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Legal Reconstruction of Mudharabah: A Comparative Study on the Compilation of Islamic Economic Law and Financial Services Authority Regulation

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The development of Islamic financial institutions in the last decade has shown significant progress. The higher the possibility of the transaction occurring in LKS, the more potential there is for disputes. Rulings regarding LKS have been legalised in the form of the Financial Services Authority Regulation (POJK). These rules have become the basis for the implementation of LKS operational activities. Meanwhile, the regulation regarding the resolution of Islamic economic disputes is guided by the Compilation of Islamic Economic Law (KHES). This compilation is a guide for the Religious Courts judges to assist resolving Islamic economic disputes. This research the analyses the problems arising from the different definitions of mudharabah in POJK and KHES. These differences have the potential to be a problematic as both guidelines are used by different institutions and also have a stake in the development of LKS. The purpose of this research is to find the solution to bridge the conflicts arising from arrangements in POJK and KHES and to accommodate and create a joint arrangement for the progress of LKS. This research is empirical legal research. The results obtained show the rules governing mudharabah according to the Quran, in relation to the definition contained in POJK, from mudharabah in financing for LKS with the principle of profit-sharing between mudharib (customer) and Shahib mal (the person who provides contract). This financing is fully supported by Shahib Mal and the business is run entirely by Mudarib. The construction of the legal relationship that occurs in this contract is a partnership that profit shares in accordance with the agreement at the beginning of the contract. While in KHES, the legal construction is

defined by mudharib This definition does not suitably apply to the mudharabah contract as a profit-sharing contract so it is necessary to reform this definition in KHES.

Key words: *Legal reconstruction, mudharabah, takwil, POJK and KHES.*

Introduction

Nowadays, the Islamic Economy (Bashar, 1997) Institution is known widely in many countries. LKS is no longer alienated because this institution has been significantly growing and developing in almost every Muslim majority and non-Muslim majority country. In Indonesia Islamic finance has developed rapidly, despite being the later country to develop it compared to bordering countries such as Malaysia and other countries in the Middle East,. Historical records show that from 1991 to 2015, there have been many Islamic economic institutions established and the policies or regulations to support this have also been issued by the government. For example, in 1991 the first Islamic Bank, Bank of Muamalat Indonesia was established. This was followed by the establishment of other Islamic economic institutions such as: Islamic insurance (1994), Islamic mutual funds by Danareksa Investment Management Inc. (1997), the introduction of the Inter-Sharia Money Market and the Jakarta Islamic Index (2000), the first Sharia ReIndo Syariah Retakaful (2004), MOU between BAPEPAM-LK (Capital Market Supervisory Agency and Financial Institution) and DSN-MUI (National Sharia Board – National Council of Ulema) in regulating Sharia Capital Market regulations (2003), Amanah Finance, the first non-bank financial institution (2005), issuing Law No. 21 of 2008 concerning Sharia Banking and the Law No. 19 of 2008 concerning Government Sharia Securities (2008).

In the last ten years, the Islamic finance industry in Indonesia, which is dominated by Islamic banking, (Abdullah, 2008) has experienced significant growth at an average pace of 30-40 percent, excluding the last two years which experienced a slowdown due to unstable economic conditions. Unfortunately, given the average share of the Islamic financial market, (Azhar, 2010; Sazesh & Siadat, 2018) the Islamic finance industry did not meet the expectation showing an average of below six percent. The unequal growth rate causes questions and challenges to arise in consideration of the potential it has. As a country with the largest Muslim population in the world, Indonesia should be able to become a major player in Islamic finance. Islamic finance can develop and grow worldwide as it has many untapped resources. The development of Islamic finance will also make a positive contribution to strengthening the state's economy.

In addition to empowering LKS, it is also necessary to strengthen the dispute resolution related to LKS. The development of business brings more potential disputes. Therefore, it is

understood that litigation and non-litigation dispute resolution needs to be strengthened so the parties have the agreement of the legal certainty.

Material laws that are used in addition to the existing Law, supporting regulations are also created. To people's knowledge, the resolution of Islamic economic disputes has become an absolute competence of the Religious Courts as affirmed by Law No. 3 of 2006. The Law regarding the Religious Courts provides legal certainty for justice seekers if disputes related to the Islamic economy are present. Apart from that, the law is always general in nature and further clarifies the existing rules, The Compilation of Islamic Economic Law (in Indonesian KHES) is issued. This compilation has been regulating for eight years since the Supreme Court Regulation (Peraturan Mahkamah Agung/PERMA) No. 2 of 2008 was signed on September 10, 2008.

