Analysis of Fatwa DSN-MUI No.105 on Capital Guarantee Issues in a Mudharabah Contract

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This study critically examines the Fatwa MUI No. 105 on sharia ruling of capital guarantee in a mudharabah contract in Islamic bank practices. Some opinions from sharia Fatwa which is issued by International Fatwa Issuing-Bodies and Classical Muslim Scholars were used to obtain the holistic view on mudharabah capital guarantee. This study employs qualitative approach to assess the opinion of sharia scholars and utilizes inductive approach to summarize the data or information that are collected. The main data of this study is fatwa MUI No.105, Muslim scholars' opinion from Fiqh or Ushul Fiqh literature, and group of international fatwas that are issued by reputable fatwa-issuing body. The study found that the MUI Fatwa No.105 which is stated that mudharib can guarantee mudharabah capital voluntarily contradicts to majority of four mazaahib, International Islamic Fiqh Academy and AAOIFI that state the mudharib is not allowed to guarantee the capital of the mudharabah. In addition, the Fatwa was not included the aspect of Amanah in its stipulation. However, under sharia methodology of maslahah, mudharib is still allowed to provide capital guarantee in certain situations: first, if mudharib is doing negligently in business, second, mudharib willingly impose themselves to guarantee the mudharabah capital, third, afraid of loss of potential customer, and lastly, mudharib voluntarily guarantee only the capital not profit.

Keywords: Capital Guarantee, Fatwa DSN-MUI No.105, Mudharabah

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INTRODUCTION

In several countries, it is recorded that mudharabah contract becomes less priority contract in Islamic bank (Nor & Ibrahim, 2015; Afzal & Hasan, 2018; Hendrik, et al, 2018; Surahman & Syarif, 2020). There are some reasons why mudharabah contract is less priority, Sapuan (2016) asserts that mudharabah contract contains high agency problem risk, such as asymmetric information, adverse selection, and moral hazard. Nor & Ibrahim (2015) were in the view that, by applying mudharabah contract in Islamic account, Islamic bank is exposed to commercial risk, business risk, withdrawal risk, and reputational risk. Nor & Ibrahim (2015) further explained that the difference between Islamic bank and conventional bank in term of return is, the return on principle is guaranteed and the return on profit is determined upfront in conventional bank. Meanwhile, the return on principle and return on profit is not guaranteed in Islamic bank's mudharabah contract, because it is a partnership or business contract, and Islamic bank even bear business risk. Therefore, guarantee on capital in Islamic bank is become an important issue to discuss.

Several previous studies have also raised the same issue of the unpopularity of the mudharabah contract in several Islamic banks in the world. This unpopularity is due to the absence of capital guarantee in a mudharabah contract (Hendrik, et al, 2018; Hadi, 2011). There will be at least two impacts, first, impact on customer that the customer becomes less interested to put their money in the form of mudharabah contract, because the bank cannot guarantee the return, and second, impact on the bank that the product with mudharabah contract contains business risk, and reputation risk. Reputation risk becomes the worst possibility, if the Islamic bank is not able to return customer funds (due to lack of understanding of customer in term of mudharabah contract), then Islamic banks will be considered as untrustworthy and not profitable. The customer will switch their bank if the bank doesn't meet their expectation (Lee & Ullah, 2011). Further, Khir, et al (2013) assert that if the capital of mudharabah is not guaranteed, then it may lead to the customers move their fund to conventional bank accounts.

Notwithstanding, sharia advisor has put off their ideas regarding to the capital guarantee in a mudharabah contract and has been enlightened in some of sharia rulings. Regarding this, most industry players also raised the issue that concern on the implications status of Mudharabah-Based accounts. In Malaysia, according to IFSA (2013), bank's investment account is classified into three categories, include current account, saving account, and deposit account. Current account and saving account are included collectively to CASA funds, where in nature it is classified as debt for the bank. Therefore, CASA fund must be guaranteed by bank and debt must be returned to the investor. Meanwhile, deposit account particularly under mudharabah contract is a partnership contract in nature. In partnership contract, both parties have contributions. The return (profit and loss) should be linked to both parties. On the other hand, in Indonesia's Islamic bank, third fund is classified only into three, current account, saving account, and Islamic deposit account (POJK, 2015). According to Fatwa (MUI) Majelis Ulama Indonesia, Islamic deposit applies mudharabah contract, while saving account applies mudharabah and wadi'ah contract, and demand/current account applies wadi'ah contract. Given the differences in the contracts used in fund-raising products, the rules regarding capital guarantee are also different for each product.

IFSA (2013) asserts that the fund that is included as the Islamic deposit, must be fully repaid to the depositors. However, it is not explained either implicitly or explicitly that Islamic banks must return depositor funds in full. According to Fatwa MUI No. 105, it is mentioned that the owner of capital (shohibul Maal) cannot ask the manager (mudharib) to guarantee a return on capital, however the manager can guarantee a return of capital on his own volition without a request from the owner of capital, in addition, owners of capital may request third parties to guarantee a return on capital. Meanwhile AAOIFI is in the view that capital provider may request a guarantee from the mudharib in condition that it is only applied if there is misconduct or negligence by mudharib.

