

THE CHARACTERISTICS OF PROPORTIONALITY PRINCIPLE IN ISLAMIC CROWDFUNDING IN INDONESIA

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Abstract

Proportionality is a legal principle not only requires equality of the rights and obligations among parties based on competing values, but also has purpose to deliver justice among parties. This principle is in line with the Al Musawah principle in the Islamic contract or agreement which it also has the same goal: ad 'adl wa tawazun. This principle is the implementation of the principle of good faith, the principle of transactions based on honesty including in terms of determining the profit margin. The research significance are to provide enhance knowledge about proportionality principle in Islamic crowdfunding in Indonesia, especially in financing contract in Islamic financial technology as a new business innovation scheme. This paper in order to promote the impartial perception and to harmonize the Islamic law and Indonesian laws. The type of the research is legal research. The research methods apply the conceptual approach to the the Islamic crowdfunding under proportionality principle in financing contract.

Keywords: Islamic crowdfunding, Islamic financing, proporsionaliti principle, al 'adl wa tawazun principle, al musawah principle

Abstrak

Proporsionalitas adalah prinsip hukum yang tidak hanya membutuhkan kesetaraan hak dan kewajiban di antara para pihak berdasarkan nilai-nilai yang bersaing, tetapi juga memiliki tujuan untuk memberikan keadilan di antara para pihak. Prinsip ini sejalan dengan prinsip *Al Musawah* dalam kontrak atau perjanjian Islam yang juga memiliki tujuan yang sama: *ad 'adl wa tawazun*. Prinsip ini adalah penerapan prinsip itikad baik, prinsip transaksi berdasarkan kejujuran termasuk dalam hal menentukan margin keuntungan. Signifikansi penelitian adalah untuk memberikan peningkatan pengetahuan tentang prinsip proporsionalitas dalam *crowdfunding* Islam di Indonesia, terutama dalam kontrak pembiayaan dalam teknologi keuangan Islam sebagai skema inovasi bisnis baru. Makalah ini untuk mempromosikan persepsi yang tidak memihak dan untuk menyelaraskan hukum Islam dan hukum Indonesia. Jenis penelitian ini adalah penelitian hukum. Metode penelitian menerapkan pendekatan konseptual untuk *crowdfunding* Islam di bawah prinsip proporsionalitas dalam kontrak pembiayaan.

Kata Kunci: *crowdfunding* Islam, pembiayaan Islam, prinsip proporsionalitas, prinsip *al 'adl wa tawazun*, prinsip *al musawah*.

I. INTRODUCTION

Bryan A. Garner¹ stated that crowdfunding is a collective fundraising effort that involves using the internet to attract potential fund owners who have the opportunity to support the goals of fundraisers. Adam Ng refers to Ordanini defined crowdfunding as “a collective effort by consumers who network and pool their money together, usually via the Internet, in order to invest in and support efforts initiated by other people or organizations”. From these definitions, social capital in the form of trust, social network, and norms are both important elements and outcomes of crowdfunding.² The Islamic crowdfunding is a hybrid business innovation model that integrates between the concept ethics business of Islamic finance institutions and crowdfunding as one of fundraising innovation model of finance technology. Islamic crowdfunding is expected become a solution for micro, small and medium enterprises or start up business instead of formal financial intermediaries. Islamic crowdfunding which it is one of the digital technology information and the development of finance economic which it has provided online financial services among contracting parties without knowing each other. In the Islamic crowdfunding system, the contracting parties may never meet in the real life or even they will stay anonymous to each other.

Crowdfunding is the one of the financial technology platform service. There is no specifically regulation which has enacted Islamic crowdfunding in Indonesia, therefore there is a lack of regulation regarding to the definition, term and conditions, legal protection and supervision which able to cover risk mitigation regulations. In February 2018, National Sharia Board of Indonesia has enacted guidance through Fatwa Ref.#117/DSN-MUI/II/2018 regarding Financing Service based on Information Technology under Sharia Principles (hereinafter referred to as Fatwa DSN MUI No.117/2018). This Fatwa DSN MUI No.117/2018 is only guidance, which the characteristic of fatwa is non-binding as the law is established. Financing Services based on Information Technology under Sharia Principles is the implementation of financial services based on sharia principles which bring together or connect Financiers with Financing Recipients in order to built financing contracts through electronic systems by using the internet. Meanwhile based on article 1 point 3 of POJK No.77/POJK.01/2016, the information technology based on lending service is the implementation of financial services to arrange a meeting among lenders with the recipient of the loan in order to construct a lending agreements in rupiah currency directly through electronic systems by using the internet network. This platform generally to support for the development of microcredit or Small Micro Entrepreneurs (hereinafter referred to as SMEs) in capital and investment. The method of the information technology based on lending service is expected to be a solution for SMEs and new start-up business.

At a glance, Islamic crowdfunding is simply a combination of:

1. The technology of crowdfunding,
2. The principles of business transaction which comply to Islamic law (the Islamic principles of muamalat), and
3. The modern contracts of the Islamic finance industry.

In Islamic perspective, each individual is bound by Islamic compliance by making the law of Allah (Islamic Shari'a) as a standard of action (miqyâs al-'amal). So it is not surprising that the scholars formulated the rules of shari'iyah (based on the

¹ Bryan A. Garner, *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, Texas, 2014, p.459.