Despite under PERMA, KHES has a central role as the judges' guide for settling Islamic economic cases in the Religious Courts because of the unavailability of more detailed regulations, for instance, Law that contains more legal substance as in KHES (Suhaimi & Saleh, 2012).

In fact, the dynamics of guidance and law development in Islamic finance have led to many new concepts in Islamic-related norms of agreements that support sharia financial and business activities. Some new concepts have been regulated in KHES but many problems have not been well accommodated for and even raise conflict in relation to the KHES norms.

Research Problems

The background of the research depicts the conflict between the existing regulations in POJK, which are used as a guide by all Islamic Economic Institutions, and the regulations in the Compilation of Islamic Economy Law that are used by the Religious Courts judges in deciding Islamic economic disputes occurring in LKS. In the adjudication stage, it is necessary to formulate several problems that deepen the understanding of the core of the problem; what is the proper legal reconstruction for *mudharabah* contract? This has arisen due to the different definitions of *mudharabah* according (Anwar et al., 2010) to POJK and KHES. This difference can be destructive in regards to the legal consequences arising from the contract agreed since the difference in the existing definition results in different legal construction. In KHES, *mudharib* is described as a representative, while in POJK it means consumer. The construction of the legal relationship formed will bring different legal consequences.

Literature Review

It is undeniable that financial institutions show significant growth in the form of banks, fiduciaries, insurance, and capital market in the Islamic financial system. The development of Islamic finance in Indonesia is moderately good considering many individuals, especially Muslims, conduct financial transactions through Islamic Economic Institutions. The development of Islamic Economic institutions, especially banks, has now reached approximately 3,119 office units. This amount is considered very high and provides tangible proof that Islamic economic institutions are in great demand. This is inversely proportional to 2007 when Islamic economic institutions numbered roughly 925 office units.

The widespread and rapid growth of Islamic economic institutions' development certainly is inseparable from the guidance of the National Council of Ulema (MUI), which states that bank interest is usury and is strictly prohibited and forbidden in Islamic teachings. This guidance has identified the narrowing of the market for conventional banking, (Kiae et al., 2013) as the major problem in Indonesia as the biggest Muslim population. Meanwhile, the Islamic banking (Muda & Ismail, 2010) market is expanding due to the shifting of Muslim customers from conventional to Islamic banking. (Arshad & Ismail, 2011)

Dispute

Economic activity is any activity related to thissue goods and chattels issue. Economic activity can be established in the transaction between economic actors. But the implementation of these transactions can sometimes cause potential disputes.

The definition of a dispute according to the Indonesian Language Dictionary is something that causes opinion differences, quarrels, disagreements, or conflict. Terminologically, a dispute is a conflict between two or more parties based on different perceptions about an interest or property rights that possibly cause legal consequences for both and legal sanction is likely given against one of the two.

Furthermore, Islamic economics is defined as the study of community life in order to meet the needs and to earn God's blessing. Or in other words, an act or business activity performed according to Islamic principles, or an economic system based on Islamic teachings and values.
Based on the above definitions, the meaning of Islamic economic disputes is a conflict between two or more economic actors whose business activities are carried out according to Islamic economic law principles. This caused by different perceptions about an interest or property right that could possibly cause legal consequences for both, or legal sanctions which may be likely given against one of the two (Gamal, 2006).

The business activity certainly does not always run as smoothly as desired by the business actor even though it has been regulated by law or an agreement between business actors, which has been agreed upon. Despite agreements avoiding disputes in practice is sometimes inevitable. Aberrations in the implementation of Islamic economic activities will eventually become disputes in Islamic economics (Kayed, 2012).

Generally, disputes happen due to fraud or broken agreements by some parties or particularly if one party breaks the agreement. One or more parties may have completed the agreement yet it is less similar to what has been agreed upon. The agreement is completed but behind in schedule or the other party commit forbidden agreement and cause losses on the other party.

When a person or legal entity has entered into a sharia agreement with another party, then both parties have agreed. Therefore, according to civil law, the agreement by both parties will be binding as a law for those who agreed upon it.

Thus, the event of an Islamic economic dispute is caused by either two parties, an individual or legal entity that forms a contract or agreement based on Islamic principles, when one party is in default, and/or commits an act against the law and causes losses to other parties (Djojosugito, 2008).

