# The Protection of The Rights of Musyarakah Guarantee Owner Through Judge's Decision

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***Abstract***
In this context, sometimes there is a disparity in decisions between those who ratify the execution of guarantees and auctions only based on the fact that the customer has defaulted by not paying the installments, and there are judges who consider the negligence factor whether it was intentional by the customer or beyond the ability of the customer, so it is the same case namely the existence of a default, but the decision is different due to different interpretations of the concept of negligence in the Indonesian bank regulations or the DSN MUI fatwa. This research is to answer three questions in the study, namely: (1) What is the basis for consideration and legal reasoning by the judges in resolving cases of disputes over the execution of guarantees in *musyarakah* financing? (2) Why does the decision disparity occur in handling disputes over the execution of guarantees in *musyarakah* financing? (3) Has the construction of the judge's decision provided protection for the rights of the owner of the guarantee in *musyarakah* financing? This type of research includes a variety of legal research with a normative juridical study pattern. To answer the problems in the research, the author examines, analyzes and strengthens the argument by using the theory of legal discovery and the theory of justice. The approach used in this research, namely the case approach is used to examine, explore, and examine judge decisions and the philosophical approach is used to explore in depth legal issues regarding the execution of Musyarakah guarantees from various aspects to explain in depth the concept of negligence so as to protect the rights of customers as guarantee owners. The results of this study indicate, firstly, in providing legal considerations and reasoning

in the decision on the execution of musyarakah guarantees, the judge based on two different tendencies. Some judges apply legal norms as they are without interpreting and others carry out interdisciplinary interpretations. Second, disparities in decisions arise due to (i) differences in interpreting statutory provisions which give rise to different methods of legal discovery and interpretation (ii) differences in assessing evidence and (iii) differences in the dynamics of thinking due to differences in understanding the meaning of law. Third, the protection of the rights of the guarantee owner in the construction of judge's decisions is still diverse.

## I. Introduction

*Musyarakah* is one of the sharia banking products in which the customer and the bank both commit themselves to a partnership for business and/or capital with a profit or loss sharing system according to their respective portions. Like *mudharabah, musyarakah* was originally a form of contract based on trust, and not a compensation contract or based on accounts payable. Fatwa of the National Syari'ah Council of the Indonesian Ulema Council (hereinafter abbreviated as **DSN MUI** fatwa: in **Indonesian**) Number 08/DSN-MUI/IV/2000 concerning Musyarakah Financing states that in principle, in Musyarakah financing there is no guarantee, but to avoid deviations, Sharia Financial Institutions (hereinafter abbreviated as **LKS: in Indonesian**) can ask for guarantees from customers. Furthermore, regarding the disbursement of guarantees in musyarakah financing, Bank Indonesia Regulation (hereinafter abbreviated as **PBI: Indonesian**) Number 7/46/PBI/2005 in Article 8 letter o states:

*Banks can ask for guarantees or collateral to anticipate risks if the customer is unable to fulfill the obligations as contained in the Akad due to negligence or fraud.*

From the description above, the musyarakah financing guarantee can only be disbursed if the customer is proven to have made a deliberate mistake, negligent, or violated the things that have been mutually agreed upon in the contract.

The characteristics of collateral in *musyarakah* financing are different from guarantees in accounts payable. The guarantee in the *musyarakah* is held to bind the customer so that the customer does not do whatever he

wants to the capital invested by the LKS, so that it does not harm the LKS. While guarantees in accounts payable are held to replace unpaid debts.

In the course of the *musyarakah* business, there are often delays in payment of installments from the customer to the LKS. This condition triggers a dispute between the two, especially when the LKS wants to execute the customer's guarantee so that it is not uncommon for the dispute to go to the Religious Court.

When examining and adjudicating disputes between LKS and customers in musyarakah financing in which there is a problem of confiscation of collateral or confiscation of execution of the guarantee, the first thing that the judge must remember is that the guarantee in the musyarakah is not compensation for unpaid debts, but it is compensation for the negligence and intentional mistakes of the customer, causing losses to the capital invested by LKS. In other words, if the disbursement of collateral in accounts payable depends on the existence of a default/failure to pay installments from the debtor, then the disbursement of the guarantee in the musyarakah depends on the negligence and intentional mistake of the customer causing the default. So not all defaults due to default conditions can be used as the basis for disbursing Musyarakah guarantees.

Problems then arise when adjudicating the case for the execution of musyarakah guarantees, there is a judge's decision that does not consider whether the element of "customer error and negligence" has been fulfilled and only considers the condition of default/failure to pay. This kind of consideration is certainly different from the conception of "customer errors and omissions/*syarik*" which is known in the fiqh literature, because it seems to generalize the musyarakah contract with the debt contract.