Then, how is the practice in Indonesia's Islamic banks, and how do Islamic banks stand on capital guarantees in a Mudharabah contract? There are two issues commenced related to the fatwa-MUI No. 105. First, the mudharib (in this case, Islamic bank) has no obligation to return fully or partially the capital funds to the shohibul maal when a loss occurs, except for losses due to ta'addi, tafrith or mukhalafat al-syuruth. However, resolution no. 3 states that mudharib may guarantee a capital of his own free will and without a request from the shohibul maal. And what happen in practice is, Islamic bank provides 'guarantee' a full return of capital to the owner. Although it is not stipulated in

the contract that the bank guarantees the customer's capital in the Mudharabah contract, but at maturity time, the customer will get a full refund on their deposit along with profit sharing.

According to the abovementioned fatwa, we assume that the fatwa may generate into at least these two main problems: (a) as for mudharabah muthlaqah (where the bank as a mudharib has full authority to determine the management of capital funds in a pool of funds (contemporary mudharabah practices). In a sense, it is no longer distinguishable between businesses that are progressing or making profits, and businesses that are experiencing losses. In other words, Islamic banks will attempt to 'guarantee' the return of capital funds in whatever the situation; (b) if Islamic banks intentionally or unintentionally 'guarantee' mudharabah capital funds and ensure that all mudharabah's customers (without exception) will get a full return on their capital, then the 'urf law might apply. The bank will be accustomed to providing a guarantee on principal, and the customer will perceive that the mudharabah capital funds placed in Islamic banks will always be returned.

We inquire this fatwa MUI 105 which states that mudharib can provide capital guarantee to shahibul maal based on their own volition will lead to perception that this is the way of bank to attract more customers to put their money in Islamic bank. Afterwards, Islamic bank attempts to equate their product with conventional bank's product in term of guarantee the principal fund. If this is based on maslahah, so whether it is real maslahah or not real maslahah. In nature, we argue that this contradicts to the Amanah (trustworthy) principle, that should exist in Mudharabah contract. Azmi (1995) defines amanah or trust as a concept where wealth or properties are managed by other party, and this concept closely applied in profit and loss sharing contract. Tahrim, et al (2018) considers that mudharabah is a contract that requires a high level of trust between contracting parties, therefore, it deemed to be conducted by good track record friends/parties and the frequently send the project progress and financial report. Thus, mudharabah contract is also popular with trust-based contract. Confidently to say, there are numbers of studies discussed mudharabah contract, but there is still lack of studies discussed in term of capital guarantee issue which is reviewing from the amanah/trust point of view.

This paper critically examines the issue on sharia ruling of capital guarantee in a mudharabah contract in Islamic bank practices in Indonesia. To get a holistic view, this paper attempts to analyze from the fatwa of MUI No. 105, and compared to the view of international fatwa-issuing bodies such as AAOIFI, Academic Islamic Fiqh and reveal the views of the scholars (pro and cons) regarding the capital guarantee in a Mudharabah contracts. It also needs to be aggregable that this paper only discusses the sharia ruling of capital guarantee in a mudharabah contract from the side of funding product (saving account and deposit account).

LITERATURE REVIEW

Mudharabah Contract

The practice of *mudharabah* contract principally has been previously done by our Prophet Muhammad (PBUH), he arranged the *mudharabah* contract with his lovely wife, Siti Khadijah. The project that is conducted by Rasulullah is trading goods to Syiria (ISRA, 2010). *Mudharabah* contract or also known as silent partnership is a partnership contract that involves two parties. One party stands as capital provider (*rabbul Maal*), while other party stands as labor provider (*mudharib*) (Ishak & Rahman, 2021). Awad, et al (2019) mentioned that according to Hanafi scholars, *mudharabah* is popular as *muqharadhah*. Both *mudharabah* and *muqharadhah* basically have similar feature in principle, where one party provides capital, while another provides skill and knowledge on the specific project. Ishak & Rahman (2021) further explains about the rules pertaining to *mudharabah*, which are mostly identical to other sharia contract in finance, such as the projects must be free from *riba* (interest), free from haram elements, free from *gharar* (uncertainty) or speculation. Furthermore, there are several special rules on *mudharabah* pertaining to capital and return sharing. This makes *mudharabah* as unique contract especially compared to conventional.

According to majority Islamic scholars, capital in *mudharabah* contract should be in the form of money, and the profit must be determined based on ratio/percentages (Ishak & Rahman, 2021; Al-Zuhaili, 2006; ISRA, 2010). Nor & Ibrahim (2015) stated that return on *mudharabah* must be accordance to the performance of the business/project. The reason why profit must be distributed in the form of ration is because *mudharabah* in nature is part of the partnership contract (Al-Zuhaili, 2006). According to return aspect, if the project investment is profitable, the profit should be distributed according to pre-determined ration as agreeable among parties. Meanwhile, if the project is not profitable and there is no negligence from the *mudharib*, the capital provider is borne for the loss (AAOIFI, 2017). It is considered fairer because *mudharib* already

loss for their effort, idea, and time (Al-Zuhaili, 2006). Despite this, *mudharib* is borne for the loss if it is proven that there is a negligence from *mudharib* side.