For instance, in an Islamic banking dispute, one customer makes a loan agreement of a certain amount at one of the Islamic banks, i.e Bank of Syariah Bukopin with a monthly installment according to the agreement. In the first one or two months, the installment is paid but in the following month, the customer avoids paying the installment for various reasons (credit freeze). This causes losses for the Bank of Syariah Bukopin. This event results in a dispute caused by default (Shakespeare and Harahap, 2009; Shafiezad Abkenar & Negahdari, 2017).

The source of Islamic economic law is the source of formal law and material law. The following are legal sources that can be used as a legal principle for Islamic economic disputes solution (Rahman & Nor, 2017):

Material Legal Resources

A case adjudication should be based on valid law sources and intensification of meaning, to be applied to the facts or events found during the process of examining the case.

Valid sources of law, especially in the business sector, are the contents of agreements, laws, jurisdiction, customs, international agreements, and science. Besides the Quran and Sunnah,

important legal sources used in an adjudication process in the Religious Courts environment include:

1) The content of the agreement. The content of the agreement as a legal source for Islamic economic dispute adjudication is inseparable from the legal standing of the agreement, which acts as law for both parties. As outlined in Article 1338 to Article 1349 of the Civil Code. These provisions can be applied entirely in Islamic civil code due to the absence of usury as part of the claim damages. Therefore, the claim damages conditions must be in accordance with Islamic principles. If one party avoids achievement and occurs in overmach situation, then it is considered as default or breach of the contract and this can harm the other party. This default can be in the form of a judge's decision, mutual agreement or based on valid Islamic law. In connection with the foregoing, the defaulting party can be subject to compensation or fines at a reasonable rate in relation to the losses caused and should not contain usury. The act against the law by Kansil means an action or no action against an individual's right or is contrary to the rights and obligations of the doer or none doer or contrary to ethics or the awareness as appropriate act in social relations, towards oneself and others.

2) Rules of Law and Government Regulations related to Islamic economics, as follows: Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking; Law no. 3 of 2004 concerning Amendments to Law No. 23 of 1999 concerning Bank of Indonesia; Law no. 21 of 2008 concerning Islamic Banking; Law no. 24 of 2004 concerning the Indonesian Deposit Insurance Corporation; Law no. 19 of 2008 concerning Islamic Based Government Securities; Law no. 41 of 2004 concerning Obligatory Charity; Law no. 23 of 2011 concerning Obligatory Charity Management; Bank of Indonesia Regulation (Peraturan Bank Indonesia/PBI) No. 6/24 / PBI / 2004 October 14, 2004 concerning Conventional Banks conducting business activities based on Islamic Principles; PBI No. 6/17 / PBI / 2004, July 1, 2004 concerning Rural Bank Based on Islamic Principles; Decree of the Directors of Bank of Indonesia No. 21/48 / Kep / Dir / 1988 concerning certificates of deposit; SE. Bank Indonesia No. 28/32 / UPG July 4, 1995, concerning Check; Various Decree and other Circular of Bank of Indonesia related to Islamic Banking activities (Diaw & Mbow, 2011).

3) The guidance of Fatwas of the National Sharia Board – Indonesian Council of Ulema (DSN MUI). National Sharia Board (DSN) is under MUI established in 1999. This institution has the authority of deciding appropriate guidance in relation to products and services in the banking activities based on Islamic principles. To date, DSN MUI has issued approximately 100 guidance/fatwas on Islamic economics.

4) The Book of Fiqh and Usul Fiqh. Fiqh is a source of law to resolve Islamic economic disputes. Most of the venerated books of fiqh contain examples of various transaction problems that can be used as references in solving Islamic economic problems.

5) Applied customs in Islamic economics. A source of law in adjudication in Islamic banking cases, according to customs that apply in the Islamic economic field, must contain three requirements: firstly, the act is committed by certain group of people repetitively for a long time (longaet inveterate consuetindo); secondly, the customs are already a legal conviction of the people (opinion necessitates); and thirdly, legal consequences are valid if the customs are violated. The existence of these requirements is a must for customs to be a source of law.

6) The Compilation of Islamic Economic Law (KHES) is applied based on the Supreme Court Regulation (PERMA) Number 2 of 2008. The legal content is classified into four books: Book I contains Legal Subject and Amwal (Properties), Book II about Contracts, Book III regarding Obligatory Charity and Grants, Book IV about Islamic Accounting.

