, secondary legal sources and tertiary legal sources. Data were collected through literature review and analysis was conducted using qualitative approach. Findings showed that many regulations and guidance on shariah banking had been issued by the relevant competent authority in Indonesia, the Indonesian Financial Authority Body (Otoritas Jasa Keuangan (OJK)) and the Indonesia National Shariah Council (Dewan Syariah Nasional (DSN)). However, researcher found that none of the regulations, as well as the Shariah Banking Law that provided clear regulations on the concept and implementation of musharakah financing in Indonesia. Only in 2015, OJK has issued OJK Guideline that provided an implementation guidelines for musharakah financing in Indonesia. Analysis through the OJK Guideline compared to the concept of shariah banking musharakah financing itself indicated that there was deviation the implementation of musharakah financing in Indonesia from shariah banking concept. The deviation came in form of security granted to secure the full repayment of the financing to the Banks. Finally the researcher also provided recommendation to improve the implementation of musharakah financing in Indonesian banking system.

Keywords: *Musharakah Financing, Regulatory Perspective.*

1. Introduction

Islamic financing in Indonesia officially started in 1st November 1991 with the establishment of Bank Muamalat Indonesia, Tbk (BMI). BMI itself started its banking operational in 1st May 1992. It was established using Law No.7 Year 1992 re. Banking as may be amended in 1998 with Law No.10 Year 1998 (Banking Law). According to Banking Law, shariah banking was understood as bank with profit sharing concept. There were no specific regulations on shariah banking at that time. In 1999 the amount of commercial banks that used shariah concept became 3 unit, and in 2000 it increased to 6 units.

In year 2008, the Government of the Republic Indonesia announced the promulgation of, Law No.21 Year 2008 re. Shariah Banking (Shariah Banking Law). It was then followed by issuance of several Central Bank Regulations (now known as Financial Services Authorities (Otoritas Jasa Keuangan (OJK)). To assist the disputes settlement in shariah banking, the Government and House of Representative of the Republic of Indonesia agreed to amend Law No.7 Year 1989 re. Religion Court in 2006 with Law No.3 Year 2006 re. The Amendment of Law No.7 Year 1989 re. Religion Court (Religion Court Law).

With respect to the development of the number of shariah banks operating in Indonesia, since August 2017, there were 13 Shariah commercial banks operated in Indonesia. These shariah commercial banks had 459 branches, 1.189 sub-branches, 1.837 number of office, 2.536 ATMs. Besides, there were also 167 Shariah Rural Banks (Bank Perkreditan Rakyat Syariah (BPRS)) with 440 offices.

The current study aimed to find out whether the implementation of Musharakah concept in Indonesia, based on legal and regulatory perspective had complied with the shariah banking concept. The structure of the study consisted of intoduction, literature review, methodology, result, data analysis, discussion, and conclusion.

2. Literature Review

2.1. Concept in Shariah Banking and Finance

Shariah banking and finance was developed based on Shariah Law. Shariah itself is the Divine Law as revealed in the Quran (Book of Allah SWT) and Sunnah (words or acts) of His Prophet Muhammad. The main concept of shariah banking and finance was that money has no intrinsic value. Therefore people should not lend money to others for profit i.e. interest [1,2,3] The lending itself shall not be used for gambling purpose (*maysir*) and doing something illegal (haram). This meant that loan is not prohibited, but the loan must be made with no interest at all, in form of charitable loan [4,5]

Those principles were applied to the shariah banking system, that "loan" is made on profit sharing based, with full attention to the underlying transaction for what the money is used for [6] No

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speculative or illegal underlying transaction will be allowed. It can also be said that Islamic banking and finance are a system through which financing was rewarded in the forms of either equity through the sharing of future business profits [7].

2.2. Concept of Musharakah

To understand the concept of Musharakah is to know and understand comprehensive definitions of Musharakah. Many definitions were given by scholars, government and private institutions. Some of those scholars are [8] in Islamic Banking and Finance: Fundamentals and Contemporary Issues, [9] in Shariah parameters for Musharakah Contract: A comment published in International Journal of Business and Social Science; [10] in Contemporary Practices of Musharakah in Financial Transactions published in International Journal of Management and Applied Research, Maouloud, [11] in Risk Management & Performance of Islamic Banks: Using Income of Mudharabah & Musharakah as Moderator pulished in Journal of Islamic Banking & Finance, [12, 13, 14, 15, 16] in Handbook of Islamic Banking. The others are Institution like Islamic Banking Department (n.d.), State Bank of Pakistan in Handbook of Islamic Banking Products & Services, Ethica's Handbook of Islamic Finance (2013) and Marifa Academy in Islamic Banking & Finance: Principles and Practices (2014). From all definitions given, the most important characteristics in musharakah are: musharakah is partnership between two or more parties, each of the partner contributes a specific amount of money, the profit obtained from the partnership is distributed according to the partnership agreement, and losses are borne in accordance with the contribution of each partner to the capital.