Starting from the above, the problem in this research is focused on examining whether the legal reasoning in the decision on the execution of the problematic Musyarakah financing guarantee in the religious court has taken into account the interests and rights of the customer as the owner of the guarantee in which case it turns out that the default is not due to negligence on the part of the customer. To be more specific, this study will examine three decisions of the religious courts in the case of the musyarakah guarantee dispute. The three were selected to represent other cases that were settled in Indonesia's religious courts. It aims to map the types of legal reasoning and their impact on the protection of the customer's rights as the owner of the guarantee. The decision was the decision of the Medan Religious Court (hereinafter abbreviated as **PA Medan: in Indonesian**) Number 944/Pdt.G/2015/PA.Mdn dated March 10, 2016 which was later annulled by the Medan Religious High Court Decision (hereinafter abbreviated as **PTA Medan: in Indonesian**) Number 68/Pdt .G/2016/PTA.Mdn dated October 5, 2016, but later the decision of the first

instance was upheld by the Cassation Decision of the Supreme Court (hereinafter abbreviated as **MA: in Indonesian**) Number 624 K/Ag/2017 dated October 25, 2017.

In analyzing the problems above, the author will use the theoretical framework of legal discovery and the theory of justice. In this study, the author does not discuss legal findings in general but only limits on legal findings by judges (*rechtsvinding*). Paul Scholten states that the discovery of law by judges is something other than just the application of rules to events, sometimes and even very often it happens that the rules must be found, either by way of interpretation or by analogy or by *rechtssvervijning* (legal concrete)(N.E. Algra dan Van Duyendijk, 1983). This theory is used to analyze the legal discovery arguments contained in the decision on the dispute over the execution of guarantees in the financing of musyarakah, which are problematic because of the discrepancy between the expected conditions (*das sollen*) and the reality (*das sein*), namely the inadequate regulation that regulates the negligent criteria that are the conditions for confiscation. and the execution of guarantees in the financing of musyarakah is problematic, thus pushing judges out of the confines of the formal legal system to explore or formulate arguments in the form of legal considerations and reasoning in decisions. This is the urgency of using the theory of legal discovery. Meanwhile, the urgency of the theory of justice is to measure whether the legal findings by judges have reflected the principles of justice or not. Because a decision will be considered good if it is able to provide a sense of justice for the disputing parties. The theory of justice in this dissertation is based on the view of John Rawls which states that the main virtue in social institutions is justice, as is truth in the system of thought. A theory, however elegant and economical, must be rejected or revised if it is not correct, so laws or institutions that are not concerned with justice must be reformed if they are unjust (John Rawls, 1973). Then, the legal literature introduces the terms *legal justice, moral justice*, and *social justice*. Legal justice can be seen from the applicable laws and regulations and from the judge's decision which reflects the legal justice of the state in a formal form. Whether or not a statutory regulation or judge's decision is fair is largely determined by the representation of *moral justice* and *social justice* in it. At this point, judges are often faced with two difficult choices between prioritizing legal justice with moral justice and social justice. There comes a time when accepting the facts contained in the trial must ignore legal justice to achieve moral justice and social justice. The textuality of the musyarakah financing contract will be ignored in order to obtain justice for the owner of the musyarakah guarantee. For judges, the opportunity to find the law because the law has not accommodated moral justice and social justice is still very open. This is where the correlation between the theory of

justice and the theory of legal discovery "goes hand in hand" to reach a fair decision.

To complete this research, the author uses a normative juridical method with a statute approach and a conceptual approach. The primary, secondary, tertiary legal materials obtained by the author will be analyzed using the techniques of Grammatical Interpretation, Theological Interpretation, and Systematic Interpretation.

This paper begins with a discussion of the conception of errors and omissions in musyarakah financing according to Islamic jurisprudence, followed by a section that discusses three religious court decisions, analyzes the legal considerations used by judges in handling cases of problematic Musyarakah financing guarantee disputes and maps the typology of legal considerations and their impact on rights of customer rights

## II. Research Method

This type of research is included in a variety of research with a normative juridical study pattern. The choice of this type is because this dissertation lays down the law as a building system of norms, in the form of principles, norms, and rules of laws and regulations, court decisions, agreements, and doctrines (Diantha, 2016). In connection with the interests of this paper, the author uses a case approach (Dr. Jonaedi Efendi & Prof. Dr. Johnny Ibrahim, 2018). The case approach is used to examine, explore, and examine judges' decisions (Qamar et al., 2017) in cases of disputed executions of guarantees in musyarakah financing.

Based on the problems and approaches above, the steps in this research include determining legal materials, namely decisions within the religious courts in the issue of guarantee execution disputes in musyarakah financing. After obtaining the data, it is then analyzed using a qualitative juridical analysis method (Ali, 2021), namely after the data is obtained, it is described using sentences systematically and concluded by means of deductive thinking so that it becomes a general picture that narrows to a specific picture to be able to answer problems based on research results.