7) Jurisdiction and doctrines on Islamic economics. Jurisdiction as a source of law for Islamic economic adjudication is the jurisdiction of a first-degree and appeal level judge's decision that has permanent legal force and is justified by the Supreme Court, or, the decision of the Supreme Court that has permanent legal force, particularly Islamic economics. In other words, jurisdiction as a source of law is the decision of a judge that has gone through a process of examination and notation from the Supreme Court with recommendations that the decision that has met the jurisdiction legal standards.

Mudharabah

Mudharabah is a contract (Zulaihi, 2007) of cooperation between the bank as the owner of capital (shahibul maal) and the customer as the *mudarib*, accompanied by the necessary experience and skills to manage a productive halal business. The profit from the use of these funds is shared based on an agreed ratio.

Mudharabah contract (Sapuan, et. Al, 2016) is used by banks to facilitate the fulfillment of capital requirements for customers to run a business or project by engaging in capital participation for the business or project concerned. (Kamaluddin et al., 2018)

This profit-sharing transaction is allowed in Islam and even included in the blessed businesses as the hadith of the Prophet. ‘Three matters that have the blessing (of Allah): A deferred sale, muqaradah (mudarabah), mixing wheat with barley for domestic use and not for sale.' (Narrated by Ibnu Majah from Shuhaib).

Mudharabah characteristics are as follows (Rahman et al., 2017):

First, the contract. The contract must be stated clearly and understood by both parties, oral and written, and can be completed by using electronic devices in accordance with sharia and applied regulations.

Second, transactions. The capital owner is the funds provider and *mudarib* is the fund manager in cooperation.

Third, the business capital submitted by investors must be handed over, either in stages or in cash, according to the agreement. The capital cannot be transferred by credit. Likewise, the business capital should be in the form of money, and also goods or the combination after being evaluated to record the precise value.

Fourth, business activities. Business undertaken by *mudarib* must be a halal business and in accordance with sharia principles and/or applied laws and regulations. Therefore, when it is non-halal a business and breaks Islamic principles, *mudaraba* transaction is invalid. *Mudharib* in conducting *mudharabah* business must be in *mudharabah* entity. Costs arising from business activities on behalf of *mudharabah* entity may be charged to *mudharabah* entity.

Fifth, the profit-sharing ratio. The profit-sharing method must be agreed upon and clearly stated in the contract. The profit-sharing ratio may not be in the form of a nominal or percentage figure of capital, and a percentage which results in profit is earned by one party and losses are borne to one party. The profit-sharing ratio may be changed according to the agreement.

Sixth, profit and loss sharing. Business profits are calculated precisely to avoid disputes at the time of profit allocation or *mudharabah* termination. All profits are also distributed according to the agreed ratio.

Takwil (Intensification of Meaning) Interpretation

Nurcholish Madjid refers to takwil in terms of metaphorical interpretation; understanding or defining textual facts from Holy sources (Quran & Sunnah) in such a way that what is shown is not the literal meaning of words but the figurative. This method was conducted to find the figurative meaning of *mudharabah*, which contains two different texts and definitions regarding *mudharabah* Indonesia Law. With two different texts, it is necessary to use a metaphorical interpretation method to understand the most appropriate meaning according to the source texts of the law in *mudharabah* arrangement, which is the Quran. With the

application of this method, it is expected to obtain results in the form of *mudharabah* legal reconstruction.

Research Methods

To understand the focus of the research and to answer the problems, a series of activities are formulated in this research:

The first stage, through literature review data of POJK and KEHS regarding *mudharabah* in Indonesia and the basics of the applied regulations that were collected. Collected data was then analised with descriptive methods. The descriptive analysis method was conducted to obtain a systematic and objective picture of the facts and characteristics as well as the relationship between the elements and rules creating *mudharabah* implementation.

The Second Stage, a critical reflection was carried out on the findings regarding the definition of *mudharabah* in KHES and POJK and the differences in the definition was analysed. The obtained data were then processed and analised with descriptive methods and *takwil* interpretation. This method was used to obtain a systematic and objective picture of the facts and elements and rules creating *mudharabah* according to the law.

The Third Stage used the *Takwil* interpretation method of the analysis results of the first stage combined with the results of the second stage to find the concept of legal reconstruction governing *mudharabah*.

Data Source

Primary Data

Data was obtained through the research of two institutions, the Religious Courts and OJK. OJK has the authority to issue POJK. Field research was completed by conducting in-depth interviews to find problems, from which the parties were asked to give ideas and opinions about regarding *mudharabah* contract.

