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Gedung Fakultas Syariah IAIN Raden Intan Lampung  
Jl. Letkol H. Endro Suratmin, Sukarame, Bandar Lampung 35131  
Telp: (0721) 703289/Faks: (0721) 703289  
Email: al.adalah@iainradenintan.ac.id  
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## DAFTAR ISI

- Mohamad Atho Mudzhar & Muhammad Maksu*  
681 | SYNERGY OR CONFLICT OF LAWS? (COMPARISON BETWEEN THE COMPILATION OF RULES ON SHARI'AH ECONOMY (KHES) AND THE NATIONAL SHARI'AH BOARD'S (DSN) FATWAS)
- Deni K. Yusup*  
701 | PERAN NOTARIS DALAM PRAKTIK PERJANJIAN BISNIS DI PERBANKAN SYARIAH (TINJAUAN DARI PERPEKTIF HUKUM EKONOMI SYARIAH)
- Hamka Siregar*  
715 | SUMPAH PEGAWAI NEGERI SIPIL DALAM PERSPEKTIF HUKUM ISLAM
- Abdul Hamid*  
729 | APLIKASI TEORI *MASHLAHAH* (MASLAHAT) NAJM AL-DÎN AL-THÛFÎ DALAM PENYELESAIAN SENGKETA PERJANJIAN BISNIS DI BANK SYARIAH
- Muttaqin Choiri*  
743 | POSISI *RAY* DALAM PEMBENTUKAN HUKUM ISLAM
- Muhibbuthabary*  
755 | ANALISIS YURIDIS TERHADAP PUTUSAN MAHKAMAH AGUNG REPUBLIK INDONESIA NOMOR: 425 K/AG/2014 TENTANG CERAI GUGAT
- Muhammad Harfn Zuhdi*  
771 | *FIQH AL-BÎ'AH*: TAWARAN HUKUM ISLAM DALAM MENGATASI KRISIS EKOLOGI
- Eka Nuraini Rachmawati & Ab Mumin bin Ab Ghani*  
785 | AKAD JUAL BELI DALAM PERSPEKTIF FIKIH DAN PRAKTIKNYA DI PASAR MODAL INDONESIA
- Achmad Asrori*  
807 | BATAS USIA PERKAWINAN MENURUT FUKAHA DAN PENERAPANNYA DALAM UNDANG-UNDANG PERKAWINAN DI DUNIA ISLAM
- Laurensius Arliman S & Fitri Daulay*  
827 | DISPENSASI PERKAWINAN BAGI ANAK DI BAWAH UMUR DI PENGADILAN AGAMA PADANGSIDIMPUAN
- Candra Perbawati*  
843 | PENEGAKAN HAK ASASI MANUSIA DI ERA GLOBALISASI DALAM PERSPEKTIF HUKUM ISLAM
- Asriani*  
855 | INVESTASI EMAS DALAM PERPEKTIF HUKUM ISLAM
- Syamsuri Ali*  
867 | PENGOBATAN ALTERNATIF DALAM PERSPEKTIF HUKUM ISLAM
- Muhammad Hasan*  
891 | PENGAMALAN DAN PENGELOLAAN ZAKAT BERBASIS KEARIFAN LOKAL (STUDI DI MASYARAKAT KAMPUNG SANGGAU)
- عبد القادر جيلاني  
903 | العدالة في قضية التعدد في نظر الفلسفة القانونية المعيارية، والنفسية والاجتماعية

# SYNERGY OR CONFLICT OF LAWS? (COMPARISON BETWEEN THE COMPILATION OF RULES ON SHARI'AH ECONOMY (KHES) AND THE NATIONAL SHARI'AH BOARD'S (DSN) FATWAS).\*

Mohamad Atho Mudzhar & Muhammad Maksam

Professor of the Sociology of Islamic Law & Senior Lecturer at the Faculty of Shariah and Law  
The State Islamic University of Jakarta  
E-mail: athomudzhar@yahoo.co.id

**Abstrak:** *Sinergi atau Konflik Hukum? (Perbandingan Kompilasi Hukum Ekonomi Syariah (KHES) dengan Fatwa Dewan Syariah Nasional (DSN).* Artikel ini membandingkan Kompilasi Hukum Ekonomi Syariah (KHES) yang dibuat oleh Mahkamah Agung Indonesia pada tahun 2008 dengan fatwa yang dikeluarkan oleh Dewan Syariah Nasional (DSN) Majelis Ulama Indonesia (MUI). Perbandingan dilakukan dalam beberapa ketentuan terutama yang menyangkut *Murâbahah*, *Mudârabah*, *Ijârah*, *Tâmîn*, *Kafâlah*, *Hawâlah*, dan *Rahn*. Hal ini dilakukan karena beberapa pihak merasa khawatir jika kompilasi itu bertentangan dengan fatwa Majelis Ulama Indonesia. Hasil penelitian menunjukkan bahwa tidak terdapat konflik antara kedua regulasi di atas. Bahkan sebaliknya, mereka saling melengkapi. Perbedaan antara kedua regulasi hanya terjadi dalam tataran konseptual mengenai bentuk *Murâbahah*, pembatasan *Murâbahah*, *Mushtarakah*, dan definisi asuransi Syariah.