² A Adam Ng, Abbas Mirakhor, and Mansor H. Ibrahim, *Social Capital and Risk Sharing: An Islamic Finance Paradigm*, Palgrave Macmillan, New York, 2015, p.117.

texts of the Qur'an and al-Sunnah): Al ashlu fiil af'al taqhayyudu bi hukmillah (The law of human action is bound by Allah's law). Therefore, a Muslim, especially a community that engages in Islamic crowdfunding, must know the Islamic view of an action before he does it whether it is obligatory, sunnah, mubah, makruh or haram and acts in accordance with the views of Islamic law.

According to Ishol, that Islamic financial transactions are based on contracts that make these transactions considered valid in Islamic law. Therefore, the validity and permissibility of a contract are used to analyze a variety of contracts and modern products developed through Islamic financial transactions, as stated as follows: *“Islamic financial transaction has its basis as being an ‘uqud (contracts) which are regarded as valid activities in Islamic law. Therefore, the validity and permissibility that inundated the ‘uqud also inure to the favor of variety of modern contracts and products being developed through the Islamic financial transaction.”*³

In order not to hesitate in the formation of the contract, then any business innovation that develops at this time must first be reviewed in relation to the validity of the contract or contract that he made. Attachment to Islamic law applies to parties both Muslim and non-Muslim parties who voluntarily submit themselves to submit to Islamic Law on contracts or sharia contracts that have been made. In a business transaction, the principle of kafah is needed, which means that from the beginning of the contract signing to the end of its implementation, it submits itself to the sharia, including the instrument of settlement of the dispute in the event of a sharia economic dispute in the future. Internet technology has changed the mechanism of business transactions and created new forms of business innovation and has new characteristics that are very different from the characteristics of previous forms of business transactions. Starting from the harmony and the terms of making a contract, the type of contract that will be made, until the dispute resolution process (from beginning to end) is expected not to violate sharia compliance and not categorized as prohibited/forbidden transactions. In other words, the formation of a business innovation contract, including Islamic crowdfunding is obliged to heed the rules of shara 'asy alasy syai' far'un 'an tashuwurihi", which means that legal assessment of a problem departs from the description of something.

The fintech company makes products divided into categories, such as e-money, loan based crowdfunding or lending, pledge, payment, reward and donation based crowdfunding, financial planning, capital market, internet banking, and comparison of financial services products. However OJK still builds regulation only limited to "lending service based fintech" scheme which is similar with "peer-to-peer lending"/"loan based crowdfunding" (hereinafter referred to as P2P lending).

Currently OJK only uses P2P lending service regulation on fintech. In the other words, OJK provides regulation in order to register, to manage, to monitor or to control fintech model with P2P lending system only, whereas there are many kinds of platform of fintech type. P2P type is faux pas par excellence in fintech in perspective of economic liberalism and capitalism due to it is the most popular in public demand and more profitable or low in risk. This type of Fintech has a function as an intermediary for those who want to lend money and those who need to borrow money. Fintech model brings economic and social impacts globally in order to financing and

³ Abdullahi Saliu Ishol, et al, "Al-'aqd Al-sahih: The Legal Basis for Determining the Validity of Islamic Financial Transactions", *International Journal of Economics and Financial*, Vol 6, 2016, p.143.

lending matter.⁴ With this platform is easier than bank mechanism/procedure for the person or community to apply lending/financing which bank mechanism is more complicated and difficult for the community, especially for the start up business/SMEs.

Moreover, the OJK regulation is still applicable to the common fintech, not for sharia fintech. This is a major obstacle to sharia fintech related to registration, regulation and supervision considering sharia fintech is highly demanded by the muslim majority of Indonesia. Recorded shariah bank financing and sharia business unit amounted to Rp.282.1 trillion per February 2018. OJK records, the value fell 1.3% compared to year-end (year-to-date /ytd) of Rp.285.7 trillion. Fintech has disbursed a loan of Rp.4.47 trillion as of March 2018. In total, the financing of the Islamic finance industry is much higher than fintech. However, loan growth is much faster fintech, ie 74.6% ytd.⁵

In relation to characteristic of crowdfunding, Hermer⁶ differentiated based on the background, namely crowdfunding as an intermediate body, as a business body (for profit/commercial) and as a non profit body (not to profit). Piotr Pazowski⁷ divided in to four types of platform of crowdfunding as following:

- a. investment crowdfunding/equity based crowdfunding
- b. lending based crowdfunding
- c. reward based crowdfunding
- d. donation based crowdfunding.

Meanwhile, in an official website of FCA, each definition of crowdfunding platform is being explained as followed: (i) loan-based crowdfunding: It's also known as peer to peer lending, here the customer lending money as a reward of interest payment and capital repayment from time to time; (ii) investment-based crowdfunding: customer invest directly or indirectly in a new business or settled business by buying investment such as stock or debenture; (iii) donation-based crowdfunding: persons who is giving money to a company or organisation they support, (iv) pre-payment or rewards-based crowdfunding: persons who is giving money as a reward over appreciation, services or products (like a concert ticket, innovative products computer games).⁸

The development of the Islamic crowdfunding platforms and products may therefore more promote risk sharing activities.⁹ In Fatwa DSN MUI No.117/2018, there are several types of *aqad* and their mechanisms of sharing risk which is related to the Islamic financial technology transaction, namely:

- a. A Sale and Purchase Agreement is a contract between the seller and the buyer that results in the transfer of ownership of the exchanged object (goods and prices).

