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Shifting the Burden: Reverse Proof in *Shirkah* under Islamic Law

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Abstract: *This study examines the concept of reverse burden of proof in musharakah dispute resolution in Indonesia. Musharakah, as a profit and loss sharing-based Islamic economic instrument, faces the challenge of information imbalance between active and passive partners, which disadvantages passive partners in proving loss disputes. This normative research uses statutory, conceptual, and case study approaches to court decisions. The results show that Fatwa DSN-MUI No. 105/DSN-MUI/X/2016 introduces a new norm that allows the manager to guarantee the return of capital if the loss is caused by negligence, exceeding limits, or violating the terms of the contract. This concept is in line with the principle of strict liability and is supported by several scholarly views based on 'urf, tuhmah, maslahah, and dalālat al-ḥāl. The case study shows that the manager can prove that the business loss did not result from bad faith. The application of the reverse burden of proof in musharakah disputes is important to achieve justice and address information imbalance.*

Keyword: *Guaranteeing Capital, Musharakah, Reversal Burden of Proof,*

INTRODUCTION

Musharakah cooperation, as one of the important instruments in the Islamic economic system, offers a fair partnership mechanism based on the profit and loss sharing system (PLS). This scheme is used to replace the interest or debt-based financing system, but also encourages a fair risk sharing and wealth distribution scheme (Ghoni et al., 2025; Khalil et al., 2002) under sharia principles. On the other hand, PLS financing schemes are less attractive due to high financial risks (Lestari et al., 2024). The *musharakah* agreement emphasizes the pooling of capital between two or more parties to achieve a common business goal, where each partner shares in the results and potential losses according to the agreed ratio. This reflects the balance of interests and responsibilities collectively. It is different in its implementation, in that the partnership relationship in the *musharakah* contract does not always run smoothly, and there is the potential to lead to disputes in business continuity. Including the implementation of contracts that lead to limited access to information in the structure of partnership relationships that lead to injustice or loss (Ghoni et al., 2025).

In the context of *musharakah* contracts, this information imbalance generally materializes between active partners, who are directly involved in managing the business

operations, and passive partners, who contribute capital but do not have an active role in day-to-day management. This leaves the active partner with in-depth knowledge of the intricacies of the business, market dynamics, real financial conditions, network of relationships, and potential risks and opportunities that may arise. In contrast, passive partners rely heavily on reports and information that are periodically or incidentally submitted by active partners. This information gap creates a power disparity. The active partner, with superior mastery of information, has the potential to make strategic decisions that are not fully transparent or even self-serving at the expense of the passive partner's interests. Passive partners, without sufficient visibility into business operations, find it difficult to effectively monitor the performance of active partners, evaluate the reasonableness of operational costs, or detect any indications of unhealthy or even fraudulent management practices.

The difference in access to information puts passive partners at a severe disadvantage in terms of evidence. When allegations of misappropriation of funds, untrustworthy management, or other bad faith by active partners arise, passive partners are faced with the challenge of gathering valid and relevant evidence. Forcing passive partners to prove the arguments of their lawsuit based on general principles in the burden of proof, with limited access to information, creates very unfair conditions and has the potential to hamper the enforcement of justice. The assumption that each partner will act honestly and responsibly can be eroded if one party has the intention to abuse their trust without an effective supervision and accountability mechanism. The burden of proof that rests entirely on the party with less access to information may incentivize the untrustworthy party to hide facts or manipulate data.

Due to the potential injustice arising from disputes over losses in *musharakah* cooperation, the concept of reverse burden of proof (*omkering van bewijslast*) is presented as a corrective mechanism. The concept of reverse burden of proof (*omkering van bewijslast*) is an exception to the general principle of civil procedure law that the party filing a lawsuit is obliged to prove its arguments. The party filing a claim or lawsuit is obliged to prove its claim. The reverse burden of proof shifts the obligation for the passive partner to the active partner, especially in the condition that the active partner has greater control over the information or situation relevant to the dispute. Reverse proof is also used in financial-related crimes such as corruption and money laundering, where the burden of proof shifts from the prosecution to the defendant. The defendant must prove that his/her wealth was not derived from a crime. This is because the defendant knows the origin of his wealth, as has been widely reviewed in various articles (Ahmad et al., 2022; Sitompul et al., 2022). In the context of *musharakah*, the application of this principle may mean that the active partner, who has full access to information on the management of the business, as well as the obligation to prove that the actions in carrying out the cooperation are following the provisions, especially when the passive partner raises allegations of irregularities or negligence. In the context of disputes over the existence of losses in *musharakah* contracts, the application of the reverse burden of proof can be an important instrument to achieve justice.