## III. Results and Discussion

### A. Musyarakah Guarantee in the Perspective of Islamic Jurisprudence

In fiqh, the concept of guarantee in *musyarakah* is the same as guarantee in *mudharabah*. Therefore, the fiqh opinion regarding the *mudharabah* guarantee is also the same as the opinion regarding the *musyarakah* guarantee. Regarding the law requiring guarantees in this *mudharabah* / *musyarakah* financing, the scholars differ into two groups, namely:

1. Opinions that prohibit guarantees in mudharabah contracts.

   This opinion is the opinion of the majority of fiqh scholars from the Hanafi, Malikiyah, Syafi'iyah, and Hanabilah schools (Ibnu Nujaim, 2013). Among the arguments used to support this opinion are:

   - In principle, *mudharib* (entrepreneur) is a person entrusted with the mandate to manage capital, and *mudharib* cannot be sued for compensation for the business (Al-Baji, 2009).
   - Requiring a guarantee to the *mudharib* will change the essence of the *mudharabah* contract from a contract based on trust to another contract that is not the essence of the *mudharabah* contract (Al-Baji, 2009).

     In his explanation, As-Sarkhosi said:

     المقصود بهذا العقد الشركة في الربح وكل شرط يؤدي إلى قطع الشركة في الربح بينهما مع حصوله فهو مبطل للعقد لأنه مفوت لموجب العقد.

     "*That which is meant by the essence of the mudharabah contract is a partnership in terms of profit. So if there are conditions that can break the profit partnership, then these conditions can cancel the mudharabah contract.*"(As-Sarkhosi, 2016)

     Then al-Baji also explained:

     أن عقد القراض لا يقتضي ضمان العامل, و إنما يقتضي الأمانة ولا خلاف في ذلك. فلذلك إذا شرط نقل الضمان عن محله بإجماع إقتضى ذلك فساد العقد والشرط.

     *"Mudharabah/qirodh contracts do not show dhomanul 'amil (compensation from entrepreneurs), because the impact of a mudharabah contract is the emergence of trust. Therefore, if the mudharabah contract requires a guarantee, then the mudharabah contract is damaged and the condition is void.*" (Al-Baji, 2009)

     (Al-Baji, 2009)

   - Requiring a guarantee in the mudharabah contract will instead change the *mudharabah* contract into a contract based on compensation or debt, and will change the position of the *mudharib* from being a representative entrusted with the mandate to manage mudharabah capital, to being a debtor who is obliged to provide guarantees, so that such conditions cannot be This is in accordance with the fiqhiyyah rules:

     العبرة في العقود بالمقاصد والمعاني لا بالألفاظ والمباني

     *The thing that is considered in the contract is the goal, not the wording.*

     The consequence of the fiqhiyyah rules above is that even though a contract is called a *mudharabah* contract, if the purpose is not like that of the *mudharabah*, then the contract cannot be interpreted as a *mudharabah* contract.
   - The application of guarantees as a condition for *mudharabah* is a form of *gharar* (deception) (Ibnu Rusyd, 2018). The guarantee in *mudharabah* is considered gharar, because when the *mudharib* loses in his business,

he will lose twice, namely the loss because he does not get wages for his efforts in managing the business capital, and the loss because he has to compensate for the loss of business capital with the guarantee.

2. Opinions that justify the existence of *mudharabah* guarantees.

This opinion is the opinion of a group of fiqh experts such as Imam Ahmad bin Hambal in one of his narrations which is *marjuh* (weak), and ash-Syaukani. Among the arguments for this opinion are:

- Hadith of the Prophet:

المسلمون على شروطهم (رواه أبو داود)

"*Muslims are obliged to obey the agreement they have agreed to.*" (HR. Abu Daud) (Abu Daud, 2014)

The legal *istinbath* of the hadith above is that if the owner of the capital makes an agreement by requiring a guarantee that must be submitted by the *mudharib,* and the *mudharib* agrees, the terms of the agreement must be implemented.

- The willingness of both parties to enter into a mudharabah agreement is the basis for the application of guarantees in a *mudharabah* contract, so that there is no prohibition on the issue of such willingness. Imam Ash-Syaukani said:
  "(Guarantee in mudharabah is allowed) because those who are in the mudharabah contract are equally willing to do this. And willingness is the axis that makes it lawful (exchange) of wealth between them." (Asy-Syaukani, 1991)

- Interpretation of the opinion of some fiqh experts such as Imam Malik and his students who allow guarantees in istishna' contracts (Ibnu Abdil Barr, 2002). There is even a narration that states that the companions and scholars after that have agreed on the permissibility of guarantees in the *istishna'* contract (Ibnu Rusyd, 2014).
  The similarity point between "guarantee" in *mudharabah* and "guarantee" in *istishna*' is that they are both needed for the benefit (asy-Syatibi, 1988). It is on the basis of this benefit that guarantees are allowed in *mudharabah*, especially in this day and age where it is increasingly difficult to find people who are trustworthy in managing other people's assets.

The condition for disbursing the *musyarakah* guarantee according to the fiqh perspective is if the *mudharib* commits an intentional or negligent mistake. In the language of fiqh, intentional mistakes are called *at-ta'addi*, while negligence is called *at-taqshir*. Regarding the definitions of *at-ta'addi* and *at-taqshir*, there are various opinions from scholars who provide definitions with various words but the same in meaning. Among the

definitions of the *muta'akhir* ulama is the definition presented by Dr. Qutb Sano, as follows:

المراد بمصطلح التعدي هو مجاوزة المرء – عمدا – الحد الذي سمح به الشرع, أو الحد الذي اتفق عليه طرفا العقد, أو الحد الذي أقره العرف السائد, وذلك عند التصرف في مال الغير مضاربة أو وديعة أو رهنا أو إجارة أو إعارة...