⁴ Akhmad Ghozali Amrulloh, *Pandangan Regulasi Penggunaan Sistem Peer To Peer Lending Pada Financial Technology*, https://www.academia.edu/35712904/PANDANGAN_REGULASI_PENGGUNAAN_SISTEM_PEER_TO_PEER_LENDING_PADA_FINANCIAL_TECHNOLOGY.

⁵ <https://keuangan.kontan.co.id/news/ojk-aset-bank-syariah-tumbuh-2065-per-februari-2018>.

⁶ Joachim Hemer, *A Snapshot on Crowdfunding*, Fraunhofer Institute for Systems and Innovation Research ISI, Karlsruhe, 2011, p.12.

⁷ Piotr Pazowski, "Economic Prospects And Conditions Of Crowdfunding", *International Conference: Human Capital without Borders: Knowledge and Learninf for Quality Life*, Portoroz, Slovenia, 2014, p.1081.

⁸ <https://www.fca.org.uk>,

⁹ A Adam Ng, Abbas Mirakhor, and Mansor H. Ibrahim, *Social Capital and Risk Sharing: An Islamic Finance Paradigm*, Palgrave Macmillan, New York, 2015, p.120.

- b. Ijarah contract is a contract of transfer of usufructuary rights on a certain item or service within a certain time by payment of *ujrah* or wages.
- c. Musharakah contract: a cooperation contract between two or more parties for a particular business in which each party contributes venture capital funds (*ra's al-mal*) provided that profits are divided according to agreed ratio or proportionally, while losses are borne by the parties proportional
- d. Mudharabah agreement: a contract of cooperation between a capital owner (*shahibu al-maal*) who provides all capital with the manager (*'amil /mudharib*) and business profits are divided among them according to the ratio agreed in the contract, while the loss is borne by the capital owner .
- e. Qardh agreement : a loan agreement from the lender with the provision that the loan recipient must return the money he receives in accordance with the agreed time and method;
- f. A wakalah contract : a contract of delegation of power from the power of attorney (*muwakil*) to the recipient of the power of attorney (*wakil*) to accomplish certain legal actions which may be represented;
- g. The contract of *wakalah bi al-ujrah*: a wakalah contract which is accompanied by a reward in the form of *ujrah* (fee).

Furthermore, this fatwa stated several model of Information technology-based financing based on sharia principles that can be performed by service provider are:

Firstly, factoring financing; namely financing in the form of service for collection of receivables based on proof of invoice, either accompanied or without accompanied by bail (*qardh*) given to entrepreneur who have a bill to a third party (payor).

Secondly, financing procurement of third party ordered goods (purchase orders); namely financing provided to entrepreneur who have obtained orders or work orders for procurement of goods from third parties.

Thirdly, financing the procurement of goods for entrepreneur that sell online (online seller); namely financing provided to entrepreneur who conduct online buying and selling transactions at information technology-based trading service providers (market place/e-commerce platform) who are already working in partnership with the service provider

Fourthly, financing the procurement of goods for entrepreneur who sell online with payment through the provider of payment gateways; namely financing provided to entrepreneur who are actively selling online (seller) through their own distribution channels and payments made through payment authorization providers online (payment-gateway) which cooperates with the service provider.

Fifthly, funding for employees; namely financing provided to employees who need consumptive financing with a salary cut cooperation scheme through the employer institution.

Sixthly, community-based financing, namely financing provided to community members who need financing, with the payment scheme being coordinated through the community coordinator/management.

Meanwhile, based on Article. No.1 verse (25) in Act of The Shariah Bank, the definition of funding or the provision of funding or bill which is considered to be similar to that is in the form of:

1. Profit share transaction in the form of Mudharabah and Musyarakah;
2. Renting transaction in a form of *ijarah* or *ijarah muntahiya bittamlik*;
3. Trade transaction in a form of accounts receivable *murabahah*, *salam*, *istishan*;
4. Lending transactions in a form of accounts receivable *qardh*;

5. Service renting transaction in a form of ijarah;
6. Multi-service transaction.

This fatwa also contains provisions that are prohibited in sharia financing service based information technology, including *riba* (an additional given in the exchange of *riba* goods/*riba fadl* or additional that is agreed upon in the principal debt in return for the suspension of payment in absolute terms/*riba nasi'ah*); *gharar* (an uncertainty in a contract, either regarding the quality or quantity of the object of the contract or about its submission); *maysir* (every contract that is carried out with unclear objectives, and inaccurate calculation, speculation, or profit); *tadlis* (the act of hiding the object's contract disability done by the seller to trick the buyer as if the object of the contract is not defective); and *dharar* (an action that can cause harm or loss to another party).

From the explanation above it can be concluded that Islamic crowdfunding or crowdfunding shariah or shariah information technology based crowdfunding contain deflation as a crowdfunding platform designed to fulfill shariah principle, which is an effort to collect/raising funds collectively (individual and/or organisation) in funding a project of start up businessman/SMEs, giving financing both personal or business, or other necessities over internet platform which is in line with shariah principle. Islamic crowdfunding will use shariah contracts between giver, organiser site and receiver. In addition to that the object and the aim of financing which is funded are also things that have to fulfill shariah principles that excluding gambling, interest, *gharar* and *batil* substance. Undeniably, due to insufficient regulation related Islamic crowdfunding in Indonesia, some financiers and SMEs are still unsure regarding to the definition, regulation, risk and its mitigation, legal protection, supervision of the Islamic crowdfunding platform. Therefore many of muslim community who have willingness to joint this system constrained understanding related to the application of applicable principles, including the implementation of the proportionality principle.