Secondary Data

Secondary data is the data obtained through literature reviews including books, articles, proceedings, and documents related to the research object.
Data sources in this study were primary and secondary data sources. The primary data source used was the results of interviews with parties who acknowledged the problems. Secondary data sources used are as following:

Primary legal materials, rules of law such as:

1) Law No. 3 of 2006 concerning the Religious Courts
2) The decision of the Constitutional Court No.93 / PUU-X / 2012 concerning Authority to adjudicate Islamic economic disputes as contained in Article 55 of Law No.21 of 2008
3) Law No. 21 of 2008 concerning Sharia Banking

Secondary legal materials were: journals and books concerning *mudharabah* contracts and *takwil* methods.

Results and Discussion

Philosophy of Establishing Islamic Economic Law

The need for Islamic economic law in the current practice is also accompanied by the need for the dispute settlement, both adjudication, and non-adjudication. After the enactment of Law no. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning the Religious Courts, the Religious Courts expanded its authority in resolving Islamic economic disputes. The expansion of this authority then gained legitimacy in resolving the provisions of Islamic economics which became a legal standard as in Law No. 21 of 2008 concerning Islamic Banking. In the jurisdiction of the Religious Courts in resolving Islamic economic disputes, the establishment of the Compilation of Islamic Economic Law (KHES) has become a form of Islamic law formalisation, as well as meeting the legal needs in dispute settlement. KHES, is generally compared by some groups to the existence of the Compilation of Islamic Law which has long been created and used by the Religious Courts. To this time the existence of KHES is still being questioned by some groups because the legal standard is merely in the form of Supreme Court Regulations. This is understandable looking at the development of the Islamic law formalisation in Indonesia regarding Islamic economics and finance. KHES must go hand in hand with the civil code and business laws that are accommodated by laws and regulations, as well as Islamic economic provisions in the guidance of DSN MUI which has been accommodated by Bank of Indonesia Regulation based on the mandate of Law No. 21 of 2008 concerning Islamic Banking. Therefore, referring to the foregoing problems, this paper focuses on the further elaboration of two main discussions: the existence and standing of KHES.

The History of Compilation of Islamic Economic Law (KHES) establishment is inseparable from the mandate of Article 49 of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 regarding the the Religious Courts. The article gives additional authority to the Religious Courts to resolve Islamic economic disputes. After the enactment of Law No. 3 of 2006, the Supreme Court formulated a number of policies, one of which was establishing formal and material law as guidelines for the resolution of Islamic economic disputes for judges in the scope of the Religious Courts.

In the initial draft of KHES, there were 1040 articles in 5 chapters, while in the final draft there were 849 articles in 4 chapters. In the compilation, it was recognized that the Team could compile the draft after referring to the *Majallah Al-Ahkam* (the Islamic civil law compiled by the Ottoman Government in the 1800s). To perfect the initial draft, new material included was taken from contemporary Jurisprudence books and the results of scientific studies conducted by the centre of international Islamic economic studies. The KHES discussion, in various records, mention that it did not take a long time. It was approximately 1 year (2 years since the team was formed by the Supreme Court) until KHES was determined through PERMA No. 02 of 2008, September 10, 2008. Norms in the Compilation of Islamic Economic Law in the initial draft of KHES consisted of 5 chapters: legal skills, capabilities and compulsion, assets, contracts, obligatory charity and grants. Then, in the final draft it became 4 chapters, from which the system in the Compilation of Islamic Economic Law (KHES) consisted of: Book I on Legal Subjects and Amwal (properties), Book II about Contract, Book III Obligatory Charity and Grants and Book IV on Sharia Accounting. Given to the norms established in the KHES, almost 80% or approximately 653 articles out of 796 articles (articles 20- 674 of KHES) discuss norms relating to the contract.

KHES Legal Standing in the National Rules of Law

In contrast to Compilation of Islamic Law (KHI), which uses the legal standard Presidential Decree No. 1 of 1991, followed up with Decree of the Minister of Religious Affairs No. 154 of 1991 concerning Implementation of Presidential Decree No. 1 of 1991, KHES, for the time being, uses the legal standards of Supreme Court Regulation No. 2 of 2008 concerning KHES. Given the similarities, either KHI or KHES initially aims to prepare a uniform guideline (unification) for judges of the Religious Courts. The existence of KHES has been a guideline for judges to adjudicate Islamic economic disputes as affirmed in Article 1 of PERMA No. 2 of 2008 concerning KHES. This is in line with KMA / 032 / SK / IV / 2006 regarding the Enforcement of Book II Guidelines for Implementation of Duties and Administration of Courts as stated in Part II of Technical Justice, material law for the Religious Courts and the Islamic Court, which is the Compilation of Islamic Economic Laws.