ويراد بالتقصير التواني عمدا في القيام بما أمر به الشرع أو بما اتفق عليه طرفا العقد أو بما دل عليه العرف السائد, وذلك عند التصرف في مال الغير مضاربة أو وديعة أو رهنا أو إجارة أو إعارة.

> What is meant by *at-ta'addi* is intentionally doing something that exceeds the limits permitted by the shari'ah, or the limits agreed upon by both parties in the contract, or the limits set by prevailing custom, when managing the capital/funds of another party, both in *mudharabah, wadi'ah*, pawn, *ijarah*, and *i'aroh* contracts.
> Whereas what is meant by *at-taqshir* is intentionally being reluctant or unwilling to do what is ordered by Sharia, or what is agreed upon by the parties in the contract, or what is indicated by the prevailing custom, when managing the capital/funds of another party, both in the contract *mudharabah, wadi'ah, pawn, ijarah,* and *i'aroh* contracts.

From the description above, the definition of intentional error (*at-ta'addi*) refers to the act of committing an act intentionally, which in turn causes a loss, such as damaging merchandise. Meanwhile, the definition of negligence (*at-taqshir*) refers to the state of not taking action, in which the situation ultimately results in losses, such as not wanting to trade in the morning when the market is still busy even though the order to trade in the morning has been agreed by both parties involved do musyarakah.

Deliberate errors (*at-ta'addi*) or negligence (*at-taqshir*) in managing the capital belonging to LKS committed by the customer resulting in a loss of LKS capital will result in the customer being obliged to compensate for the loss, which if not done, the guarantee belongs to the customer can be sold or auctioned to cover LKS losses.

## B. Musyarakah Guarantee in a Positive Legal Perspective

From a positive legal perspective, the rules regarding guarantees in *musyarakah* financing can be found in Article 8 letter o of Bank Indonesia Regulation (PBI: Indonesian) Number 7/46/PBI/2005 concerning Funds Collection and Distribution Agreements for Banks Conducting Business Activities Based on Sharia Principles. The Bank Indonesia regulation absorbs from the DSN MUI Fatwa No. 08/DSN-MUI/IV/2000 which allows for guarantees in musyarakah financing.

Indeed, the DSN MUI Fatwa is not one of the types of legislation recognized in Indonesia. However, its existence is often legitimized by laws and regulations, so it must be obeyed by sharia economic actors. The DSN MUI fatwa, which was originally not binding on citizens, can become

binding when it is absorbed by the laws and regulations. For example, the DSN MUI fatwa Number 08/DSN-MUI/IV/2000 concerning Musyarakah Financing which allows LKS to ask for guarantees from customers in musyarakah financing, is legitimized by PBI Number 7/46/PBI/2005.

The conditions for disbursement of guarantees as stated in PBI Number 7/46/PBI/2005 are when there is negligence and fraud on the part of the guarantee owner (customer). While the limits regarding the definition and criteria for negligence and fraud that are the basis for the permission to withdraw the guarantee, there is no regulation that regulates it (legal vacuum). In this legal vacuum, judges must ijtihad in interpreting "negligence" and "cheating" when examining cases of disputed executions of problematic Musyarakah financing guarantees. Some judges have interpreted "negligence" and "cheating" in musyarakah financing, as a default as contained in Article 1243 of the Civil Code (hereinafter abbreviated as KUHPer) and unlawful acts as contained in Article 1365 of the Criminal Code. And there are some judges who do not merely refer to the definition of default in Article 1243 of the Criminal Code but also consider aspects of the causes of default, whether from the customer's side or from LKS or from other things beyond the ability of the customer. Therefore, the impact of the difference in judges' considerations resulted in disparity in decisions when deciding cases of execution of Musyarakah financing guarantees. Some judges have authorized the execution and auction of Musyarakah guarantees with the consideration that the customer has defaulted or failed to fulfill his obligation to repay the Musyarakah capital, as stated in the decision of the Medan PTA Appeal Number 68/Pdt.G/2016/PTA.Mdn dated October 5, 2016 (Medan PTA Decision Number 68/Pdt.G/2016/PTA.Mdn Page 8, n.d.). Some other judges have decided that the default was not due to the customer's negligence, so the LKS was required to return the collateral to the customer, as stated in the Medan PA Decision Number 944/Pdt.G/2015/PA.Mdn (Medan PA Decision Number 944/Pdt.G/2015/PA.Mdn Pages 55 – 57, n.d.) dated March 10, 2016. While some other judges have even studied which party actually had a role in the failure to pay, so he found that it turned out that the customer and the LKS both had a share in the error that caused the default to occur, so that the collateral that had already been auctioned off, part of the money must be returned to the customer, as stated in the decision of Cassation Number 624 K/Ag/2017 (*Supreme Court Cassation Decision Number 624 K/Ag/2017 Pages 25 – 26, n.d.*) dated October 25, 2017.