This paper analyzed the implementation of the proportionality as one of the most important legal principle in contract law perspective in Islamic crowdfunding transaction. More over this paper compared among proportionality principle in contract law perspective and *al musawah* principle as one of legal principle in Islamic contract (Islamic *uqud*).

II. RESEARCH METHOD

The study of normative law was used, considering the exclusive character of the study itself which method is normative. This method was used to analyze the correlation of legal regulations, jurisprudence, and contracts. Doctrinal study, however, was used to analyze the principle of law, the literature of law, along with scholars' views of law that have high qualification (doctrine) and comparison of law.

As this study is a normative research, *statute and conceptual approaches* were used. Statute approach was applied by examining the legislation and other related legal regulations on intended legal issue. It is a approach using legislation and regulation.¹⁰

III. UNDERSTANDING OF PARTNERSHIP (AL MUSHARAKAH)

Based on the National Sharia Council-Indonesian Ulema Council Fatwa No.114/DSN-MUI/IX/2017 Concerning the Syirkah Agreement, what is meant by a syirkah contract is a cooperation contract between two or more parties for a particular

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2005, p.55-56.

business in which each party contributes funds/business capital (Ra's Al-Mal) provided that profits are divided according to the agreed ratio or proportionally, while losses are borne by the parties proportionally. Al Musyarakah or in the fiqh books is often referred to as Syirkah, in language it means mixed. As for the term, al Musyarakah is a partnership cooperation contract to increase the value of assets owned by each partner by integrating capital and resources.¹¹

The transaction process which in the term fiqh mu'amalat is called 'aqd is the plural word al-'uqud. There are several principles of al-'uqud that must be applied when parties conduct transactions in Islamic crowdfunding. The principle of justice, in the sense that both parties that conduct economic transactions (banks and customers) must apply and be treated fairly in the context of broad and concrete understanding. This is based on a number of Al-Qur'an verses that highly uphold justice and anti-tyranny. Including tyranny in economic terms symbolized by usury. Basically, the parties have the freedom to set the conditions stipulated in their contract, as long as they do not violate the provisions that are generally applicable and do not conflict with the moral spirit of the economy in Islam. This is in line with the hadith of the Prophet Muhammad. History of al-darquthni which means: "The Muslims (bound) with the requirements they have set (agreed), except the conditions that justify the illegitimate or forbid the lawful".

Some of the definitions of al musyarakah are expressed by the fuqaha, although they are expressed by different editors, but the essence contained in them is the same, namely the bond of cooperation between people who are associates in terms of capital and profits. Followings are the various forms of partnership (Syirkah):

a. Syirkah al Inan

Syirkah al Inan Is a partnership contract between two or more people that establishes a business rights partnership (tasharruf) in a capital (maal) in percentage (syuyu') with a system of profits and losses borne jointly. The purpose of Syuyu 'here is that the rights of each partner to capital are not determined physically, but based on percentages. For example, 50% of total capital. By law, syirkah al Inan is acknowledged by the ulama, because besides being based on naql's argument, the need for (hajjah) trade on a large scale is impossible without involving many investors as capital owners. Moreover, the substance of akadsyirkah is the legalized contract of wakalah. That is, each syarik (the partnering party) represents each other free of charge to their partners in managing their capital, to get mutual benefit.

b. Syirkah al Abdan

Syirkah al Abdan is a partnership contract between two or more people to do ('charity) a project with a profit system shared together according to the agreement. Syirkah al abdan only involves labor (charity), without involving property (maal). For example, A is a designer architecture, B is a building construction expert, and C is an installation expert. Then the three of them worked together to work on a project. By law, this syirkah al abdan is disputed by scholars. According to Imam Abu Hanifa, it is absolutely permissible, according to Imam Malik, if the work is single, and according to Syafi'iyah it is not permissible. Shafi'iyah scholars do not allow this syirkah al inan because according to them there is no syirkah term in charity.

c. Syirkah al Mufawadlah

Syirkah al Mufawadlah is a partnership contract between two or more people in a particular business field that involves work (charity) and capital (maal) with a system of profit and loss sharing. This Syirkah al Mufawad is a combination of al inan

¹¹ Syaikh Sulaiman Al bujairami, *Hasyiyah al bujairimy ala al khathib* (Damaskus: Dar al Kutub al Ilmiyah, tt), Juz III, p.40.

and syirkah al abdan. In legal legality, Syirkah al Mufawad was disputed by the ulama. According to Imam Abu Hanifah and Imam Malik, it is legal. Because in Syirkah al Mufawad it contains the contents of bai 'and wakalah, that is, each partner sells his capital assets to another, and bestows management of the assets (nadhar) of the assets under his hand.¹² Whereas according to Shafi'iyah it is not valid, for two fundamental reasons. First, the legality of the syirkah contract must be built on the basis of a percentage (syuyu') of capital (ikhthilath), thus allowing the merger in profit. Because profit is a branch (furu') of the main root (usul) in the form of capital. In the contract of syirkah al mufawad, there was no merger of capital (ushul), so the merger of furu 'profit was not valid.¹³ Second, impose compensation (dlaman)¹⁴ on partners for risks that are beyond their responsibility.

