

Classic And Contemporary Mudharabah Philosophy Between Theoretical And Practice

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Abstract: - Islam as a religion of rahmatan lil'alam in pays great attention to human activities in muamalah, as well as in business matters. The cooperation system or often referred to as a participation contract in business (Mudharabah) is something that can be applied. The parties to this agreement are the fund manager (mudharib) and the fund owner (shohibul maal). However, along with the development of the times and the diverse business needs that require optimum capital, this kind of cooperation model has also undergone an evolution. Where in the initial concept there were only two unionized parties, in the current concept a third party is needed, namely Islamic financial institutions and the like. The goal of this study is to determine how mudharabah contracts are described in traditional fiqh texts and how LKS goods relate to mudharabah contracts.

Keywords: Mudharabah, Fiqh Muamalah, Islamic Financial Institutions

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1. Introduction

The opportunities addressed by sharia business players in creating community resources include socialization regarding methods, transactions, and commercial operations the more quickly sharia business is emerging in Indonesia. So that the existing sharia business can develop optimally. This is a challenge in sharia business in Indonesia. Where Muslims make up the majority of Indonesians, therefore the participation of the community is needed. In general, it can be said that sharia requires lawful economic activities, both the product that is the object, the way it is obtained, and the way it is used, [7].

The development of the Islamic economy in Indonesia is very rapid and can be said to be quite encouraging. This is due to the existence of Islamic banking which provides facilities in accordance with Islamic law. The sharia principles applied in sharia banking become legal guidelines in carrying out operational activities

for activities that are prohibited by sharia in sharia banking, namely in financing or distribution where there is an element of usury that is forbidden (not allowed). Likewise, in investing, it is not permissible in businesses that are prohibited, such as illegal food/beverage production activities, other businesses that are outside the rules of Shari'a, [8].

One of human nature is as a social being with interdependence and need of one another which makes humans unable to live alone. Various kinds of characters that exist in humans are advantages or disadvantages of each other which can be utilized by collaborating and creating cooperation with mutual benefits and providing benefits, such as cooperation in doing business, there are many contracts that exist in Islam that allow humans to with other humans to cooperate in the economy, the mudharabah contract is one of them..

A mudharabah agreement is a two-party configuration in which one party contributes capital and the other properly manages that

capital to carry out business operations or establish a business in order to generate a profit that can be divided in accordance with the terms of the contract at the beginning of the relationship. In a mudharabah contract, the customer serves as the manager of capital (mudharib) with a specific business while the bank serves as the owner of the capital (shahibul maal), and the profit sharing ratio (profit) is in line with the agreement at the time of the contract. Nonetheless, the capital source will be responsible for paying any losses you incur, [19].

The idea of mudharabah includes a component of fairness, in which neither the owner of the money nor the management of the funds gains while the other side suffers. The mudharabah contract, in which the profit sharing is based on the agreed-upon ratio at the commencement of the contract, is the only basis for the distribution of profit sharing. The party supplying the money will suffer the loss if it is a business consequence (i.e., not due to fraud or termination of the agreement), whereas the mudharib will face the loss of management expertise and time as well as the anticipated profit-sharing ratio, [15].

Classical fiqh texts only define the mudharabah contract as a kind of collaboration between two or more parties for a company with a profit-sharing scheme. The mudharabah contract has, however, evolved to become a product in Islamic Financial Institutions, including banking, insurance, capital markets, and others. Thus, a discussion of LKS products based on mudharabah contracts is essential.

Also, the acknowledgment of profit sharing in the form of profit sharing is a difficulty in the industry. The distribution of profit sharing is explained in the traditional fiqh literature as occurring after the capital has been repaid. But, in actual fact, profit sharing takes the form of monthly profit sharing in LKS, particularly Islamic institutions (syarhiyyah). As a result, the profit-sharing mechanism between traditional fiqh earnings and Islamic bank operations differs.