Regardless of the debate over the granting of Islamic economic authority to the Religious Courts and the readiness of this court, one of the weaknesses in KHES lies in the legal standard that gives legitimacy to the existence of the KHES. Given the hierarchy of laws and regulations, as a material law in Islamic economic disputes, KHES bargaining position is considered weak, though Article 2 of PERMA No. 2 of 2008 concerning KHES states that it 'does not reduce the responsibility of judges in settling law to guarantee a fair decision'. In the nomenclature of the legal system in Indonesia, this law is essentially a decision determined by the functions of state power that binds legal subjects to rights and obligations in the form of prohibitions, obligation (obligatere), and permission (permittere).

According to the theory, regulations (regels) can be in the form of legal regulations (rechtsregels) and policy regulations (beleidregels). Jimly Asshiddiqie reports that there are 3 types of religious guidance according to 13 books of Hadith, most of those are books of Hadith from the Mazhab Shafi'i. Referring to the clause 'to fill the legal vacuum', in principle it can be interpreted as referring to 13 books that can only be done when this provision has not been stipulated firmly to become valid rules and used in material law in the Religious Courts. Understandably, judges hold the principle 'judges must not refuse to decide a case on the grounds of legal vacuum' because judges must seek legal presence. See Article 16 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power (Murzinova et al, 2018).

The Religious Courts are considered as a *family court* for the Muslim community. So, when the authority of the Religious Courts is attached to the Islamic economy, many consider this as inappropriate action. Viewing from the legal standing of the Supreme Court Regulations, this is perceived as stated in Article 7 paragraph (4) of Law no. 10 of 2004 concerning the Formation of Rules of Law, as well as in Article 8 of Law no. 12 of 2011 concerning Formation of Rules of Law. Regulations outside the provisions mentioned in Article 8 are acknowledged and considered to have binding legal force in so far as those that are ordered by higher legislation or formed based on authority. It is necessary to look at whether the legitimacy of the Supreme Court Regulation on KHES is made based on a delegation of a higher law or the basis of the authority granted to the Supreme Court. Meanwhile, if referring to KHES with the legal standard of the Supreme Court Regulation established in 2008, Law No. 12 of 2011 concerning the Formation of Rules of Law is required veiwing. When these rules are still in effect, it is only known as rules ordered from higher legislation. KHES status in the rules of law cannot be considered equal to the guidance of DSN MUI. Apart from the recognition of the norms in the Supreme Court Regulation being binding or not, the KHES status, in general, cannot be contradicted by the provisions of Islamic economics that have been regulated under the legal standard. Judges decide whether a case uses KHES or not as a part of their the consideration and adjudication. Thus, when the KHES norm is used as material in the consideration in a judges' decision, it is legally considered binding on the parties to the dispute.

Financial Services Authority: New Institution Acting as Supervisor

OJK (Financial Services Authority) was formed based on Law Number 21 of 2011 concerning the Financial Services Authority. The formation of the OJK was motivated by the need to reorganise institutions that perform the regulatory and supervisory functions in the financial services sector, as affirmed in Law Number 23 of 1999 concerning Bank of Indonesia and mandated a number of times, most recently in Law Number 6 of 2009 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2008 concerning Second Amendment and Act Number 23 of 1999 concerning the Bank of

Indonesia. Also, the formation was motivated by the development of the financial sector, conglomeration of financial service institutions and increasing violations in the financial services sector, and also the lack of protection for consumers of financial services. The vision of the OJK, which is a trustworthy monitoring institution that oversees financial services industry, is to protect the interests of consumers and the public, and to be able to bring the financial services industry into becoming a pillar of the national economy in global competitiveness as well as in the capability to promote public prosperity. OJK has a function as an organiser of an integrated regulation and supervision system for all activities in the financial services sector. OJK has always been independent in accomplishing its duties, such as conducting arrangements and supervision of financial service activities in the banking sector; financial service activities in the capital market sector; and financial services in the insurance sector, pension funds and other financial institutions. Article 4 of Law of OJK states that the establishment of the OJK aims to overlook the convening of all activities in the financial sector so that they are managed regularly, fairly, transparently, and accountably; to realise a sustainable and stable financial system; and to protect the interests of consumers and public. The education and consumer protection functions of the financial services industry at OJK are categorised into preventive actions and repressive actions. OJK has the authority to educate the public in the context of preventing consumers and public losses, consumer complaint services, and legal defence for the benefit of consumers and society.