d. Syirkah al Wujud

Syirkah al Wujud is a partnership contract between two or more people who have popularity or figure that can boost the sale value of a commodity. What is meant by popularity here is the party that has gained public trust (consumers or producers) in the business world because of their achievements, management, or professionally work.¹⁵ By law, the Syirkah al Wujud contract was disputed by the ulama. According to Hanafiyah and Hanabilah it is permissible with two arguments. First, based on the initial principle, all muamalah are permitted unless there is an argument which prohibits them. And here there is no argument that prohibits this. Second, the hajah factor is urgent, it is still possible to legalize it through the concept of implicit representation (*wakalah dlimni*).¹⁶

IV. ISLAMIC CROWDFUNDING AS PARTNERSHIP CONTRACT (MUSHARAKAH)

Islamic crowdfunding is a form of business transaction in the form of partnership (musarakah) was born from the syirkah akad or the syirkah contract. If analyzed based on the National Sharia Council-Indonesian Ulama Council Fatwa No.114/DSN-MUI/IX/2017 Concerning the Syirkah Contract, then what is meant by parties in Islamic crowdfunding is called syarik, which has the definition of partners or parties that carry out the syirkah contract, either in the form of a person (syakhshiyah thabi 'iyah/natuurlijke persoon) or equivalent to a person, or a legal entity (rechts person). The form of funds collected online is referred to as Ra's Al-Mal, namely the business capital in the form of assets united by the origin and the sharia. The funder gives syirkah amwal, namely syirkah, whose ra al-mal is in the form of assets in the form of money or goods. Whereas the recipient partners offer Syirkah 'Abdan, where Syirkah, which Ra's Al-Mal is not in the form of assets, can be in the form of design ideas, project ideas, forms of business or work skills or other intellectual abilities, including a commitment to fulfill Shirkah's obligations to other parties based on agreement or proportion. The Islamic crowdfunding service provider is a party that bridges between funders and recipients of funds through electronic transactions. The profit in this provision is known as the ratio term or profit sharing ratio. The ratio is divided into two types, namely the proportions which are based on the portion of Ra's

¹² Al Mawardi, *al Hawi al Kabir* (Beirut: Dar al Kutub al Ilmiyah, tt), Juz. VI, p.473.

¹³ Musthafa al Bugha, et al, *Al Fiqh Al Manhajy Ala Madzhab Al Imam Al Syafi'i* (Beirut: Dar al qalam, 1992), Juz. III, p. 219.

¹⁴ Syaikh Sulaiman al Jamal, *Hasyiyah al Jamal* (Beirut: Dar al Fikr, tt), Juz. III, p.393.

¹⁵ *Ibid.*

¹⁶ Al Imam Abu Zakariya al Nawawi, *Majmu' Syarh Al Muhadzdzab li al Syairazi*, Juz. I, p.350.

Al-Mal parties (Sharik) in Shirkah in dividing profits and losses. On the other hand, there are agreements based on agreement and not on the basis of Ra's Al-Mal's share of profits. Expected returns that are usually found in conventional crowdfunding are clearly prohibited in Islamic crowdfunding because they are categorized as usury.

In Islamic Crowdfunding, the term superiors or subordinates and employers are not known. Both capital providers, as well as those who receive capital, as well as Islamic crowdfunding service providers have equal importance in accordance with their respective functions. Yudha Hernoko in his dissertation summary said that the dimensions of commercial business contracts that emphasize the aspect of respect for partnership and business continuity (efficiency and profit oriented) no longer dwell on mathematical balance. The relationship construction of the parties in the commercial business contract actually emphasizes the proportionality of the exchange of rights and obligations among the perpetrators. With the acceptance of universal principles such as good faith and fair or honest transactions (good faith and fair dealing; *redelijkheid en billijkheid*; propriety and fairness) in business practices, proving that what is preferred is to guarantee that differences in interests between the parties have been arranged through a proportional burden sharing mechanism, regardless of the proportion of the final results received by the parties.¹⁷

V. THE AL MUSAWAH PRINCIPLE IN ORDER TO REACH JUSTICE AND PROPORTIONALITY (AL 'ADL WA TAWAZUN)

In accordance with the current provisions (Regulation of the Central Bank of Indonesia Number 10/16/ PBI/2008 concerning the Amendments to Regulation of the Central Bank of Indonesia Number 9/19/PBI/2007 concerning the Implementation of Sharia Principles in Fund Collection Activities and Funds Distribution and Sharia Bank Services), fund raising activities, fund distribution, and bank services are not limited to certain parties or sharia companies only. As long as the activities carried out in compliance with sharia the principles carried out by fulfilling the basic provisions of Islamic law include the principles of justice and proportionality principles (*al 'adl wa wa tawazun*), *kemaslahatan* (*maslahah*), and universalism (*alamyah*) and do not contain *gharar*, *maysir*, *riba*, wrongdoers and objects unclean, then the activity is permitted by provisions. *Tawazun* is the attitude to not discriminate and deal with or solve problems according to the functions and proportions of the parties. The principle of *al musawah* aims to achieve *tawazun* where the essence includes the balance of material and spiritual aspects, private and public aspects, the financial sector and the real sector, business and social, and the balance of aspects of utilization and preservation. Sharia transactions do not emphasize the maximization of corporate profits only for the benefit of the owner (shareholder). So that the benefits obtained are not only focused on the shareholders, but on all parties who can feel the existence of an economic activity. The application of proportionality principles in Islamic banking can also be applied in Islamic crowdfunding, which aims to create the following principles: (1) Justice, namely sharing profits on the basis of real sales according to the contributions and risks of each party. (2) Partnership, which means the position of investors (depositors), and fund users, as well as the financial institutions themselves, as equal as business partners who work together to benefit. (3) Transparency, Islamic financial institutions will provide financial statements in an open and continuous manner so that investor customers can find out about the condition of their funds. (4)

¹⁷ A. Yudha Hernoko, *Asas Proporsionalitas Sebagai Landasan Pertukaran Hak Dan Kewajiban Para Pihak Dalam Kontrak Komersial*, Universitas Airlangga, 27 Agustus 2007.