2. Discussion

2.1. Mudharabah Agreement in Classical Fiqh Literature.

The term "mudharabah" derives from the verb "dharb," which meaning to strike or stroll. More specifically, the act of a person moving their feet

to do business is referred to as striking or walking [9]. Qiradh is another name for mudharabah. The language of the Iraqi people is mudharabah, but the Hijazi people refer to it as qirâdh in their language.

As for the terms mudharabah or qirâdh put forward by scholars with different editorials, however, according to the majority of jurists, mudharabah is:"

عقد بين اثنين يتضمن أن يدفع احدهما للآخر مالا يملكه ليتجر فيه بجزء شائع معلوم من الربح كالنصف أو الثلث أو نحوهما مخصوصة

"Contract between two parties who bear each other, one party hands over his property to the other party to be traded with a predetermined share of the profits, such as half or one third with predetermined conditions".

In a commercial partnership agreement known as a mudharabah, the first party (shâhib al-mâl) supplies all (100%) of the capital while the second party takes on the role of management. Mudharabah divides corporate earnings in accordance with the terms outlined in the contract. As long as the loss is not the consequence of the manager's fault, the owner of the capital is responsible for paying it if the company experiences a loss. The management shall bear responsibility for the loss if fraud or carelessness by the manager led to it, [16].

Before Islam came, mudharabah had been carried out by the people at that time. This type of mu'âmalâh was known during the Jahiliyah period. Then Islam stipulates (permits) this mudharabah because there is maslahah in it. The attitude of Islam which justifies or cancels or changes only certain parts of the mu'âmalâh that existed before, also occurs in other mu'âmalâh laws. Therefore, Islam provides basic principles that serve as guidelines for each type of mu'âmalâh, [17].

The provisions of Islamic law relating to mu'âmalâh are partly a stipulation and reaffirmation of practices that had taken place in the pre-Islamic era. This is because the practice of mu'âmalâh is in harmony with the basic principles of Islamic teachings. In addition, in the practice of mu'âmalâh contained great benefits. One form of mu'âmalâh is mudharabah. The Prophet Muhammad himself worked as a mudharib in commercial transactions of this type

to Khadija before he was officially appointed as Allah's Apostle, [3].

Mudharabah is not specifically mentioned in the Qur'an as a type of mu'āmalāh that is permissible in Islam. Generally, a number of scriptures suggest its legality, and experts consider these verses to be the foundation for mudharabah.

Your Lord is aware that you stand (pray) for fewer than two-thirds of the night, one-half of the night, or one-third of the night together with some of your companions. And the length of the day and night is decided by Allah. Read what is simple (for you) from the Quran since Allah is aware that you are unable to predict the boundaries of such periods. He is aware that you will include ailing people and those who wander the land in search of God's blessings, as well as those who battle for Allah. As a result, read from the Quran what is simple for you, establish prayer, pay zakat, and offer Allah excellent loans. And Allah will give you the highest recompense and the biggest reward for everything good you do for yourself. and seek Allah's forgiveness; because He is Forgiving, Most Compassionate. (QS. Al-Muzammil: 20)

According to Wahbah al-Zuhaili, [21], This verse explains the legality of transactions using a mudharabah contract. Al-mudharib refers to a person who travels (walks) on earth to seek Allah's blessing, as stated in Surah al-Jumu'ah (62) verse 10: *"When the prayer has been performed, then spread land and seek the bounty of Allah and remember Allah as much as possible so that you will get success"*.

In addition to the Quran, the Prophet SAW's hadiths provide the following evidence for the legitimacy of the mudharabah contract:

حَدَّثَنَا الْحَسَنُ بْنُ عَلِيٍّ الْخَلَّالُ حَدَّثَنَا بِشْرُ بْنُ ثَابِتٍ الْبَزَارُ حَدَّثَنَا
نَصْرُ بْنُ الْقَاسِمِ عَنْ عَبْدِ الرَّحْمَنِ بْنِ دَاوُدَ عَنْ صَالِحِ بْنِ صُهَيْبٍ
عَنْ أَبِيهِ قَالَ
قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ثَلَاثٌ فِيهِنَّ الْبَرَكَةُ الْبَيْعُ إِلَى
أَجَلٍ وَالْمَقَارَضَةُ وَأَخْلَاطُ الْبُرِّ بِالشَّعِيرِ لِلْبَيْتِ لَا لِلْبَيْعِ