This concept is new as contained in DSN-MUI Fatwa No. 105/DSN-MUI/X/2016 concerning Guaranteeing the Return of *Mudharabah*, *Musyarakah*, and *Wakalah bil Istitsmar* Financing Capital as a form of *ijtihad* (Candra, 2022). This shows the development of *mudharabah* contracts in the context of the DSN-MUI Fatwa, as highlighted by (Mursid et al., 2023), one of which is related to aspects of responsibility and liability of *mudarib*. This fatwa allows for a guarantee of return of capital in a *shirkah* cooperation contract by the *sharik* to *sahibul mal* for the difference of opinion on the occurrence of losses in the cooperation contract due to *ta'addi*, *tafrith*, and *mukhalafat al-syuruth*.

Several studies discuss reverse proof related to the *shirkah* contract. First, Asmadi Mohamed Naim (Mohamed Naim, Habibi Hj Long, et al., 2016) which highlights the sharia

perspective regarding the provisions for *mudarib* to prove his compliance in running the business if the actual profit is below the expected profit and the results obtained that there is a shift in the burden of proof in ensuring protection for both parties with consideration for the protection of property and reducing greed. Second, Mardi Candra (Candra, 2022) focuses on the *ratio legis* of the reverse proof principle in DSN-MUI Fatwa No. 105/DSN-MUI/X/2016 and its comparison with consumer protection laws. Third, Firman Wahyudi (Wahyudi et al., 2024) focuses on the construction of reverse proof in DSN-MUI Fatwa No. 105/DSN-MUI/X/2016, which is philosophical and its correlation with the principle of *strict liability*. This article aims to look at the Indonesian practice of *Musharakah* contracts. This is crucial in ensuring that dispute resolution mechanisms are not only based on procedural legal formalities, but also take into account the reality of information imbalance and the need to protect the more vulnerable parties in partnership contracts.

METHOD

This research is normative legal research. This research uses a conceptual and case approach. Conceptual approach, namely research departing from legal concepts, in this case the concept of reverse proof in *shirkah* contract as in DSN-MUI Fatwa Number 105/DSN-MUI/X/2016. The case approach is an approach by examines cases in a court decision. In this case, the religious court decision Number 1651/Pdt.G/2019/PA.Tgrs. This research uses primary legal materials and secondary legal materials, which are collected through library research.

RESULT AND DISCUSSION

Evidence in Islamic Law

The concept of al-Bayyinah (clear evidence) is the primary means of proof in Islamic law. Bayyinah includes various forms of evidence that clarify the truth. The concept is broader than just eye-witness testimony and includes any means of making something clear. The flexibility of al-Bayyinah allows adaptation to different types of disputes, including in financial matters. This flexibility allows consideration of various forms of evidence beyond direct observation, which is particularly important in complex business transactions.

There are two opinions regarding the burden of proof in Islam as a development of the concept of proof, namely imposing on the plaintiff and the second opinion that the proof is both the plaintiff and the defendant (Analiansyah, 2018). In the first opinion, the obligation to prove lies with the plaintiff as it is based on the fact that originally belonged to or the rights of others, and there is an obligation to prove the validity of the claim. The main foundation in this opinion refers to the Hadith of Bukhari, namely Al-Bayyinah 'ala al-Mudda'i wal-Yamin 'ala al-Mudda'a 'Alaih (the proof is on the plaintiff, and the oath is on the defendant). This Hadith emphasizes the plaintiff's responsibility to provide evidence for their claims. Defendants can generally discharge their responsibility by taking an oath denying the claim. This promotes efficiency in the legal process by establishing a clear initial burden of proof. The second view is that the burden of proof is shared between the plaintiff and the defendant. The plaintiff is obliged to prove its case, but the defendant may also rebut by submitting evidence.