Universal, which means that it does not differentiate between ethnicity, religion, race and class in society in accordance with the principles of Islam as rahmatan lil alamin. In Islamic financial institutions, including one of the Islamic crowdfunding systems, making justice as the main goal in muamalah. According to the Qur'an, Q.S. al-Hadid (57) verse: 2517, creating justice is the main goal why Allah SWT. Sending His messengers to the earth. Al-Qur'an also regards the justice together with piety to Allah SWT (Q.S. Al Maidah (5) verse: 8). This shows how important the position of justice in Islamic sharia is. Lawyers in Islamic history have agreed that justice is the most important goal of maqashid al-shari'ah.

Islam is absolutely unambiguous about eradicating all forms of injustices, inequity, exploitation, oppression and wrongdoings.¹⁸ Sutan Remi Sjahdeini mengemukakan pendapat dari Lee & Delta mengenai tujuan dalam prinsip kepatuhan syariah dalam Islamic finance dimana Islamic financial system, therefore, cannot be introduced **merely by eliminating riba** but also by adopting the Islamic principles of social justice and introducing laws, practices, procedures and instruments which help in the maintenance and dispensation of justice, equity and fairness.¹⁹

Liebesny stated that "Islamic law is basically divine law".²⁰ Sri Edi Swasono argued that the syariah economic system places to the ukhuwah, namely placing more importance to the common interest and justice. It is an economic system based on religious morality, is oriented to secular and spiritual interest, it is discriminatory, not exploitative and not predatory, is non usurious, and rejects the abhorrent principle "to get something out of nothing".

The syariah is a legal system that is based on divine revelation. The basis of the syariah is wisdom and advantage for societal welfare. In this life and the life here after. This advantage is fully manifested in justice, brotherhood, happiness, affection, prosperity and in the sense of goodness. Anything that strays from justice to oppression, from brotherhood to animosity, from affection to violence, from happiness to misery, from benevolence to greed, from prosperity to poverty, from wisdom to ignorance, and from ukhuwah (togetherness) to firqoh/self interested, are departure from syariah.²¹

VI. THE APPLICATION OF PROPORTIONAL PRINCIPLE IN ISLAMIC CROWDUNDING

According to Agus Yudha Hernoko, the characteristics of the principle of proportionality in a contract are:

- a. Contract containing the principle of proportionality within is a contract with acknowledgement on equal rights, opportunities, and chances to each of the contractans to determine an equitable exchange for them. Equality does not mean "equal result" but more refers to the position of each party expecting "the equitability" on rights and function, the principle of equitability on rights;

¹⁸ Mazliza Mohamad, Management Of Multi Storey Buildings: Islamic Perspective, *Journal of Contemporary Islamic Law* Vol.1 (2), Bangi, 2016, p.111.

¹⁹ Sutan Remi Sjahdeini, *Perbankan Syariah: Produk-Produk dan Aspek-Aspek Hukumnya*, Jakarta Agung Offset, Jakarta, 2010, p.146.

²⁰ Herbert J. Liebesny, Religious Law and Westernization in Moslem Near East, *The American Journal of Comparative Law*, Vo.2 No.4, 1953, p.492.

²¹ Sri Edi Swasono, "Islamic Economics within The Pancasila", Artikel pada International Seminar on Implementation of Islamic Economics: Annual Meeting of Indonesian Economics expert Association, Surabaya, 2008, p.2.

- a. Lying on equitable rights, a contract with the principle of proportionality is a contract using the authorship of each contractan as the basis to determine which substance is equitable and which one is not for them (the principle of authorship);
- b. A contract with the principle of proportionality is a contract with capability to ensure the implementation of rights and proportionally distribute the obligations in simultaneous manner for all the contracting parties. Noted that equitability does not always mean that every individual should gain something with equal amount. In this context, it is possible to have different result for each party. The principle of proportional distribution over the rights and obligations to each of the contracting parties should point to a fair exchange (the principle of proportional distribution);
- c. In terms of a disputed contract, the weight of evidence –the level of fault or other related issues- should be measured based on the principle of proportionality in order to get an elegant and win-win solution.

Moreover, Peter Mahmud Marzuki argued that “The principle of proportionality with the term “*equitable contract*” along with the element of “*justice*” and “*fairness*”. The term “*equitability*” shows an equitable and fair relationship. That is, the contractual relationship is basically held in proportional and fair manner. Referring to the principle of *aequitas praestacionis* –the principle that requires a guarantee of equitability- and the tenet of *justum pretium* –legal-based propriety, it is undeniable that the equality of both parties does never exist. Paradoxically, the contracting parties are likely to have inequal condition on which they are engaged in a contract. The inequality, however, may not be used by the dominant party to unproportionally impose their interest toward the minor. In this context, the principle of proportionality refers to *equitability*.