### C. Judge's Legal Reasoning In Cases of Execution of Musyarakah Guarantees

Among its legal considerations, the panel of judges at the first instance in case Number 944/Pdt.G/2015/PA.Mdn stated the following:

"Considering that the actions of Bank Sumut Syari'ah (Defendant I) directed Ogku Sutan Harahap to make a Statement Letter (T.I.II.2) and the actions of Bank Sumut Syari'ah (Defendant I) continued to disburse Musyarakah financing, which at first glance seemed easy, actually **trapped** Ogku Sutan Harahap, so that the Musyarakah Financing received by Ogku Sutan Harahap **did not receive legal protection** from Insurance (Defendant III), in this case the Bank Sumut Syari'ah (Defendant I) could not possibly not know the consequences that would be borne by Ongku Sutan Harahap and his heirs later if something unwanted (death) happened to Ogku Sutan Harahap, Bank Sumut Syari'ah (Defendant I) seemed to only pursue targets or pursue profit (profit oriented) and ignore the protection side of customers. Considering, whereas according to the panel of judges, Bank Sumut Syari'ah (Defendant I) should make all the requirements of the Musyarakah Financing Agreement an inseparable unit, both requirements that function to protect the interests of Bank Sumut Syari'ah (Defendant I) such as ID cards and collateral as well as requirements that function to protect the interests of the customer (Ongku Sutan Harahap) such as medical check-up requirements. Considering, that by ignoring medical check-up requirements and continuing to disburse Musyarakah financing, Bank Sumut Syari'ah (Defendant I) has actually only considered the interests of Bank Sumut Syari'ah (Defendant I), therefore Bank Sumut Syari'ah (Defendant I), has violated the principle of mutual benefit as referred to in Article 21 letter e of the Compilation of Sharia Economic Law and the policy of Bank Sumut Syari'ah (Defendant I) to continue to disburse musyarakah financing even though the requirements are not complete, it can be categorized as trapping the customer, because it contradicts and has violated the principle of good faith as referred to in Article 21 letter j of the Compilation of Sharia Economic Law." (Medan PA Decision Number 944/Pdt.G/2015/PA.Mdn Pages 55 – 57, n.d.)

From the description above, the Panel of Judges saw that there was an element of intentional error on the part of PT. Bank Sumut Syari'ah (Defendant I) which facilitates the disbursement of *musyarakah* financing by directing customers to make a statement that must be signed by Mrs. YD (Plaintiff I) even though the insurance policy has not been issued because there has been no medical check up, which resulted in losses to the customer/ his heirs when something unwanted happens to the customer as a result of the

absence of legal protection from insurance. Therefore, further in its legal considerations, the Panel of Judges of the first instance stated:

> "Considering that Ongku Sutan Harahap who passed away on July 13, 2011, all the financing he had received should be borne by PT. Asuransi Bangun Askrida Syari'ah, however, because Bank Sumut Syari'ah (Defendant I) had disbursed the musyarakah financing before the medical check was submitted by Ongku sutan Harahap and before the insurance policy was issued by PT. Asuransi Bangun Askrida Syari'ah (Defendant III), then **all obligations of Ongku Sutan Harahap to return Musyarakah financing are the responsibility of Bank Sumut Syari'ah (Defendant I)** and the Plaintiffs must be released from the obligation to pay Musyarakah financing of Ongku Sutan Harahap, while PT Asuransi Askrida Syari'ah, considering that PT Asuransi Askrida Syari'ah has never issued an insurance policy in the name of Ongku Sutan Harahap, it must be freed from all burdens and responsibilities due to insurance claims." (Medan PTA Decision Number 68/Pdt.G/2016/PTA.Mdn Page 8, n.d.)

The first-level assembly is of the opinion that with the death of the customer, Mr. OSH, the heirs of the customer do not need to pay the musyarakah financing installments because when the customer dies, the debt will be repaid by insurance. However, because at the time of the Musyarakah financing contract, the bank continued to disburse the financing before Mr. OSH did a medical check-up, resulting in the insurance party not wanting to cover the debt of Mr. OSH after his death, the judge saw that the bank had made a deliberate mistake, resulting in a loss to the customer, because the customer still pays the insurance fee at the time of disbursement of the musyarakah financing. On the basis of the intentional error on the part of the sharia bank, the Panel of Judges at the first instance freed the customer's heirs to pay off the remaining installments, and ordered the sharia bank to return the customer's collateral to his heirs.