OJK has quite extensive authority in monitoring financial institutions. It has the authority to issue regulations called the Financial Services Authority Regulation or referred to as POJK. These regulation rules have an equal hierarchical level with the regulations issued by the department, so POJK has legal power and standing at the level of department regulations.

Conflict Definition in KHES and POJK

As aforementioned, the definition of several terms and their implementation is a point of difference between POJK and KHES. Previous studies have compared the legal norms used by court practitioners, in this case, KHES and the norms used by Islamic economic institutions, in this case, POJK. There are some significant differences, especially regulations regarding *mudharabah*, which are feared to bring fatal consequences. The differences are described in the following table:

Table 1

No	KHES Article/Paragraph	Article/Paragraph in Guidance and POJK
1	**Article 236** Profit-sharing between *shahib al-mal* and *mudharib* is **clearly** stated.	As additional 'stated at time contract in the form of **a percentage (ratio)** from profit according to the agreement'. DSN guidance No. 7/2000 concerning *Mudharabah* states 'The proportional profit share for each party must be acknowledged and stated at the time the contract is agreed upon and must be in the form of a percentage (ratio) from profits according to the agreement. Change in ratio must be based on agreement.'
2	**Article 238 paragraph 2** *Mudharib* stands as **the representative** of *Shahib al-mal* to use funds.	*Mudharib* is a **shahibul maal partner**, not a representative in the sense of wakalah (delegation of duty) contract.
3	**Article 242** *Mudharib* is entitled to profits **in return for work** as agreed upon in the contract.	Obtained profits in **mudharabah are shared property**, not a grant given by *Sahibul Mal*.
4	**Article 244** *Mudharib* is forbidden to **interfuse owned property** with of cooperation property in convening *mudharabah*, except it is a custom among business actors.	In the *Mudharabah Musytarakah* contract, the fuse is possible.
5	**Article 247** *Mudarib'*s travel costs for a business trip are charged to the **capital of shahib al-mal**.	Different from DSN Fatwa No. 7/2000 regarding *Mudharabah* states "Operational costs are charged **to mudharib**. "

Based on the differences in the table, there are potential problems that possibly emerge due to differences in interpretation of the definition according to two different rules, material regulations contained in POJK are used as guidelines in the operational implementation of Islamic economic institutions as the manifestation of fatwa, whilst the KHES regulation is a guideline for the Religious Court judges in resolving Islamic economic disputes.

As shown above, KHES is a rule that contains material laws and acts as a guidance for judges in the Religious Courts when deciding cases of Islamic economic disputes. So the stance of KHES, though it is merely regulated in PERMA, is still utilised as the main reference for the judges. In practical terms, to regulate the banking sector in various existing transactions, the POJK reference is used in managing all transactions. The problem then arises due to several different definitions of KHES and POJK. The difference is this definition needs to be urgently solved because these differences may cause a difference in each transaction.

If the differences are not resolved before midpoint, there will be more complicated problems to be resolved. There are five different articles in the *Mudharabah* contract definitions:

Firstly, **Article 236** of KHES states that profit sharing on *mudharabah* contracts must be clear and definite. Whereas in the POJK, given to the DSN guidance on *mudharabah,* it is stated that profits should be settled by the percentage (ratio) at the time of the contract according to the contract. From the additional POJK provision, there is no substantial significant difference. It is understandable that the provision in the POJK is attached to clarify the profit stance at the beginning of the contract to avoid any dispute and misconduct.

Secondly, the difference found in **Article 238 paragraph 2** of KHES is that *Mudharib* is the representative of *shahib al-mal* while in POJK it is stated that *mudharib* is the partner of *shahib al mal*. The definition between the representative and the partner has the potential to be problematic because the representative has the position of a subsidiary and *shahib al-mal* cannot complete its task of seeking new capital for *mudarib* as the representative to carry out the duties. While the definition of *mudharib* in POJK acts as a partner, from which the position is equivalent to *shahib mal*. This definition evokes the difference in the legal standing of *mudarib* as it is representative and every action only represents if *shahib mal* is absent and consequently the responsibility becomes a joint responsibility, meaning borne jointly. Meanwhile, as a partner, the position and responsibility of the risks are equally distributed for *mudharib* if the faults are caused by *mudharib*.(Ismal,2014)