Al Hasan bin Ali Al Khallal said, He told us Bisyr bin Thabit Al Bazzar said, He told us Nasr bin Al Qasim from 'Abdurrahman bin Dawud from Salih bin Shuhaib from his father said, "Rasulullah shallallahu 'alaihi wasallam said: "Three things in which there is a blessing; a sale and purchase that gives tempo, borrowing, and a mixture of wheat and barley for household consumption rather than for sale."

Mudharabah contracts are divided into two: 1) mudharabah-muthlaqah (unrelated/independent mudharabah); and 2) mudharabah-muqayyadah (related mudharabah). Wahbah al-Zuhaili underlined that an unbound mudharabah contract refers to a capital contribution from the shâhib al-mâl to the mudharib to do business (business) without identifying the nature, type, location, timing, or party conducting the company. The word "bound mudharabah" refers to a mudharabah contract that calls for the transfer of funds from the mudharib to the shâhib al-mâl in order to conduct business. The nature of the transaction is characterized by its type, location, timing, and/or the party doing it, [21].

Scholars agree on the validity of mudharabah-muthlakah. However, scholars differ on the legal status/validity of mudharabah-muqayyadah. The scholars of the Malikiyah and Syafi'iyah believe that the mudharabah-muqayyadah contract is illegal; however, the scholars of the Hanafiyah believe that the contract is permissible in the following circumstances: 1) Imam Abu Hanifah and Imam Ahmad Ibn Hanbal allow mudharabah-muqayyadah relating to the time of business, the party doing the business, and the time to come (idhâfatuha ilâ al -mustaqbal); while Imam Malik and Imam Syafi'i forbade it; and 2) a mudharabah-muqayyadah contract that is associated with uncertain terms (for example, if someone says: if someone comes to you paying a debt to me through you, then the payment of the debt that you have received can be used as business capital with a mudharabah contract); Hanabilah and Zaidiah scholars allow the mudharabah-muqayyadah contract; while the Hanafiyah, Malikiyah, and Syafi'iyah scholars do not allow it.

In the mudharabah contract, the amount of capital must be clear. This can be expressed in units of currency. The mudharabah capital provided by the mudharib must be free of debts and loans when carrying out the mudharabah contract. Meanwhile, the mudharabah carries out a mudharabah contract starting from the time the mudharib provides capital to start a joint venture. There is no guarantee from the mudharib that investors would receive their money back or their money plus profits. Such a guarantee is not required because the investor and mudharib's relationship is one of mortgage and the mudharib is a reliable individual. According to Malik and Syafi'i, a mudharabah contract is unlawful if

investors stipulate that the mudharabah must offer guarantees in the contract's conditions.

AAOIFI, published Sharia Standard No. 13, Causal 8/2, states that in addition to the proportion of profits that have been agreed upon, namely the distribution of profits must be based on an agreed percentage of profits, and not based on a single fee or percentage of capital. Mudharib cannot claim salary or commission or any periodic remuneration for work completed by him. However, it is permissible if the two parties draw up a separate agreement that is independent from the mudharabah contract, which stipulates that getting certain commissions based on customary business is not part of the mudharabah contract.

2.2. Mudharabah Agreement in Contemporary Jurisprudence

The notion of the mudharabah contract in classical fiqh differs from the mudharabah contract in modern fiqh studies. Especially when the mudharabah contract is applied to Islamic Financial Institution (LKS) products such as Islamic banking products, Islamic cooperatives and other Islamic business institutions. There are at least a number of contemporary mudharabah contract products that are different from classical fiqh, including the following:

a. Mudharabah as a Savings Product

Mudharabah contracts in Islamic banks are applied to products for raising public funds (funding) and channeling funds (financing). In the funding position, mudharabah is applied to:

- 1) Savings, both regular savings and term savings, such as hajj and qurban savings. This fundraising item is based on the National Syaiah Council's Fatwa about savings, Number 2/DSN-MUI/IV/2000. Savings are defined in this fatwa as deposits that may only be withdrawn under specific conditions and cannot be withdrawn using a check, demand deposit slip, or another analogous form of exchange, [10].
- 2) Deposits, both regular and special (special investment) deposits, when money is put in a particular bank for a certain company. This product is based on the National Sharia Council's fatwa regarding deposits, number 03/DSN-MUI/IV/2000. Deposits in this context refer to time deposits, the withdrawals from which may only be performed depending on the customer's good deposit agreement at a specific period, [11].

The client who distributes funds to the bank is acting as the owner of the funds (shâhibul mal) under the terms of the mudharabah contract on the financing side. Islamic banks are those serving as mudharîb, or money managers. Banks have the ability to conduct a variety of commercial ventures that do not contravene sharia principles and grow them, including mudharabah with other parties, in their function as mudharib. According to the predetermined ratio, the client will get a portion of the bank's earnings. While starting an account, the contract must include profit sharing in the form of the client, [20].

b. Mudharabah Contracts as Fund Distribution Products

Meanwhile, on the financing side, mudharabah in Islamic banking or Islamic financial institutions is applied to mudharabah financing, both working capital financing and special investment (mudhârabah muqayyadah). This mudharabah finance product is based on the National Sharia Council of the Indonesian Ulema Council's Fatwa about mudharabah financing, Number 07/DSN-MUI/IV/2000 (Qiradh). Based on this fatwa, LKS is permitted to use mudharabah, which is a business partnership agreement between two parties in which the first party (shâhib al-mâl/bank) provides all the capital, the second party (mudharîb/customer) manages the business, and the parties split the profits in accordance with the terms of the agreement stated in the contract, [12].

In terms of finance, the client takes on the role of mudharib and the bank assumes the role of fund owner (shâhib al-mâl) (fund manager). With this financing, LKS, as the fund's shâhib al-mâl (owner), provides all funding for a project's demands (business). LKS has the authority to provide direction and oversight, but Mudharîb is free to engage in any activity that has been mutually agreed upon and is compliant with sharia. LKS does not control the firm or the project, [20].

According to the mudharabah concept, unless the mudharib (client) intentionally makes a mistake, is careless, or defaults, LKS as a supplier of money covers all losses resulting from the mudharabah (violating the agreement). Similar to collateral, there is essentially no assurance with mudharabah finance. The LKS may, though, request assurances from the mudharib or a third party to ensure that the mudharib does not stray.

Only if it is established that the mudharib broke the terms of the contract between the parties will this guarantee be paid out.

c. Mudharabah Contracts on Sharia Insurance Products

In the sharia insurance business, in general, sharia insurance participants do not provide specific conditions that limit how funds are managed so that this contract is categorized as a mudharabah mutlaqah. Whereas in its position as mudharib on the one hand and shaibul maal on the other hand, sharia insurance is like an Islamic bank. The funds collected from the participants will then be invested in Islamic investment vehicles, and if a profit is made, the proceeds will be distributed to the participants and the company in accordance with the ratio or ratios agreed upon at the beginning of the agreement, such as 50:50, 70:30, and so forth.

d. Interbank Mudarabah Investment (IMA)

This investment is an instrument of the Islamic Interbank Money Market (PUAS). The maximum term is 90 days. This certificate is issued by Islamic Banks and Islamic Business Units (UUS). For this certificate, the sale transfer may only be made by the issuing bank. Meanwhile, the buying bank may not transfer to the next party. Fees are paid at the beginning of each month in the amount of the realized rate of return on mudharabah investment deposits at the issuing bank.

e. Sharia Bonds Based on Mudharabah Contracts

Islamic bonds are long-term securities based on sharia principles that are offered by issuers to sharia bondholders and obligate the issuer to pay sharia bondholders income in the form of profit sharing, margin, and fees as well as refund the bond money at maturity. The issuer in the mudharabah sharia bond is the mudharib while the holder of the mudharabah sharia bond is shahibul maal.

f. Practical Problems in the Field (Recognition of Profits)

In the classical fiqh books it is informed that fiqh scholars agree that the proceeds may not be shared between the parties as long as the capital cannot be pinned. So that the mudharib may not take profit sharing as long as there is a risk ahead. Because it can be called a profit when the capital has returned intact.