As for the decision at the appellate level, among the descriptions of its legal considerations, the Court at the appellate level stated as follows:

> "Considering that the main issue in this case is the issue of the Musyarakah Financing contract No. 120/KCSY02-APP/MSY/2011 dated 26 April 2011, wherein Ongku Sutan Harahap has enjoyed Musyarakah financing of Rp. 700,000,000 (Seven hundred million rupiah), there are no things that violate the principles of the contract, the terms of the pillars of the contract or things that cancel the contract as specified in the Compilation of Sharia Economic Law (articles 21 to 26). Therefore, the Musyarakah contract cannot be

cancelled. Thus, the heirs are obliged to pay the debt of the late Ongku Sutan Harahap to Defendant I (Bank Sumut Syariah Padangsidimpuan Branch). Considering, that based on the considerations above, the Panel of Judges at the appellate level can conclude that the disbursement of funds based on the Musyarakah financing agreement is not contradictory, even without a life insurance policy from the customer Ongku Sutan Harahap and therefore insurance is not a requirement for the Defendant (Bank Sumut Syariah Padangsidimpuan branch) to disburse the agreed funds." (Medan PTA Decision Number 68/Pdt.G/2016/PTA.Mdn Page 8, n.d.)

From the description above, it appears that the Appeals Council saw that the disbursement of funds based on the Musyarakah financing agreement did not conflict with the terms and conditions of the Musyarakah, even without a life insurance policy from the customer Ongku Sutan Harahap because insurance was not a requirement for the Defendant (Bank Sumut Syariah Padangsidempuan branch) to disburse the agreed funds. Therefore, with the death of the customer, then the heirs do not pay the installments until a warning is given by the sharia bank, then the customer's heirs have been proven to be in default, and therefore the guarantee can be auctioned off by the sharia bank to cover the losses suffered by the sharia bank due to default on the part of the customer's heirs.

At the cassation level, the Assembly considered that in this case there was an element of negligence on the part of both parties (Islamic banks and customers). Negligence on the part of the sharia bank for making a statement from the customer's wife (plaintiff 1) which states that if the insurance policy has not been issued and something happens, then all financing is the responsibility of the heirs, as the reason for disbursing Musyarakah financing before the insurance policy is issued, this is an indication (qarinah) the lack of prudence of Islamic banks. Prior to the issuance of the insurance policy, the sharia bank should not issue a musyarokah contract. Even though the contract is valid without a policy, because insurance is not a requirement to withdraw the agreed funds. However, the policy is very important and urgent to ensure the security of financing in case of unwanted things in the future. In addition, these actions are not in accordance with the spirit of Islamic economics and violate economic principles that are in accordance with sharia principles. Therefore, the bank must know the consequences. Because the fact that these actions have caused loss and anxiety. Thus the Islamic bank has made negligence by letting Mr. OSH as a consumer not know the consequences

that will be borne by him and his heirs in the event of a risk of death later in life, as intended by Article 21 letters (e) and (j) Compilation of Sharia Economic Law . With carelessness on the part of the bank, it means that the bank has ignored the prudent banking principle, where the bank in carrying out business activities both in collecting, especially in channeling funds to the public, must be very careful. The purpose of implementing this precautionary principle is so that banks always protect public funds, and banks are always in a healthy condition to carry out their business properly and comply with the provisions and legal norms that apply in the banking world, as referred to in Article 2 and Article 29 paragraph (2) Law Number 10 of 1998 concerning Banking, therefore the bank has made negligence which has resulted in an unlawful act. Meanwhile, negligence on the part of the customer for having made a statement that the heirs are willing to bear the financing debt if anything happens to the customer. Therefore, with the negligence of both parties, the loss in musyarakah financing must be borne proportionally between the sharia bank and the customer, which in this case is borne by the heirs. The following is an excerpt from the court's legal considerations at the cassation level:

> "Considering, that the first party (Defendant I) made a Musyarakah contract on April 26, 2011 and on that date a statement was made by the second party (Plaintiff I) if the insurance policy has not been issued and something happens, then all financing is the responsibility of the heirs, only of course, with the death of the second party, it is a business risk as mentioned in Article 6, especially the first party is so easy to withdraw funds before the insurance policy is issued only with a statement which is certainly full of risks. Therefore, because this contract is a Musyarakah contract, **the risk must be borne proportionally between the Plaintiff (as the second party) and Defendant I (the first party)**. Considering, that the existence of a Musyarakah contract between Ongku Sutan Harahap and Defendant I has created a risk of loss because in the absence of life insurance that guarantees to return the principal capital of the Musyarakah contract received by the customer if the customer dies, is an act that can harm the heirs who should have paid an amount of Rp. 752,000,000.00 (seven hundred fifty two million rupiah) is borne by the insurance party but because the act of disbursing funds without an insurance policy in advance is an act that is contrary to Article 16 of the contract Number 120/KCSY02-APP/MSY/2011 and this is a loss caused by the bank's carelessness and because the contract is a Musyarakah contract, the loss must be borne jointly by the parties to the contract. Since the contract is a musyarakah

> contract, the loss must be divided proportionally so that the capital money in the amount of Rp. 752,000,000.00 (seven hundred fifty two million rupiah) must be paid off by the Plaintiff in the amount of 53.22 (fifty three point twenty two) percent and the Defendant I is 46.78 (forty six point seventy eight) percent, according to Article 3 paragraph (2) Musyarakah Financing Agreement Number 120/KCSY02-APP/MSY/2011 dated 26 April." (Supreme Court Cassation Decision Number 624 K/Ag/2017 Pages 25 – 26, n.d).