Above all, one more thing that become the uniqueness of *mudharabah* contract is in accordance with general principles in fiqh mu'amalah, such as *ta'awun* (partnership), *amanah* (trustworthy), *tawazun* (balance), *'adl* (justice), *maslahah* (benefit), and *syumul* (universal) (Tanjung, et al, 2017). The principle of ta'awun in the *mudharabah* contract is indicated by the existence of partnership activities between two or more parties where one party is the owner of capital, and the other party is the manager of the business. The principle of Amanah is demonstrated by the position of shahibul Maal as a silent partnership, where shahibul Maal entrusts all matters of his project/business to the *mudharib*. Considering that the *mudharib* is appointed as a business manager on the grounds that the *mudharib* has the skills and competencies required to manage the business. The principle of tawazun is shown in the aspect of profit sharing, where the shahibul maal will bear the loss if there is a loss that is not caused by the negligence of the *mudharib*. However, the *mudharib* must be responsible for any losses if it is known and proven that the *mudharib*'s negligence has occurred. The fair principle is indicated by the agreement between the two partners in determining the profit-sharing ratio. The principle of maslahah is shown by the existence of business activities that provide benefits to a large number of people, and the universal principle is shown that the *mudharabah* contract can be carried out in any legal business field.

Mudharabah Contract in Islamic Deposit & Saving Account

In Indonesia's Islamic bank, the customer can put their deposit money into three form, current account (giro account), saving account, and deposit account. Current account applies *wadi'ah* contract, while saving account applies *wadi'ah* and *mudharabah* contract, and deposit account applies only *mudharabah* contract (*mudhrabah muthlaqah* and *mudharabah muqayyadah*) (POJK, 2015). It is clear enough that current account and saving account in a *wadi'ah* contract (or popular with CASA fund) are treated like a debt by Islamic bank. Therefore, CASA fund must be guaranteed by bank and debt must be returned to the investor (Khir, et al, 2013). Meanwhile, saving account and deposit account particularly under *mudharabah* contract is a partnership contract in nature. In partnership contract, both parties have contributions. The return (profit and loss) should be linked to both parties (Al-Zuhaili, 2006). Thus, referring to the general shariah ruling of *mudharabah* contract in Islamic deposit and saving account, Islamic bank is not required to guarantee the capital. Somehow, fatwa MUI No. 105 allows Islamic bank to provide a capital guarantee for all product in a *mudharabah* contract based on Islamic bank's own free will. Therefore, this study attempts to look at different view of scholars regarding capital guarantee in a *mudharabah* contract and analyze the controversial of fatwa MUI 105.

METHOD

This study employs qualitative approach to assess the opinion of sharia scholars. According to Eldersevi & Haron (2019), qualitative method is commonly used to examine opinions in particular research areas. This study also utilizes inductive approach to summarize the data or information that are collected. Moreover, comparative-analytical approach is employed to examine the Fatwa MUI No.105 and compared to other relevant source of fatwas. The main data of this study is fatwa MUI No.105 and another supporting fatwa that are issued by MUI. Furthermore, to examine and evaluate this fatwa, we utilize Muslim scholars' opinion from Fiqh or Ushul Fiqh literature and group of international fatwas that are issued by reputable fatwa-issuing body. International Islamic Fiqh Academy and Accounting and Auditing Organization for Islamic Financial Institution and Islamic Financial Services Board (IFSB).

ANALYSIS AND DISCUSSION

Fatwa MUI no. 105 states that Islamic banks are allowed to provide guarantees for capital in *mudharabah* contracts voluntarily caused controversy among Muslim academia, particularly Muslim scholars in Indonesia. The controversy exists in the provisions of the MUI fatwa No. 105, paragraph 3 "*The manager may guarantee a return of capital of his own free will without a request from the owner of the capital*", which means that, Islamic banks may provide a capital guarantee on their own volition (voluntarily). Fatwa allows Islamic banks to provide guarantees for *mudharabah* capital is considerably contradicting to the concept and spirit of Amanah in profit and loss sharing contract.

The concept of trust in *mudharabah* contract comes with an authority that is given to the *mudharib* to entirely manage the business. Shahibul maal entrusts the entire of his funds managed by *mudharib*, in other words, shahibul maal gives amanah to *mudharib* to manage the funds in a project or business to get the benefit. However, there are some problems that can interfere

with the application of the principle of trust in *mudharabah* contract. Maharani (2007) explains the violation of trust principle in *mudharabah* contract is agency problem such as the bank violates the commitment by not acting in the best interests of owner. Other risks that exist in *mudharabah* contract that can interfere with the principles of amanah are the presence of asymmetric information, moral hazard, and fraud (Sapuan, 2016). In addition, MUI Fatwa that allows sharia banks to provide guarantees on *mudharabah* capital gives lead to perception that there is no trust in this contract, so customers need guarantee, even if it comes from freewill of sharia banks. Nevertheless, Sapuan (2016); Khir, et al (2013) explained that the evolution of *mudharabah* practice from classical *mudharabah* to contemporary *mudharabah* will also have an impact on changes in the law of *mudharabah* contract. To examine how the scholars' views on the capital guarantee of *mudharabah* contract, this study attempts to investigate some scholars' opinions both pros and cons, and in the end of writing, we will provide our preferred opinion related to this matter.