Apart from these two opinions, proof on the plaintiff and balanced proof, there is a new theory in the burden of proof, which is reverse proof (Analiansyah, 2016). In the context of reverse proof in Islam, there are four principles, namely intention, justice, maqasid al-shari'ah, and presumption of guilt (Ahmad et al., 2022). Reverse proof puts the party to prove their innocence (Dahwal, 2016). Kisworo argues that the existence of reverse proof is to achieve the benefit of upholding justice. Compared also related to the condition of society at the time of the Apostle, who highly respects the truth so that the burden of proof is on the

prosecutor or accuser, in contrast to the condition of morality now that there is a tendency to hide the truth (Kisworo, 2012).

Shifting the Burden of Proof in Trust-Based Agreements

Sharia economic contract disputes, especially those related to disputes over losses in shirkah contracts, can be carried out through reverse proof, which places the manager to prove that the losses incurred are not caused by bad faith. As in the DSN-MUI Fatwa, the ratio legis of proof in the fatwa is in line with the principle of strict liability in the Consumer Protection Law. Business actors are considered responsible until they can prove their innocence (Wahyudi et al., 2024). There are two scholarly views regarding the reverse proof on the manager regarding the provision of activity details as a step to minimize moral hazard. The first view of the majority of scholars is that in trust-based contracts, the trustee is considered free from liability for damages (daman) until proven to have committed negligence (taqsir) or overstepped the limit (ta'addi). The basic rule is to believe the trustee's statement regarding the cause of the loss, unless the capital owner has evidence to the contrary. This principle is based on the interpretation of Islamic hadiths and rules that state that everyone is considered free from liability until proven guilty. In this context, the trustee has a strong position, and the accuser must provide evidence to accuse the trustee of acting dishonestly or negligently. Reversing the burden of proof to the trustee is against the principles of Islamic law (Mohamed Naim, Habibi Hj Long, et al., 2016).

The second view is that the party holding the trust should be responsible for proving its actions. This is because the party providing the capital or power of attorney does not have access to information about how the business is run by the trustee. If this rule does not exist, the trustee can act without the need to explain or account for their actions. As revealed by Mohamed Naim, four things become the basis. First, the 'urf (tradition) is that it is customary for financial institutions to notify supervisory authorities that their operations are running without problems. As a result, the concept of burden of proof has become a generally accepted norm in this sector. Thus, the principle of burden of proof can be seen as a fundamental rule in commercial financial activities, whether they involve inherent liability or are based on trust.

Second, tuhmah (the potential to hide the true condition). Strong suspicion (tuhmah) can shift the burden of proof to the fund manager because of the potential for concealment of dishonesty. Although initially the fund manager is presumed innocent, scholars such as those in the Maliki school and Caliph Umar considered tuhmah, especially in cases of easily concealed goods or potential greed of public workers. The actions of the Prophet's companions also supported shifting the burden of proof based on tuhmah in some trust contracts.

Third, maslahah. The obligation of compensation (damān), according to Ibn Rushd al-Hafid, is imposed because of overreaching (ta'addī) or for the public good (maṣlaḥah) to protect property. The change in the burden of proof is influenced by maṣlaḥah, istiḥsān, and sadd al-dharā'iʿ to ensure that the loss is not due to negligence, protecting both parties. Fourth, dalālat al-ḥāl (contextual evidence or market reality). Dalālat al-ḥāl refers to the significant difference between the achievements of a particular project and similar projects in the market (Mohamed Naim, Habibi Hj Long, et al., 2016). It is therefore reasonable that parties entrusted in trust-based reciprocal agreements are required to provide information regarding their workings, especially when unusual conditions occur that result in losses or impairment of the other party's assets (Mohamed Naim, Habibi Hj Long, et al., 2016).