In this case, the heirs of the customer are burdened with paying a loss on musyarakah financing of 53.22% of the total financing of Rp.752,000,000.00, which is Rp.400,214,400.00 (four hundred million two hundred and fourteen thousand and four hundred rupiah). Meanwhile, the sharia bank must bear a loss of 46.78% of the total financing of Rp.752,000,000.00, which is Rp.351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand and eight hundred rupiah). Therefore, the Cassation Council ratified the auction of the musyarakah guarantee, but the Islamic bank must return the remaining auction proceeds to the customer's heirs, after all costs and obligations of the customer's family have been issued.

## D. Analysis of Decision on Execution of Musyarakah Guarantee Dispute

In this paper, the author wants to analyze the three judges' decisions in the Religious Courts above regarding the dispute over the execution of guarantees in musyarakah financing. The analytical theory used is the theory of law discovery and the theory of justice. The results of the analysis will show how the theory of legal discovery and the theory of justice affect the outcome of the decision.

The discovery of law by judges in the Religious Courts is a necessity in resolving cases that become competencies to be resolved, including the discovery of Islamic law which in implementing it really needs to be combined and compared with rules outside Islamic law. The legal findings discussed in this study are specifically in the case of disputes over the execution of guarantees in musyarakah financing.

When dealing with the issue of disputed execution of guarantees in problematic Musyarakah financing, judges of the first instance only consider the negligence factor (or what in the language of Islamic jurisprudence is more accurately referred to as *at-ta'addi*, which is a deliberate mistake) from the sharia bank and not being careful in researching that in fact the customer also has a role in negligence which results in musyarakah losses. The first-level judge in this case has actually tried to interpret the law on the concept of intentional error or negligence

and fraud which is not formulated in the laws and regulations or the DSN MUI fatwa. The judge saw that the loss of the musyarakah, which was the hands off the insurance company to pay off the debts of the customer who died due to the reason that the disbursement of financing was made before the insurance policy was issued, was purely due to the fault of the shari'ah bank as one of the *syarik*'s, so that the customer as another *syarik* did not need to bear the loss because the financing should have been repaid by the insurance if there is no accelerated disbursement before the insurance policy is issued, because the customer has paid the insurance fee. The legal interpretation of the concept of negligence by the judge of the first instance is manifested when in assessing the fact that the customer has failed to pay installments, it does not directly link it with negligence when violating the contents of the musyarakah contract agreement, namely paying on time. The judge at the first instance expanded the scope of "negligence" in the case by exploring the legal fact that the source of the musyarakah loss was because the sharia bank made it easier for the disbursement of the musyarakah financing even though the insurance policy on behalf of the customer had not yet been issued. This is seen from the theory of legal discovery, the judge has made a decision by conducting ijtihad and the thought process to find the law for the case he is handling. The legal interpretation by first-level judges in interpreting the element of negligence by expanding the legal requirements for executing the musyarakah financing guarantee is a form of ijtihad by carrying out interdisciplinary interpretations so as to provide a broad definition for the concept of negligent due to the absence of laws and regulations regarding negligent criteria which are a condition for allowing disbursement of the musyarakah guarantee.

This is different from what is done by the court of appeals which applies legal norms as they are without interpreting the meaning of "negligence" which is the basis for allowing disbursement of guarantees in problematic Musyarakah financing, namely only basing the validity of the execution of guarantees because the customer has defaulted/failed pay the installments as stated in the musyarakah agreement contract. According to the appellate judge, the absence of insurance is not a barrier to disbursing the musyarakah financing because the musyarakah is still valid even though there is no insurance. In this context, the appeals panel seems to only apply the contents of the musyarakah contract textually. The appeals panel did not pay close attention to that "negligence" in Article 8 letter o of PBI Number 7/46/PBI/2005 needs to be interpreted because the criteria are negligent not only on the issue of default or default, but negligence also includes who actually did the negligence causing losses in financing musyarakah. In this case, what the appellate judge does is not in accordance

with the theory of justice, because it punishes the customer to bear all losses in musyarakah financing even though there is a legal fact that sharia banks and customers both have contributed to the loss in musyarakah financing as described on. What the appellate judge did in this case shows that there are no regulations or legislation that regulates in more detail the criteria for negligence, if the expansion of its meaning is not explored by comparing it with the concept of negligent outside positive law, such as the concept of negligence in Islamic jurisprudence, it will result in to the unprotected rights of the owner of the guarantee for a mistake that was not only committed by him but also apparently committed by a shari'ah bank, always one of the parties bound by the musyarakah contract. For this reason, the task and role of judges is highly anticipated by the community, namely to explore the meaning of "negligence" which leads to losses in musyarakah financing.