The View on Capital Guarantee in *Mudharabah* is impermissible

The majority scholars are in the view that stipulating a principal guarantee in a *mudharabah* contract is not allowed. According to the scholars of the Maliki (Ibn Rushd, 1425), the scholars of Shafi'i (Al-Mawardi, 1419), and the scholars of Hambali (Ibn Qudamah, 1388) agreed to that *mudharib* is not allowed to provide capital guarantee in a *mudharabah* capital particularly when loss is occurred. The argument behind this was that *mudharib* acts as Amin (who liable an Amanah from shahibul maal) and should not be liable to capital guaranty except if the *mudharib* does negligence or intentionally doing wrong. Therefore, how Capital guarantee in a *mudharabah* contract is not allowed because it contradicts to the Amanah principle?

1. *Mudharib* is a trustee/Amin/fiduciary/wakil

In either classical or contemporary *mudharabah*, the *mudharib* is given a trust by the shahibul maal to manage his funds. In this case, *mudharib* will contribute time, energy, skill, thought to the project or business. Therefore, *mudharib* should no longer burdened with the guarantee of return of *mudharabah* capital. The International Fiqh Academy (2001) resolution No. 123 assert that "*the mudharib is considered in the shariah to be a trustee; therefore, he is not liable to guarantee the loss except in case of negligence or intentional wrongdoing or violation of the conditions of the contract or the rules of investments that were made the basis of the contract. In this respect, individual and collective mudharabah are given the same rules.*". Further, International Fiqh Academy (2001) mentioned that *mudharib* is not liable for capital guarantee, and if if it is required either explicitly or implicitly, the the contract becomes invalid, and *mudharib* is entitled to a fair profit (*ribh al-misl*).

AAOIFI sharia standard No. 45 states that the guarantee of goods (rahn) is not required on a trust-based contract, such wakalah, *wadi'ah*, musyarakah, *mudharabah*, and rental goods in the hands of musta'jir. If the rahn is used as a source of payment (the right of the trustee) in the case of the trustee exceeding the limits, negligence, and /or violating the conditions, then the *rahn* is allowed.

2. Because *mudharabah* is proceed based on trust, then providing capital guarantee by *mudharib* will lead to fasid *mudharabah* contract

Ibn Qudamah (1388) view that guaranteeing capital in a *mudharabah* contract may lead to a fasid contract. "*If the owner of the capital (Shahibul-Mal) requires the manager (mudharib) to be responsible for business risks, then that requirement is fasid because it is not part of the benefit and is contrary to the characteristics of the contract.*" And "*The third part (fasid conditions) is to require things that are not included in the benefits and characteristics of the contract, such as requiring the mudharib to guarantee all or part of the capital from losses. There is no difference among scholars regarding the facade of this condition.*" Meanwhile, opinion of Qadhi Abdul Wahhab stated that: "*Because the mudharabah is formed based on trust, therefore, if the mudharabah requires the existence of dhaman (guaranteed return on capital), then this is contrary to the basic principle. If a contract contains conditions that are contrary to its basic principles, then the contract is void*".

According to Al-Baji (1533), *mudharib* acts as fiduciary that is not liable for capital guarantee in a *mudharabah* contract. Otherwise, capital provider is liable for the loss under any circumstance as long as there is no negligence from the *mudharib* side. Therefore, if *mudharib* liable on a capital guarantee under *mudharabah* contract, this contradicts to the nature characteristics of *mudharabah* contract. Furthermore, stipulating capital guarantee in the contract is impermissible because by doing this, there is a liability transfer from shohibul maal to *mudharib* and the *mudharib* take over the role of shohibul maal. To strengthen this view, Ibn Taymiyyah (1422) said "*the followers of Imam Ahmad hold that everything which contradicts to the objective of a contract (muqtada al 'aqd) is void*". Thus, imposing capital guarantee which is liable to Islamic bank will get to the invalid contract.

3. If *mudharib* provides capital guarantee in a *mudharabah* contract, then mudbarabah is no longer Amanah principle but Qard

Ibn al-Qayyim (1915) explained that "*the maxims and principles of jurisprudence (ushul fiqh) establish that what should be taken into account in contracts is their essence and substance, not their words and forms.*" Which means that every financial transaction contract must be based on its substantive and essence, not word or form. If *mudharib* is liable to guarantee *mudharabah* capital, then the *mudharabah* contract is considered as qard. Consequently, the status of the *mudharib* who was previously a representative or fiduciary then changed to a debtor, and the status of shohibul maal changed to a lender. Therefore, the law of riba applies, in line with *qawa'idh al-fiqhiyyah* "*kullu qordin jarra naf'an fa huwa riba*", every loan that draws a benefit is riba. In addition, the characteristics of trust in the *mudharabah* contract will disappear with the presence of qard with the addition of interest. Because, with or without trust, debtor is liable to pay full amount of money with additional benefit in it. To support this, AAOIFI argues that the legal basis for *mudharib* not requiring to guarantee the return of capital is because this condition excludes *mudharabah*, musyarakah or wakalah contracts from its framework; and turn it into a loan contract (qardh) which is guaranteed by the *mudharib* (to return it), because these contracts are based on Amanah, and this condition (guaranteeing the return of capital) is contrary to the principle of the contract, then the contract is invalid.