Thirdly, the difference found in **Article 242** of KHES in which Mudharib has the right to profit in return for work agreed upon in the contract is based on the definition, the business profits obtained by *mudarib* are rewards or wages. The definition is deemed inadequate because when profits are considered as rewards it means that *mudharib* is an employee receiving wages or salaries. While in POJK it is stated that the profits obtained in *mudharabah* are shared property, not a reward given by *Shahibul Mal*, this definition is in accordance with the understanding of the meaning of *mudharabah*; *mudharabah* is a cooperation in which profits will be shared according to the profit-sharing ratio agreement at the beginning of the contract. (Atmeh and Ramadhan, 2012)

Fourthly, the difference is that in **Article 244** of KHES it is stated that *Mudharib* may not mix privately-owned property with the assets of cooperation in convening *mudharabah*, unless it has become a custom among business users. While in the *mudaraba musytarakah* scheme mixing is very possible and this is not against the law, and widely applied in the community.

The last difference in **Article 247** KHES relates to the cost of travel by *Mudharib* in the context of the business trip. This is charged to the capital of *Sahib al-mal*. Since the position of *Mudharib* is the representative of *Sahib Mal,* then all rights and responsibilities are become attached to *Sahib Mal*. While POJK states that operational costs are charged to *mudarib*. The consideration used in POJK that arises due to the position of the *mudarib* as a partner of *shahib mal* and the rights and obligations in *mudharabah* agreement becomes the responsibility of the *mudarib* including costs from *mudharabah* agreement.

Legal Reconstruction

In this study, regular interviews were conducted at the Religious Courts where there had been several cases related to Islamic economic disputes. Yet, cases that are directly related to the different definitions in the transactions contained in POJK and KHES have never existed before. Interviews were also conducted with OJK as the policymaker.

From the interview results, previous disputes that entered the Religious Courts were very closely related to civil disputes, such as disputes resulting from defaults or breach of contract on agreements. In the interview, there were differences in the conception of disputes and the possibility that the Religious Courts might submit it back to the regulations of POJK. Indeed, the parties in the agreement are the rules in POJK not in KHES. A similar opinion was also issued by the OJK regarding the difference in the definition of *mudharabah*, which as the basic law of *mudharabah* originates from POJK so the agreement and dispute resolution returns to the regulations. However, in responding to these different conceptions, OJK followed up to harmonise the *mudharabah* concept as OJK already had a division tasked with harmonising POJK rules with other rules.

By analising *takwil* interpretations known as metaphorical interpretations, such as understanding or defining textual facts from the source, not the literal meaning but the figurative meaning of source words is shown. Through *takwil* method, which is the closest to the basic understanding of the concept of *mudharabah* agreement, it defines that the stance of *mudharib* in POJK is as a partner, not as a representative. The meaning of *Mudharabah* Financing is of financing distributed by LKS to other parties for productive business. In this financing, (Ziqri, 2009) LKS as *shahibul maal* (owner of capital) finances 100% of the needs

of a project (business), while the entrepreneur (customer) acts as *mudharib* or business manager.

So that the legal reconstruction returns to the understanding that *mudharib* is a partner, the provisions regarding costs incurred from businesses related to *mudharib* and profits sharing in the businesses are additional to *mudharib*. (Kusuma and Ryandono, 2007) The costs incurred in the business become the full responsibility of *mudarib* and the profits are joint venture profits to be distributed equally according to the principle of profit-sharing that has been determined and agreed upon at the beginning of the contract and not considered as a reward for *mudarib* business.

Conclusion

The *mudharabah* contract, or profit-sharing agreement, is the basic contract of Islamic economic institutions. Profit-sharing is at the core of the activities in Islamic financial institutions. Therefore, this contract should be the superior contract for all LKS. This condition is inversely proportional to the concept of the *mudharabah* contract regulated by POJK and KHES, in which the two have a slight difference in definition regarding mudharabah. From the legal construction of *mudharib* position in KHES as a representative of *shahib mal* or sharia bank, a the legal relationship emerges between the representative and the person represented. Similarly, legal consequences arise in this contract. While *mudharabah* legal construction in POJK is referred to as an agreement of cooperation and the position of the *mudarib* is as a partner, the right to profit-sharing of the business and the obligation to bear all costs incurred in the agreement.

By using *takwil* interpretation method, this research tries to reconstruct the legal principles for *mudharabah* contracts in KHES. Given the basic rules, *mudharabah* is a contract of cooperation in exchange for profit sharing, thus the text contained in POJK is the closest to the definition of *mudharabah* according to Quran.

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