Meanwhile, the Assembly at the cassation level, using the legal discovery method, has explored the concept of negligence and implemented it in the existing legal facts. The cassation panel interpreted that the bank's carelessness and carelessness in disbursing the musyarakah financing before the insurance policy was issued, as a form of negligence on the part of the bank as one of syarik. Meanwhile, the actions taken by the customer's wife when making a statement that the heirs are willing to bear the financing loss if something happens to the customer before the insurance policy is issued, is also interpreted by the Panel of Judges at the cassation level as a form of negligence on the part of the customer. So, what was decided by the Cassation Council when punishing the sharia bank and the customer's heirs to jointly bear the proportional loss of musyarakah financing, is a method of legal discovery on the concept of "negligence" which is not detailed in the laws and regulations. as well as in the DSN MUI fatwa Number 08/DSN-MUI/IV/2000 concerning Musyarakah Financing.

From the three decision cases above, it can be concluded that the appellate court in examining and adjudicating cases of dispute over the execution of guarantees in musyarakah financing only applies legal norms as they are, namely making default as the only benchmark for negligence on the part of the customer.

Progressivity and systematic interpretation appeared to be carried out by first-degree judges and cassation judges who viewed the problems that arose not only as default issues in the form of default on the part of the customer, but touched on the essential aspect of the element of intentional negligence/error, namely seriously assessing the facts of the trial. namely the problem of who caused the loss of *musyarakah*. Based on the evidence presented by the parties in the trial, it has been proven that the sharia bank has contributed to the occurrence of musyarakah losses, namely by

accelerating the disbursement of musyarakah financing before the insurance policy on behalf of the customer is issued. Meanwhile, the next legal fact that is proven is that the customer also has a role in the occurrence of *musyarakah* losses, namely by making a statement letter signed by Plaintiff I (the customer's wife) stating that he is ready to bear the customer's debt if something happens to the customer.

The first level assembly and the cassation level have interpreted the meaning of negligence or fraud that is not explained in the legislation. However, what was done by the cassation panel turned out to be deeper than what the first instance court did, which only viewed the bank's carelessness as a factor of negligence on the part of the bank. The cassation panel even considered that what the customer's wife did in making a statement that she was willing to bear the financing risk if something happened to the customer before the insurance policy was a form of negligence on the part of the customer, so that it is as fair as possible if the loss of musyarakah must be shared proportionally by the two parties who make the musyarakah contract, namely the sharia bank and the customer's heirs. Thus, this cassation decision is closer to a sense of justice. Therefore, in terms of the theory of justice and the theory of legal discovery, this cassation decision illustrates that the theory of justice and the theory of legal discovery go hand in hand.

## IV. Conclusion

Based on the analysis in the discussion above, this article can be concluded as follows:

1. Disputes on the execution of guarantees in musyarakah financing often arise because the customer feels that his rights have not been protected.
2. Like *mudharabah, musyarakah* was originally a form of contract based on trust, and not a compensation contract or based on accounts payable. However, to avoid negligence and fraud on the part of the customer, LKS may ask for a guarantee from the customer
3. In the perspective of Islamic jurisprudence, the elements that allow to sell customer guarantees to cover *musyarakah* losses are intentional errors (*at-ta'addi*) and negligence (*at-taqshir*) in managing the capital belonging to LKS committed by customers, resulting in losses on LKS's capital. Meanwhile, from a positive legal perspective as contained in Article 8 letter o of PBI Number 7/46/PBI/2005, the element that allows selling customer guarantees to cover *musyarakah* losses is negligence and fraud on the part of the customer.

4. In giving consideration and legal reasoning in the decision on the execution of the *musyarakah* guarantee, the judge is based on two different tendencies. Some judges apply legal norms as they are without interpreting the meaning of "negligence" which is the basis for allowing disbursement of guarantees in problematic *Musyarakah* financing and some others carry out interdisciplinary interpretations so as to provide a broad definition for the concept of negligence;
5. Disparities in decisions arise due to (i) differences in interpreting statutory provisions which give rise to different methods of legal discovery and interpretation (ii) differences in assessing evidence and (iii) differences in the dynamics of thinking due to differences in understanding the meaning of law.
6. The legal consequence of the disparity in the decision is that some customers will have their rights protected and some will not. Therefore, the protection of the rights of the owner of the musyarakah guarantee in the construction of the judge's decision is still diverse;
7. Based on a study of 3 decisions of the religious courts, namely the decision of the Medan PA Number 944/Pdt.G/2015/PA.Mdn dated March 10, 2016, the Medan PTA Decision Number 68/Pdt.G/2016/PTA.Mdn dated October 5 2016, and Supreme Court Cassation Decision Number 624 K/Ag/2017 dated October 25, 2017, it can be concluded that the appellate court in examining and adjudicating cases of dispute over the execution of guarantees in musyarakah financing only applies legal norms as they are, namely making default as the only benchmark for negligence on the part of the customer. Progressivity and systematic interpretation appeared to be carried out by first-degree judges and cassation judges who viewed the problems that arose as not just default issues in the form of default on the part of the customer, but touched on the essential aspect of negligence, namely seriously assessing the facts of the trial, namely the issue of who cause musyarakah losses.

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