There is a disagreement between the owner of the capital and the manager regarding the mention of shares. There are four fuqaha opinions, including:

1. Malik thought that the manager had a strong word because he is the trustee, and so is his case in any accusation if he brings something close to reality.
2. Al-Laits thought that it is understood as *qirad* and its equivalent that the word or testimony of the worker is proof of the truth, while the owner of the capital does not need to swear.
3. Abu Hanifah thinks that the most correct word is that of the owner of the capital.
4. Shafi'i thinks that both parties swear to each other and cancel the agreement, while the manager gets a reward.

The difference of opinion between Malik and Abu Hanifah above is related to the reason for the existence of the *nash* obligation on the person charged to take an oath; usually, the person charged is the stronger person. So, this results in the opinion of which party has a stronger word between the owner of the capital or the manager, as the party given trust. Different from the previous opinion from Syafi'i is based on the *qiyas* method as a dispute between two people who buy and sell each other regarding the price of merchandise (Rusyd, 2007). Nazih Hammad supports the non-guarantee of *mudarabah* agreements, but there is a tendency to shift the burden of proof in the event of disputes relating to losses to the *mudarib* (Mohamed Naim, Md. Hussein, et al., 2016). To further determine whether a loss is purely due to business activities alone or there is *moral hazard*, the parameters of *taqsir*, *ta'addi*, and *mukhalafat al-syuruth* are used in determining it.

In a *Shirkah*, partners hold the shared assets in trust, meaning liability only arises from contract violations, misconduct, or established negligence. Negligence is defined as failing to follow the contract terms, acting against standard business practices, or demonstrating bad faith. Consequently, partners cannot guarantee each other's profits or capital. However, a partner has the right to request assurances or security from the other to cover potential losses due to misconduct or negligence (Ayub, 2007).

Guaranteeing Return of Capital in Trust-Based Agreements

The shirkah (partnership) contract is a contract that prioritizes the principles of trust and mutual trust so that the inclusion of collateral is not an absolute requirement for the emergence of an agreement (Lathif & Habibaty, 2022). Amanah contract (trust-based contract) is interpreted as a power of attorney contract from one shareholder to another shareholder to "store" the assets that are used as joint capital. Thus, if there is any damage to the joint capital, it becomes joint responsibility as long as it is not due to negligence. Conversely, the occurrence of damage due to negligence is the responsibility of the sharik concerned (Hasanudin & Mubarok, 2012). Partnership contracts based on trust are not allowed to guarantee the return of capital because the two partners have each contributed.

Legally, there are different opinions on the construction of the provisions guaranteeing the return of capital in a cooperation contract based on trust. The first opinion is from the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) Sharia Standards, based on the opinion of the majority of scholars who prohibit guaranteeing the return of capital when a loss occurs; this is a forbidden matter, even classified as a void condition. Putra further explained the arguments in the invalidation of the contract, namely violating the substance and purpose of the implementation of the mudarabah contract, mudarabah as a trust-based contract and not a guarantee, as a form of ijma' of the scholars, and changing the substance of the contract into a qard contract. The legal provisions in the AAOIFI Sharia Standard are opinions that prioritize the principle of iḥtiyāṭ (prudence) (Putra et al., 2023).

Different provisions in the DSN-MUI fatwa, implementing innovative ijtihad by allowing capital managers to guarantee the return of capital, is a form of commitment in the

form of tabarru' from fund managers. The first Dictum Number 4 of DSN-MUI Fatwa No. 105 that guarantees the return of capital is a guarantee from mudarib/sharik/wakil bil istitsmar to return the capital in full to sahib al-mal/sharik/muwakkil. DSN-MUI Fatwa No. 105 prohibits guaranteeing capital as a form of trust contract, but some provisions deviate that capital guarantees can be carried out as long as it is at the initiative of the manager or the owner of the capital can ask a third party to guarantee the return of capital (Putra et al., 2023).