Proportional in order to apply the proportionality principle, it does not mean the same, due to the position of the parties is different, it is impossible to impose exactly the same. Each party has their respective roles and functions as outlined in the contract. Based on a mutually agreed contract, the parties are wrapped in a partnership atmosphere, there is no higher position between each other, but neither is the exact same function of each party. All carry out their functions proportionally. Proportion here means that each party understands their respective functions. Rights and obligations can be created in harmony.

The proportionality principle is equated with the principle of Al Musawah. The application of the proportionality principle is the implementation of the standard contract clause in Islamic crowdfunding starting from the pre-preparation contract, implementation of the contract and dispute settlement stages. Some of the vulnerable clauses are not in accordance with the principle of proportionality, namely the risk and insurance clauses, negative covenant clauses, and default clauses that tend to harm one party.

These followings are the author's analysis related to the application of the principle of proportionality in Islamic crowdfunding in Indonesia:

- a. The application of the principle of proportionality at the beginning of the formation of exoneration clause in the the contract (pre-preparation contract)

The electronic contracts used in Islamic crowdfunding are standard agreements that have been made and provided by Islamic crowdfunding services as one of the financial technology services that bridge the capital provider with the recipient of capital. In practice, providers of Islamic crowdfunding have standardized a clause on affirmative covenants that contains the accumulated obligations of recipients of funds.

Proportional principles are applied, so the clauses contained in the standard agreement can be more flexible and must be based on the agreement of both parties stated in the Islamic crowdfunding contract. In the pre contract, from the beginning of filling out the application form online, the parties must submit to the principle of *al musawah* (equality). There should be no party that is superior to the others. Every individual has the same nature of freedom of transaction and is protected by Islamic law. Although, freedom here is still limited so that it remains in accordance with the teachings of Islam and not freedom in the style of the western economic system (capitalism) which has proven to inflict a lot of injustice, especially Islamic countries that use this western system of freedom (capitalism). In the economic field, for example, economic freedom gave birth to a capitalist system based on the principle of open society *lizes fire*. Where each individual is justified in collecting as much wealth as possible without the need to share with the poor. In addition, market monopoly is also justified on the grounds that the market must run openly and no one should intervene in the market, because intervention in the market means the same as violating freedom.

The application of the principle of proportionality needs to be understood by each party since the beginning of the contract formation (pre-preparation contract), due to in fact, Islamic finance systems often generally only bring benefits to large companies and forget small players such as SMEs (Small and Micro Entrepreneurs. Islamic-based investments (other than bank deposits) are mostly carried out only by wealthy individuals. Although Islamic economics Focusing more on the support and involvement of the wider community, the contribution of this sector to SMEs and social projects is still minimal, with around 80% of Sharia financial assets consisting of bank loans, Sharia Banking must also face increasingly stringent regulations, similar to the regulations faced by conventional banks. The focus of banking to reduce risk means that lending to SMEs, which do not have fixed collateral and a long operating history, is not a priority. Big companies are parties that tend to take advantage and only a little — maybe not even exist — the impact is trickling down to the level SMEs, on the contrary, along with p As the growth of large companies becomes bigger, they will evict small businesses from competition. Therefore, Islamic crowdfunding is a solution for SMEs.

By combining Islamic finance systems with crowdfunding, there is the potential to deal with financing problems faced by SMEs. Islamic crowdfunding allows collective cooperation between individuals to combine resources to support a goal, project, or business they believe in. This pro-society principle can be applied to support those who need investment in real economic activities — namely SMEs. In addition, Islamic Finance emphasizes the distribution of wealth. This is evident in *maqashid sharia* (the objectives of Islamic law), which states that resources from the excess sector should be transferred to a sector that is deficient, so that wealth can circulate well and realize the welfare of humanity. Islamic crowdfunding has the aim of releasing investment from the community and channeling it to businesses that need financing the most. Integration between these two concepts can support the growth of society as a whole through increasing entrepreneurial activities, while eroding social inequality. Moreover in Islamic crowdfunding system offers a form of ethical financing and it is not only limited to Muslims. The focus is on values and ethics — such as community development, honesty, and justice — that are universally accepted. For example, a company that wants to fund activities that contribute to environmental pollution will not appeal to the public, especially on an Islamic crowdfunding platform. Islamic crowdfunding is based on sharia law, which is believed by Muslims as a law that protects all humanity. This filter, among others, prohibits the use of the

interest system and excessive risk taking or uncertainty. The application of the principle of proportionality from the beginning, will lead to the achievement of justice and negate the form of tyranny among the parties, all must be equally willing and fair and proportionate. There will be no occurrence of usury, a project that facilitates libel, projects that contain services or objects that are haram, cheating, dishonesty, covering up defects in goods, reducing scales, and using goods without permission.

b. Application of the principle of proportionality on the profit sharing ratio (nisbah)

Islamic crowdfunding was born by the syirkah contract, so the ratio for the results is subject to the provisions of the syirkah contract as stated in the DSN-MUI Fatwa No.114 Year of 2017. This fatwa clearly states that in the syirkah contract, there is a cooperation agreement between two parties or more for a particular business. This collaboration aims to achieve profits that are divided according to the agreed ratio or proportionally. In Islamic crowdfunding, there is cooperation between the parties in the business, namely the benefits and losses borne together. Profit results in musharaka are also regulated, as well as in mudarabah, according to the principle of profit and loss sharing (profit or principle) or as the term is used by Law No. 10 of 1998 concerning Revenue Sharing. Profits are divided according to pre-agreed proportions, both parties carry the risk of financial loss.