3. Methodology

The study is a descriptive analytical study. Analysis was made by using qualitative approach in order to understand the key concept of Musharakah. It aimed to explore and elaborate the implementation of Musharakah in Indonesia, in order to find out whether the regulation for the implementation of Musharakah in Indonesia had complied with shariah banking concept. The study mainly used secondary data. All data were obtained through literature review. All operational definitions used in this research will follow the definition given by the prevailing laws and regulations currently enforced in Indonesia.

4. Results

4.1. Findings and Data Analysis

The regulations on Shariah Banking in Indonesia are regulated in Law No.21 Year 2008 re. Shariah Banking (Shariah Banking Law). As the implementation of Shariah Banking Law, Indonesian Financial Services Authorities (OJK) has issued several regulations. Besides National Shariah Council (Dewan Syariah Nasional (DSN)) has also issued several Guidance with respect of musharakah financing.

There was no definition of Musharakah in Shariah Banking Law, only in the Elucidation of Article 19 paragraph (1) point c of Shariah Banking Law it was mentioned that, musharakah is a partnership between two or more parties to do certain business, which the parties contributed and the profit will be distributed according to the agreement, and lost will be born according to their portion. The definition given had the same concept of musharakah as described above. The definition provided a clear conception that in musharakah in Indonesia, people need not have to distribute profit according to the contribution. They may differ in distributing the profit as long as they agreed; however lost must be bear proportionately to their contribution.

In 2015 Indonesian Financial Services Authorities (OJK) issued A Guidance for Shariah Banks and Conventional Bank with Shariah Business Unit on how to implement Musharakah in their banking activities (OJK Guidance). According to OJK Guidance (2015), musharakah was defined as a profit loss sharing in form of capital gathering among the parties with the purpose to own assets, business or certain project, and then be managed to get profit and distributed based on the agreed portion stipulated in the agreement. OJK Guidance (2015) provided eleven matters that must exist in every musharakah financing by Shariah Bank of Shariah Business Unit in Indonesia. They consisted of the agreement between the Banks and the customer; purpose of financing; terms of financing; criteria of the customer; minimum or maximum funding; nature of financing facility; currency; withdrawal method; distribution of profit; losses and costs.

5. Discussion

Based on the definition given in the OJK Guidance, it was understood that in musharakah financing there could exist security that could be granted to the Bank by the customers. The security itself can be in the form of collateral (security in rem) or other kind of security to guarantee (security in personam) that the customer will manage the asset, business or project in good faith. The security will be liquidated or executed whenever there were defaults in the part of the customer. With respect to the security, there were main guarantee in musharakah financing, which was the conviction of the Shariah Bank that the customer will be able to return the financing in accordance with the terms and conditions that were agreed before. Collateral become the secondary or even the last source of repayment. Customer was not allowed to issue Debt Acknowledgement since in musharakah financing there was no debt at all.

Accordingly, Shariah Bank may require customer to provide security. The object of the musharakah financing itself can be made as collateral subject to the fulfilment of the terms as stipulated in the prevailing regulations. The assets that can be used as collateral by the customer are: deposit certificate; gold; right upon the land (freehold (Hak Milik), land with rights to build (Hak Guna Bangunan), land with right to use (Hak Pakai)) and the building attached to the land; right to exploit (Hak Guna Usaha) and all that is cultivate above the land; right upon strata title or apartment unit; heavy equipment mechinary attached to the building; vessel; air craft; motor vehicle; inventories; machine and receivables. In practices, most of musharakah financing were followed by secondary agreements which provided collateral to Shariah Banks.

In the event that the customer did not pay on time or in default that resulted in payment delay to the Bank, the Bank shall summon the customer and remind the customer to fulfil its delayed obligations. In the event after summons was sent and the customer did not correct the default, then Bank may impose compensation and/ or fine. Fine will be posted for charity and compensation will be treated as other income for Bank. The proceed of the selling of the collateral will be paid to the Bank for the purpose of returning the equity participation of the Bank. If the proceed of the sale is more than the equity participation, the rest will be return to the customer. On the other hand in the event that the proceeds of the sale are less than the equity participation, then the customer has to pay for the lack amount to the Shariah Bank. Indeed this kind of settlement was formally the same as the settlement in conventional banking, except that in musharakah financing there was no interest paid.

6. Conclusion

From all the above findings, analysis dan discussion, it can be concluded that Indonesia has tried to implement shariah principle

in musharakah financing. However there is still deviation in the application of musharakah financing principles. The deviation comes in the form of the existence of security especially in form of additional collateral.

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