Ibn Qudamah, one of Hanabila's scholars argues that:

أَنَّهُ لَا يَسْتَجِزُّ أَخَذَ شَيْءٍ مِنَ الرَّبْحِ حَتَّى يُسَلِّمَ رَأْسَ الْمَالِ إِلَى رَبِّهِ، وَمَتَى كَانَ فِي الْمَالِ خُسْرَانٌ، وَرَبْحٌ، خُبِرَتْ الْوَضِيعَةُ مِنَ الرَّبْحِ... لِأَنَّ مَعْنَى الرَّبْحِ هُوَ الْفَاضِلُ عَنِ رَأْسِ الْمَالِ، وَمَا لَمْ يُفْضَلْ فَلَيْسَ بِرَبْحٍ. وَلَا نَعْلَمُ فِي هَذَا خِلَافًا
"Mudharib is not entitled to take profits until he hands over the capital to the owner of the capital (shahib al-mal). When there is a loss in capital and there is a profit, the loss can be covered with profit... because it is only called a profit if it is in the form of an excess of capital. As long as there is no advantage, it means that there is no profit.... We are aware that there are differences of opinion among the scholars in this matter".

Another statement was conveyed by al-Kasani, one of the scholars from the Hanafiyah circle, as follows:

وَشَرَطُ جَوَازِ الْقِسْمَةِ قَبْضُ رَأْسِ الْمَالِ، فَلَا تَصِحُّ قِسْمَةُ الرَّبْحِ قَبْلَ قَبْضِ رَأْسِ الْمَالِ

"The condition for profit sharing is that the business capital has been returned. It is illegal to share profits before the capital returns".

Of course, it is necessary to distinguish between profit ownership rights and profit sharing. Distribution of new profits may be made if you have returned the investment. Meanwhile, if profits have been seen, but the capital has not been returned, does the mudharib have the right to some of the profits?

In this case, there are two opinions. First, the mudharib already has the right to the profits, it's just that he can't take them yet. In the Hanbali school, this is a more strongly held belief, and it is also one of the beliefs of the Shafi'i school. The opposing view holds that until it is distributed, the mudharib does not possess that benefit. This is the opinion of Hanafiyah and the opinion of Imam Malik. Ibn Qudamah said:

وَأَمَّا مِلْكُ الْعَامِلِ لِنَصِيبِهِ مِنَ الرَّبْحِ بِمَجَرَّدِ الظُّهُورِ قَبْلَ الْقِسْمَةِ، فَظَاهِرُ الْمَذْهَبِ أَنَّهُ يَنْبَغُ.

هَذَا الَّذِي ذَكَرَهُ الْقَاضِي مَذْهَبًا. وَيَهْ قَالَ أَبُو حَنِيفَةَ وَحَكَّى أَبُو الْخَطَّابِ رَوَايَةً أُخْرَى، أَنَّهُ لَا يَمْلِكُهُ إِلَّا بِالْقِسْمَةِ. وَهُوَ مَذْهَبُ مَالِكٍ وَلِلشَّافِعِيِّ قَوْلَانِ

"Does the amil/mudharib already have some of the profits, only for the mere appearance of profits, even though they haven't been shared? What is stronger in the Hanbali mazhan, ownership rights exist. this is as stated by al-Qadhi (Abu'Ya'la) as the official opinion of the

(Hanbali) school. And this is the opinion of Abu Hanifah. Meanwhile, Abu Khitab mentions another history, that the amil/mudharib does not have property rights except after distribution. And this is the opinion of Imam Malik”.