Furthermore, in DSN-MUI Fatwa No. 105, that the occurrence of losses in the business, there is no obligation for the manager to return the full capital to the owner of the capital, as long as the losses that arise manager can show the existence of losses not for three things, namely ta'addi, taqsir, or mukhalafat al-syuruth. This shows a development in liability that the manager is obliged to return capital due to losses if the three things mentioned earlier are proven and can be proven in the trial (Mursid et al., 2023). Ta'addi (ifrath) is doing what should not be done, taqsir (tafrith) is not doing what should be done, and mukhalafat al-syuruth is violating the terms agreed upon in the contract.

Case Study of Court Decision

As explained earlier, there is a dispute of opinion between sharik related to the cause of business losses; the manager (manager) proves that the loss is not due to his bad faith. One of the court decisions related to this discussion is a sharia economic case with number 1651/Pdt.G/2019/PA.Tgrs. This case uses a musharakah cooperation contract between individuals in the context of business financing with a value of Rp2,200,000,000, with the Plaintiff's contribution of Rp1,300,000,000 consisting of goods worth Rp900,000,000 and cash of Rp400,000,000, while the Defendant put in capital of Rp900,000,000 consisting of goods worth Rp450,000,000 and cash of Rp450,000,000. The agreed ratio was 40% for the Plaintiff and 60% for the Defendant (40% in the capacity of capital provider and 20% as manager).

The Plaintiff argued that the Defendant had defaulted on the agreement, resulting in the loss of the business. This loss was caused by the Defendant's unprofessional attitude and failure to provide financial reports, as well as delinquent payments of operational costs, including rent and taxes. Therefore, the petition requested the Defendant to return the capital in the form of cash as compensation for the loss in the amount of Rp400,000,000. The evidence that has been submitted is unable to prove the arguments of the lawsuit. The Defendant was otherwise able to prove that the business losses incurred were a consequence of business activities or business alone and not due to bad faith. To prove its good faith, the Defendant has provided periodic business financial reports via e-mail as agreed, but was always rejected by the Plaintiff and did not consider the dynamics of the ongoing business. Including the arguments of tax payment arrears which were refuted by witness testimony and proof of payment, and the delay in rental payments to third parties due to the business being in a loss condition but there was good faith made by requesting ease of payment and this issue was not included in the performance of the agreement.

Because there is no evidence of moral hazard committed by the manager in managing the business, and it has been carried out by the agreed agreement, the Plaintiff cannot demand the return of shirkah capital. The losses incurred are a consequence of the implementation of the shirkah contract, so that profits that have not yet occurred cannot be claimed for compensation. As in the consideration of the panel of judges related to DSN Fatwa No. 43/DSN-MUI/VIII/2004 concerning Compensation (Ta'widh) and DSN-MUI Fatwa No.: 129/DSN-MUI/VII/2019 concerning Real Costs as Ta'widh Due to Default (at-Takalif al-Fi'liyyah 'an-Nasyi'ah 'an-Nukul) that compensation for default related to musharakah contracts can occur if there is a clear share of profit or realization of business profits, but not paid. Although in its reasoning, the panel of judges did not consider the Fatwa.

CONCLUSION

Proof primarily uses *al-bayyinah*. There is a difference of opinion regarding the burden of proof between the plaintiff and the defendant. The concept of reverse proof with principles of justice and benefit also emerged, as well as the acceptance of modern evidence. Shifting Burden of Proof in Trust-Based Agreements: The burden of proof in sharia disputes (especially *musharakah*) can shift to the manager due to information asymmetry, supported by Fatwa DSN-MUI and the principle of strict liability. Scholars' views are divided, but the shift of evidence is based on tradition, potential fraud, benefit, and market reality. Guarantee of Return of Capital in Trust-Based Agreements: *Shirkah* is a trust contract, losses are borne jointly unless due to negligence. Capital guarantee is not permitted in principle, but Fatwa DSN-MUI allows it if the loss is caused by negligence or violation of the terms of the contract.

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National Sharia Board-Indonesian Council of Ulama Fatwa No: 105/DSN-MUI/X/2016 regarding Guaranteeing Return of Capital for *Mudharabah*, *Musyarakah*, and *Wakalah bil Istitsmar* Financing

Religious Court Decision Number 1651/Pdt.G/2019/PA.Tgrs