4. Capital guarantee in a *mudharabah* contract leads to excessive gharar. The principles of Amanah and gharar cannot be juxtaposed with each other.

Moreover, Ibn Rushd (2004) explicitly stated that "*stipulation of a guarantee is excessive gharar in qirad*". Excessive gharar is meant if there is a loss in the *mudharabah* contract, then the *mudharib* is charged for two things, firstly, the loss of time and effort without getting any return, and secondly, the loss of capital because the *mudharib* guarantees capital in the event of a loss. On the other hand, the shahibul maal gets two benefits, the first is a guarantee for his capital funds, and the second is the return on investment (if any). This practice is unfair to the *mudharib*. Moreover, the guarantee on *mudharabah* capital also contradicts to the rules of *qawa'id al-fiqhiyyah "Al-ghurm bil ghunm"* (liability accompanies gain).

5. There is no Maslahah in guarantee of *mudharabah* capital.

Some scholars argue that Islamic bank must be in line with conventional bank, especially to meet the need of customer. Therefore, in case of providing guarantee on *mudharabah* capital is considered as maslahah which gives benefit to public interest. However, Yousuf (2012) from his paper titled *Dawabit al 'Amal bi al-Maslahah al-Mursalah 'inda al-Usuliyyan bi al-Tatbiq 'ala Daman al-Masrif al-Islami li Wada'I Istithmar al-Mudharabah* generated the conclusion that there is no maslahah in providing guarantee in a *mudharabah* capital. Further, he explained that this practice is unfair for the bank, because if there is loss, bank is not only bear to loss their time and effort, but also must bear the loss of capital.

The View on Capital Guarantee in *Mudharabah* is permissible

Another scholar's view come with opinion that capital guarantee in *mudharabah* is permissible. Khir, et al (2013) discussed three opinions in term of principal guarantee in a *mudharabah* contract. To start with, it is allowed to stipulate in the contract that the *mudharib* is liable to guarantee the capital. For another thing, it is also allowed to guarantee *mudharabah* capital according to the determined condition. And lastly, the *mudharib* can voluntarily guarantee the *mudharabah* capital only if it is determined at the beginning of the contract, or if there is a loss in terms of capital.

The first opinion that it is allowed to stipulate in the contract that the *mudharib* is liable to guarantee the capital is according to the opinion of Ibn Qudamah (1388); Al-Shawkani (1:587), and Hammad (2000). Al-Shawkani (1:587) argues that if there is upfront agreement among contracting parties, then they oblige to fulfill the agreement "*As for borrowing and safe custody, the borrower and the custodian are not liable except in the case of misconduct and negligence, if the owner (of the borrowed asset and asset in custody) wants him to be held guaranteed and he accepted it (out of his free will), his mere consent justifies his liability to guarantee*". Further, Hammad (2000) came with evidence from the Prophet (Pbuh) said, "*Muslims are bound by their condition*". Therefore, if *mudharib* agrees to provide guarantee on *mudharabah* capital, then *mudharib* is bound to meet the agreement as stipulated in the contract. And this agreed condition in the contract is valid and binding.

The second opinion that it is allowed to guarantee a *mudharabah* capital on a voluntary basis. Al-Shawkani (1:587) stands on the argument that *mudharib* may provide capital guarantee in a *mudharabah* contract voluntarily, based on his willingness and consent.

Shurayh Ibn Al-Harist Al-Kindi as quoted by Ali Ahmad An-nadawi mentioned that: "*Whoever imposes something on himself voluntarily without coercion, then he must carry out something*". Ad-Dasuqi's opinion: "*Whoever is committed to doing a good deed, then he is obliged to do it*". Ibn 'Arabi said that "*Whoever is committed to doing something, then (according to the syara') must fulfill it*". Asy-Syaukani's opinion on the reasons for the permissibility of guaranteeing capital on his own initiative: "*because they (the mudharib) have chosen it (guaranteed capital) voluntarily, and the willingness between them is the reason for the legalization of the servant's property*".

This opinion leads to the conclusion that Islamic banks can provide guarantee for *mudharabah* capital based on the will of Islamic banks. However, Khir, et al (2013) explained that this determination can be made because the application of *mudharabah* in Islamic banks is different from classical *mudharabah*. In detail, Khir, et al (2013) explain that there are three main differences between modern-*mudharabah* and classical *mudharabah*, where these differences will have an impact on sharia rulings:

1. The contemporary *mudharabah*-based deposit is instigated in the Islamic banking industry, and banking industry is an industry with heavily regulated.
2. Since the capital adequacy requirements is applied on CASA and deposit account, therefore the *mudharabah*-based deposit is almost a secured structure contract.
3. In actual practice, income smoothing techniques such as the Profit Equalization Reserve (PER) or Investment Risk Reserve (IRR) are applied on contemporary *mudharabah*-asset deposit to mitigate displaced commercial risk (DCR).