Profits should not be shared, as long as there is risk to the capital behind. So the opposite applies, new profits may be shared if there is no risk to the capital behind. Although the capital has not returned 100%. Thus, in the perspective of classical fiqh, ideally the profits are not shared up front, as long as there is still risk behind. Because this profit before being shared is used to cover risks.

As explained in the background above, that at the practice level in LKS or Islamic banks profit recognition or profit sharing mechanisms are carried out every month. This means that this division is made before the capital returns, as explained in the classical fiqh books. The explanation regarding the profit sharing in a mudharabah contract is in principle the same as the profit sharing profit sharing in a musyarakah contract, which is a choice between the profit sharing method and the revenue sharing method. However, there are no provisions regarding the time of recognition of gains.

In the laws and regulations and their relationship with the DSN-MUI fatwa, the rule used is 'urf tijari (customs that apply among entrepreneurs). Because the 'urf relating to the time of revenue recognition by financial institutions is monthly, the DSN-MUI fatwa implicitly recognizes the 'urf. therefore, the recognition of mudharabah operating income by Islamic Financial Institutions can be done in stages (every month [syarhriyyah]). In connection with this provision, in fiqh books there are different views regarding the timing of recognition of income from mudharabah operations.

The relationship between capital (ra's al-mal) and profit (al-ribh) is discussed in the book Musu'ah al-Qawa'id al-Fiqhiyyah al-Munadzamah li al-Mu'amalat al-Maliyyah al-Islamiyyah wa Dauruha fi Taujih al-Nadzm al-Mu'ashirah by 'Athiyah 'Adlan 'Athi. It is explained that the position of capital is the principal (asl) and the position of profit is the branch (far'u). This explanation is based on the rule of fiqh which reads:

ريح المضاربة وقاية لراس المال

“The profit of a mudharabah contract business is the guardian of business capital”.

On the basis of these principles, it is stipulated that the profits from the mudharabah business may only be recognized by the parties after the business capital is returned to the owner of the capital (shahib al-mal). In other words, business profits in a mudharabah contract may be recognized by the owner and business actor after the mudharabah contract ends (ie after the capital has been returned to the owner). This is as explained by the classical fiqh experts as described above.

Due to the temporary (qalqah [fluctuative]) nature of business profits on mudharabah contracts, the risk of recognizing monthly income has the potential to create a risk of loss, i.e. Islamic banks have recognized and reported the profits of the mudharabah business, even though the business capital of the mudharabah may not necessarily return. in full.

Thus, it seems that Islamic Financial Institutions ignore the rule "mudharabah business profits are the guardian of business capital" because it is not in line with the 'urf tijari that applies to Islamic financial institutions. In addition, mudharabah business capital is generally insured or guaranteed by a third party (kafil) with a kafalah contract as part of the risk mitigation effort for mudharabah business capital.

It is probably important to make a distinction between business operations conducted by financial institutions and those conducted by non-financial institutions. It is possible to use the rule that specifies that business earnings may only be recorded once capital returns to: (1) mudharabah businesses with short terms (eg under one year); (2) mudharabah business in the real sector (not the financial sector); and (3) mudharabah business capital that is not guaranteed by a third party (kafil).

3. Conclusion

A mudharabah contract, according to traditional fiqh studies, is a commercial partnership agreement between two parties in which the first party (shâhib al-mâl) supplies all (100%) of the capital and the other party takes on the management role. Mudharabah divides corporate earnings in accordance with the terms outlined in

the contract. As long as the loss is not the consequence of the manager's fault, the owner of the capital is responsible for paying it if the company experiences a loss. The management shall bear responsibility for the loss if fraud or carelessness by the manager led to it. As a product in LKS, mudharabah contracts are implemented in deposit products, both savings and time deposits, contracts for distribution of funds by LKS, sharia insurance products, mudharabah investments between banks and sharia bonds.

The acknowledgment of profits made in practice at Islamic Financial Institutions is different from fiqh profits, in that the profit sharing of a mudharabah contract is carried out after the capital has returned, however in practice what is done by LKS is profit sharing periodically such as monthly. This is based on the consideration of 'urf tijari conducted at LKS.

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