c. Application of the principle of proportionality in handling losses/risk sharing

Furthermore, the fatwa added that not only profits, but also losses borne by the parties proportionally. The expected justice as a result of the application of the proportionality principle is that there is no tyranny that is felt by the parties involved, all must be equally willing and just according to the measure. hence, from this side the transactions that occur will glue the ukhuwah of the parties involved. Fraud, dishonesty, covering up defects in goods, reducing scales are not justified, or small things like the use of goods without permission. Application of the principle of proportionality in handling losses/risk sharing. Furthermore, the fatwa added that not only profit sharing, but also sharing losses was born by the parties proportionally. The expected justice as a result of the application of the proportionality principle is that there is no tyranny that is felt by the parties involved, all must be equally willing and just according to the measure. hence, from this side the transactions that occur will glue the ukhuwah of the parties involved. Fraud, dishonesty, covering up defects in goods, reducing scales are not justified, or small things like the use of goods without permission.

d. The application of the principle of proportionality in establishing the function of the Sharia Supervisory Board in the Islamic crowdfunding industry

Every sharia financial industry is required by the sharia supervisory board, but until now there has been no provision that regulates the duties and authority of the Sharia Supervisory Board (Dewan Pengawas Syariah, hereinafter refers to DPS), both related to aspects of professionalism, membership, double positions, or other aspects of overseeing Islamic crowdfunding. Proportionality of the DPS function is a unity in the Islamic finance industry, including in the Islamic Crowdfunding industry, it is necessary to harmonize the provisions related to DPS in a proportional manner so as not to overlap authority.

e. Application of the principle of proportionality in terms of dispute resolution.

If there is a future dispute regarding the failure of the implementation of contractual obligations, then the judge (if through litigation) or the party handling the dispute in a non-litigation manner must adhere to the application of the principle of proportionality in assessing the burden of the obligations of the parties to the contract. M. Yahya Harahap in argued that proportionality in providing evidence is relevant,

given that, in legal studies, any reasonable evidence has never been found and obtained as how logical and definite the evidence is in exact science. In the relation to the weight of evidence, applying the principle of proportionality is helpful to justify the judgment of the intended issue, lying on the principle that judges are not allowed to do either bias (the principle of fair trial) or partial bias (the principle of impartiality-no bias). Additionally, the judge is required to submit the weight of evidence toward the disputing parties in fair and proportional manner.

Possible disputes in Islamic crowdfunding can occur if they occur:

- a. The business loss (*al-khasar*) *musyarakah* is the result of business, where the amount of business capital (*Ra's al-ma*) is invested experience a decrease or amount of capital and costs, where costs exceed the amount of income.
- b. One party, some parties or parties do *At-ta'addi*, which is doing an act that should not be done.
- c. The existence of *At taqshir*, namely one party, some parties or parties do not carry out an act that should be done.
- d. There was *Mukhalafat asy-syuruth* where one party, some parties or parties violated the content and/or substance or conditions agreed in the contract.

The principle of proportionality should always frame the understanding of business people in the entire contract process in Islamic Crowdfunding, both in the pre-contractual stage, contract formation and contract implementation, up to the stage of dispute resolution.

Conclusion

The application of the principle of proportionality in Islamic crowdfunding in Indonesia *inter alia*:

- a. The application of the principle of proportionality at the beginning of the formation of exoneration clause in the the contract (*pre-preparation contract*);
- b. Application of the principle of proportionality on the profit sharing ratio (*nisbah*);
- c. Application of the principle of proportionality in handling losses/risk sharing;
- d. The application of the principle of proportionality in establishing the function of the Sharia Supervisory Board in the Islamic crowdfunding industry;
- e. Application of the principle of proportionality in terms of dispute resolution.

The characteristic of Islamic crowdfunding contract is more than a partnership type of commercial contract, more over the relationship status among contracting parties is not like employer and employee. The proportionality as a principle that underlies the rights and obligations among the parties proportionally in every clauses as a part of the whole contractual process. In assessing contractual relationships, especially commercial business contracts, including the Islamic crowdfunding contract, criteria for the distribution of rights and obligations cannot be used according to mathematical balance. The principle of proportionality opens up opportunities for position imbalances provided that the exchange of achievements takes place fairly and proportionally. The principle of proportionality places the division of rights and obligations realized in the whole process of contractual relations, both in the pre-contractual phase, contract formation and contract execution (*pre-contractual, contractual, post contractual*). Proportional principles are very oriented to the context of the relationship and the interests of the parties. This principle is applied in order to maintain harmonious relations between the parties so that they are conducive and fair.

This is in line with the principle of Al Musawah in the Sharia contract which aims to achieve justice and proportionality (al ‘adl wa tawazun).

Suggestion

The parties in Islamic crowdfunding are expected to apply this principle of proportionality as a basis for: (i) guaranteeing the exchange of rights and obligations in contracting, (ii) the rules of the game in the business transactions of the parties, and (iii) as a benchmark for the existence of the contract. The principle of proportionality in Islamic crowdfunding is expected to be the main principle understood by the cyber business community in creating an ecosystem that is conducive to conducting transactions electronically.

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