Furthermore, according to Khir, et al (2013) as a financial institution that has strict regulations, supervised by the supervisory board and the central bank, it is natural for Islamic banks to offer themselves voluntarily to provide guarantees for capital *mudharabah* deposit accounts. However, from the above considerations, the view that allows guarantees for *mudharabah* capital does not consider aspects of contradiction with the basic principle of *mudharabah* (namely Amanah).

Analysis of Fatwa MUI No 105 and Personal View

After discussing the views of the Muslim scholars and the fatwas from international shariah bodies, the majority Muslim scholars tend to agree that *mudharib* is not liable to the capital guarantee in a *mudharabah* contract. However, the MUI fatwa No. 105 stands on the second opinion where the *mudharib* is allowed to guarantee the *mudharabah* capital on a voluntary basis. Therefore, we come to the analysis that, first, the MUI fatwa No. 105 which states that the *mudharib* may guarantee a return of capital at his own will without a request from the owner of the capital contradicts to the International Fiqh Academy (Resolution No. 123) and AAOIFI that state the *mudharib* is not allowed to guarantee the capital of the *mudharabah*, but on the other hand the International Islamic Fiqh Academy allows if the shahibul maal requests a third party to guarantee his capital, and AAOIFI is in opinion that the shahibul maal may ask for a guarantee from the *mudharib*. in condition it only applies if there is misconduct or negligence on the side of *mudharib*.

The MUI fatwa No. 105 year 2016 also contradicts to the previous MUI fatwa No. 07 year 2000 in term of *mudharabah* financing (qiradh). Fatwa No. 07 asserts that there is no guarantee in *mudharabah* financing, but to avoid from the negligence, Islamic bank can ask for guarantees from a third party. This guarantee can only be disbursed if the *mudharib* is proven to have violated the contract. Nevertheless, MUI fatwa No. 105 also addresses the stipulation that owner of capital may ask a third party to guarantee a return on capital. There is a change in the subject of fatwa No. 07 and fatwa No. 105, where fatwa no. 07 states that Islamic Financial Institution may request for guarantees from third parties, and fatwa no. 105 states that owners of capital can ask third parties to guarantee a return on capital.

In term of issuing a guarantee based on *maslahah* by third party, Mish'al (2012); Mustafa and Najeeb (2018) state that guarantee of capital from a third party is allowed in two ways. First, through a *kafalah* contract (guarantee) with resources, third party (or deposit insurance) provides guarantee to the rabbul maal in the event of a loss caused by the negligence of the *mudharib*. Second, tabarru' (donation) contract from a third party through an insurance company (takaful company). If it is through insurance company, then Islamic banks must pay a number of contribution (premium fee) to insurance companies, and if the *mudharib* fails to fulfill his/her obligations, insurance company will financially assist Islamic bank by giving guarantee amount as a gift (hibah). According to SAC-BNM (2010) in its 91st meeting, SAC-BNM allows third party to issue guarantee on *mudharabah* capital in condition that the 3rd party must be an independent party. The argument behind this permissibility is the urgency to provide confidence to

investor and attract them to invest in the project according to Islamic principles. SAC-BNM addresses this issue using maslahah as evidence. In addition, SAC-BNM also allows Islamic guarantee facility with fee-based guarantee based on maslahah. Because nowadays it is hard to get a guarantee with free fee-based guarantee (Eldersevi & Haron, 2019). However, the Islamic Fiqh Academy, resolution No. 12 asserted that a fee in guarantee should not exceed the actual expenses. Kuwait Finance House (2011), resolution No. 286 identifies that the charge fee is allowed only if it reflects the actual expenses in order to avoid riba. Meanwhile, SAC-BNM allows charging fee even that might exceed the actual expenses. SAC-BNM or Shariah Advisor Council of BNM relies on the opinion of Al-Zuhaili (2002) that a fee-based guarantee even it exceeds the actual expenses is allowed based on maslahah.

The ijtihad by MUI in fatwa No. 105 issuance is certainly acceptable considering the sharia arguments and the views of the ulama mentioned in the fatwa are clear and strong. However, back to the basic principles and characteristics of the *mudharabah* contract itself, where there is trust (amanah) between shahibul maal and *mudharib* on a business project. Where, if the shahibul maal considers that the *mudharib* needs to provide a guarantee for his capital, and or the *mudharib* voluntarily provides a guarantee for the *mudharabah* capital, then both eliminate the Amanah principle that is in the *mudharabah* contract. Whereas the *qawa'idh al-fiqhiyyah* state that *Al-Kharaj bid Dhaman*, liability justifies return. Therefore, the shahibul maal should voluntarily and willingly to deal with every return and every condition of business as long as *mudharib* does not commit fraud or negligence.

So, how does author stand on this matter? I personally will sand with the majority view, general sharia ruling, AAOIFI, and International Islamic Fiqh Academy where the *mudharib* is not allowed to provide capital guarantee in a *mudharabah* contract. This personal standpoint of view is based on the reason that *mudharabah* is Amanah in nature (trust principle-based contract). Therefore, according to its basic principle, *mudharib* is not liable to provide capital guarantee in a *mudharabah* contract, on the other hand, shohibul maal is not allowed to ask *mudharib* to guarantee their capital. However, under sharia methodology of maslahah, *mudharib* is still allowed to provide capital guarantee in certain situations, amongst others, are as follows: (1) this condition only can be applied if *mudharib* is doing negligently in business; (2) *mudharib* willingly or voluntarily impose themselves to guarantee the *mudharabah* capital; (3) afraid of loss of potential customer, where due to lack of sharia literacy and awareness from the shahibul maal or rational type of customer. This rational customer tends to opt for conventional bank rather than Islamic bank, because conventional bank will guarantee their capital and return; and (4) *mudharib* voluntarily guarantee only the capital not profit.

CONCLUSION

Mudharabah in current practices has switched from classical mudharabah to contemporary mudharabah. Therefore, the shariah ruling might change due to external factor existence in a contemporary mudharabah. According to the general rule of fiqh for Mudharabah contract, demanding/providing a guarantee of principal is not allowed. Overall, the opinion of scholars in majority regarding the sharia ruling on principle guarantee in a mudharabah contract can be divided into three (1) Impermissible. Islamic bank is not allowed to provide capital guarantee in a mudharabah contract; (2) Permissible. Islamic bank is allowed to provide capital guarantee by way of a stipulated condition; and (3) Permissible, in case if Islamic bank as financial institution voluntarily to do so and stipulate in the contract or even in the condition of capital loss.

Fatwa MUI No. 105 evidently allows mudharib to guarantee a mudharabah capital in condition mudharib's own volition (voluntarily). Thus, this fatwa contradicts to the International Islamic Fiqh Academy and AAOIFI Standard Sharia view. However, this fatwa based on several opinions from Muslim scholars such as Shurayh Ibn Al-Harist Al-Kindi, Ad-Dasuqi, Ibn 'Arabi, Asy-Syaukani that if there is a commitment to do something good, without any coercion, then the commitment is obligatory to be accomplished. Unfortunately, the argument that is provided by Majelis Ulama Indonesia does not mention the issue of Amanah.

Finally, considering the market share of Islamic banking industry in Indonesia is still below 10% due to the low level of Islamic financial literacy (Ilyana et al., 2021; Albaity & Rahman, 2019; Ali et al., 2020) in the community and many customers are rational, Islamic bank is required to provide competitive, innovative, effectiveness and sharia compliance both saving and financing product.

REFERENCES

'Abd-al-'Azīz Ibn-'Abd-as-Salām as-Sulamī, Ḥammād, N. K., & 'Utmān Ǧum'a Ḍamīrīya. (2000). *al-Qawā'id al-kubrā al-mausūm bi-Qawā'id al-aḥkām fi iṣlāḥ al-anām*. Dār al-Qalam.

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2017), Shari'ah Standards, AAOIFI, Manama.

Afzal, T., & Hassan, S. (2018). Hindrance of *mudharabah* financing: a study from islamic banking industry of Pakistan. *International Journal of Islamic Banking and Finance Research*, *2*(2), 16-23.

Albaity, M., & Rahman, M. (2019). The intention to use Islamic banking: an exploratory study to measure Islamic financial literacy. *International Journal of Emerging Markets*, *14*(5), 988-1012.

Ali, M. M., Devi, A., & Bustomi, H. (2020). Determinants of Islamic financial exclusion in Indonesia. *Journal of Islamic Monetary Economics and Finance*, *6*(2), 373-402.

Al-Mawardi. (1419). *Al-Insaf fi Ma'rifat al-Rajih min al-Khilaf*. Beirut: Dar Ihya al-Turath al-'Arabi, Vol. 2.

Al-Shawkani. Al-Sayl al-Jarrar. Dar Ibn Hazm, Vol. 1.

Al-Zuhaili, W. (2006). *Fiqh al-Islami wa Adillatuhu*. Dar al-Fikr, Damascus.

Awad, O., Hamid, H. and Allaymoun, M. (2019), "E-Mudaraba suggested system for Islamic investments", Journal of Internet Banking and Commerce, Vol. 24 No. 1.

Azmi, Nazmi Ghazali. "Government *mudharabah* and musharakah shares scheme." Master's thesis, Petaling Jaya: Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 1995, 1995.

Eldersevi, S., & Haron, R. (2019). An analysis of maṣlaḥah based resolutions issued by Bank Negara Malaysia. *ISRA International Journal of Islamic Finance*.

Hendrik, S., Iwan, T., Dedi, M. A., & Zaki, B. (2018). Evidence from Indonesia: is it true that *mudharabah* financing and micro business financing are at high risk for sharia banking business?. *Russian Journal of Agricultural and Socio-Economic Sciences*, *78*(6).

Hadi, A. C. (2011). Problematika pembiayaan *Mudharabah* di perbankan syariah Indonesia. *Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah*, *3*(2), 193-208.

Ibn al-Qayyim (1915)

Ibn Qudamah. (1388 AH). *Al-Mughni*. Cairo: Maktabat Al-Qahirah.

Ibn Rushd al-Hafid. (1425 AH). *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*. Cairo: Dar al-Hadith.

Ibn Taymiyyah. (1422 AH). *Al-Qawa'id al-Nuraniyyah*. Saudi Arabia: Dar Ibn Al-Jawzi, Vol 1.

Ilyana, S., Purna, F. P., & Friantoro, D. (2021). Islamic Financial Literacy and Its Effects on Intention to Use Islamic Bank. *Ihtifaz: Journal of Islamic Economics, Finance, and Banking*, *4*(2), 97-110.

Islamic Financial Service Act (IFSA). (2013). Available at: https://www.bnm.gov.my/documents/20124/8102422b-e6dd-d149-8db0-e3637e89ed5c

International Islamic Fiqh Academy (2001). Resolution No. 123 (5/13) Qirad or Joint Muḍārabah in Financial Institutions (Investment Accounts). Available at: https://iifa-aifi.org/en/32844.html

Ishak, M. S. I., & Rahman, M. H. (2021). Equity-based Islamic crowdfunding in Malaysia: a potential application for *mudharabah*. *Qualitative Research in Financial Markets*

ISRA (2010), Islamic Financial System: Principles and Operations, ISRA, Kuala Lumpur.

Khir, M.F.A., Bouheraoua, S., Hashim, A.Md., Sairally, B.S., & Hussain, L. (2013). The Shari'ah Ruling on Capital Guarantee in a *Mudharabah* Contract. *ISRA Research Paper No. 59*.

Kuwait Finance House (2011), "Al-Fatawa al-Sharʿiyyah fī al-Masaʾil al-Iqti sadiyyah", available at: www.kfh.com/KFH_Fataw (accessed 19 August 2017).

Laldin, M., Abdul Khir, M. and Parid, N. (2012), "Fatwas in Islamic banking: a comparative study between Malaysia and gulf cooperation council (GCC) countries", ISRA Research Paper No. 31/2012, International Shari'ah Research Academy for Islamic Finance (ISRA), Kuala Lumpur.

Lee, K. H., & Ullah, S. (2011). Customers' attitude toward Islamic banking in Pakistan. *International Journal of Islamic and Middle Eastern Finance and Management*.

Maharani, S. N. (2008). Menyibak Agency Problem pada Kontrak *Mudharabah* dan Alternatif Solusi. *Jurnal Keuangan dan Perbankan*, *12*(3), 479-493.

Mishʿal, A. (2012), "Sukūk, the third party guarantee, guarantee of capital and profit, guarantee with fee", paper presented at the International Islamic Fiqh Academy conference, 13-18 September, Algeria, available at: http://iefpedia.com/arab/?p=32990

Mustafa, M. and Najeeb, S.F. (2018), "Shariah-compliant deposit insurance scheme: a proposed additional modality", International Journal of Islamic and Middle Eastern Finance and Management, Vol. 11 No. 3, pp. 488-506

Nor, K. M., & Ibrahim, S. H. (2015, February). *Mudharabah* Pool Management Frameworks: A Comparison Between Pakistan and Malaysia. In *FINAL CONFERENCE PROCEEDINGS* (p. 27).

POJK (Peraturan Otoritas Jasa Keuangan), Number 24/POJK.03/2015. Available at: https://www.ojk.go.id/id/kanal/syariah/regulasi/peraturan-ojk-terkait-syariah/Pages/POJK-Nomor-24-POJK-03-2015.aspx

SAC-BNM (2010), "Shariah resolutions in Islamic finance", available at: www.bnm.gov.my/microsite/fs/sac/shariah_resolutions_2nd_edition_EN.pdf

Sapuan, N. M. (2016). An evolution of Mudarabah contract: a viewpoint from classical and contemporary Islamic scholars. *Procedia Economics and Finance*, *35*, 349-358.

Surahman, M., & Syarif, N. (2020). Analysis Of Maqâshid Al-Syarî'ah On The Application Of The Collateral In The Mudhârabah Contract In Sharia Financial Institutions. *Amwaluna, Jurnal Ekonomi dan Keuangan Syari'ah*, *4*(2), 276-287.

Tahrim, S. N. C., Rosdi, M. S. M., Muhammad, M. Z., Yusoff, M. N. H., Musa, A., & Din, N. M. (2018). The Revival of *Mudharabah* Contract: Proposed Innovative Solutions. *International Journal of Academic Research in Business and Social Sciences*, *8*.

Yousuf, A. (2012), " Dawabi t al-ʿAmal bi al-Ma sla hah al-Mursalah ʿinda al-U sūliyyan bi al- Tatbīq ʿala daman al-Ma srif al-Islamī li Wadaʾiʿ Istithmar al-Mu darabah", Journal of Tafakkur, Vol. 12 No. 1, pp. 26-59.