**Kata Kunci:** KHES, fatwa DSN, perbandingan hukum, hukum ekonomi Islam di Indonesia

**Abstract:** *Synergy or Conflict of Laws ? (Comparison Between the Compilation of Rules on Shari'ah Economy (KHES) and the National Shari'ah Board's (DSN) Fatwas).* This article compares the Compilation of Rules on Islamic Economics (KHES) produced by the Indonesian Supreme Court in 2008 to the fatwas issued by the National Sharia Council (DSN) of the Council of Indonesian Ulama (MUI). The comparison is made in some provisions relating to *Murâbaha* (a particular kind of sale), *Mudhârabah* (partnership in a commercial enterprise), *Ijârah* (rent/lease/hire contract), *Tâmîn* (insurance), *Kafâlah* (conjoining in debt guarantee), *Hawâlah* (transfer of debt), and *Rahn* (pawning/mortgage). This is done to verify whether or not the Compilation was contrary to the fatwas of Indonesian Ulama Council. The findings shows that there is no contradiction between the two regulations. The difference occurs only in the kinds of *Murâbahah*, *Murâbahah*, and *Mushtarakah*, as well as the definition of *Tâmîn*.

**Keyword:** KHES, DSN's fatwas, comparative law, comparison of Islamic economics laws in Indonesia

## Introduction

The year of 2006 marked the beginning of the steady legal ground of Indonesian Shariah economy. The promulgation of the Law No. 3 of 2006 on Religious Courts as

an amendment to the Law No. 7 of 1989 on Religious Courts conferred an additional and new jurisdiction to the religious courts system i.e. the jurisdiction over the issues of Islamic or Shariah economy. This included such cases as Shariah banking, micro Shariah economic institutions, Shariah insurances, Shariah obligations, Shariah bonds, Shariah pawns, and others. Realizing the fact that laws governing such Shariah economic cases were not in existent yet, and to help implement the law, the

\* This is a revised version of a paper presented at the 15<sup>th</sup> Annual International Conference on Islamic Studies held at State Islamic Institute of Islamic Studies, Manado, Indonesia, September 3-6, 2015. The earlier version of the paper was presented at the International Seminar on Shariah Transactions held by the Faculty of Shariah and Law, The State Islamic University of Jakarta, in cooperation with the Bogor Agricultural Institute on June 10<sup>th</sup> and 11<sup>th</sup>, 2015 in Jakarta.

Supreme Court on September 10th, 2008 produced the Regulation No. 2 of 2008 on The Compilation of Rules on Shariah Economy known as the Kompilasi Hukum Ekonomi Syariah, abbreviated as the KHES.<sup>1</sup> There are three important issues covered by the regulation: first, the introduction of the text of the KHES detailing the rules on Shariah economic issues consisting of some 790 articles; secondly, an injunction to the judges of Religious Courts to use the text of the KHES as a source of guiding principles for deciding over Shariah economic cases; and thirdly, a recognition that the text of the KHES did not limit the judges of Religious Court from exercising their own free Islamic legal thinking to come to the right and just decisions.

On July 16<sup>th</sup>, 2008, after the endorsement by the Parliament, the President of Republic of Indonesia, Susilo Bambang Yudoyono, promulgated the Law No. 21 of 2008 on Shariah Banking. The Article 1 point 12 of the Law stipulated that what it meant by Shariah principles were the principles of Islamic law on banking activities based on fatwas issued by authorized institutions. Although the Law did not mention the term MUI (the Council of Indonesian Ulama) nor the DSN (the Shariah Nasional Board), the reference was clear i.e. to the DSN of the MUI whose function was to issue fatwas (Islamic legal pronouncements) on Islamic economic issues. In fact, long before the Law No. 21 of 2008 on Shariah Banking was promulgated, as early as year 2000, the DSN-MUI had started issuing fatwas on Islamic economic issues which later in 2006 were compiled into one volume containing some 53 fatwas.

The presence of these two documents, the KHES and the fatwa volume, raises questions as to whether or not they constitute the

rudiments of conflict of laws in Indonesia in dealing with Shariah economy. How the conflict of laws prevails or how the two documents are mutually complimentary as far as rulings are concerned, on the one hand, and how the judges of Religious Courts decide their cases in such a situation of conflict of laws on the other hand, are subjects of the examination of this paper by way of preliminary studies. A comparison will be made between the content of the KHES and the fatwas of the DSN-MUI to identify their similarities, differences, or even contradictions to one another. This paper will limit itself to comparing some seven issues, namely Bai' Murabahah, Mudarabah, Ijarah, Shariah insurance, Kafalah, Hawalah, and Rahn. Prior to such an examination, however, a few words of description is necessary concerning the history and the nature of the texts of the KHES and the DSN-MUI's fatwas.

### **The KHES: The Regulation of the Supreme Court**

The Directorate General for the Development of Religious Courts (Badilag) said that the promulgation of the Law No. 3 of 2006 on Religious Courts had led the Supreme Court to adopt four policies: first, to improve the quality of the buildings and other infrastructures of Religious Courts; secondly, to improve the quality of the judges of Religious Courts on Shariah economics including by establishing cooperation with universities for furthering the levels of the educational attainment of the judges; thirdly, to provide with rules and regulations on Shariah economy, both at the levels of the law of procedure and the law of substance; and fourthly, to provide the religious court system with technical procedures on how to deal with Shariah economy cases that are easily accessible to public.<sup>2</sup>

<sup>1</sup> In translating the content of the KHES into English, the writers prefer the term regulation or rules rather than law, since the KHES is not law proper passed by the parliament. In fact, the Supreme Court itself rightly calls it as a regulation.

<sup>2</sup> Tim Penyusun KHES, "Sejarah Singkat Penyusunan Kompilasi Hukum Ekonomi Syariah Mahkamah Agung RI," in

In order to implement those policies, the third policy in particular, the Supreme Court on October 20, 2006 had created a committee comprising of some 15 judges and administrative staff, led by Supreme Judge Abdul Manan as the chairman and Supreme Judge Rifyal Ka'bah as the vice chairman. The committee's tasks were to compile all relevant materials on Shariah economy, to hold relevant discussions and seminars, and to prepare a draft of Compilation of Rules on Shariah Economy. The committee soon conducted a series of seminars held in Solo and Jakarta in 2006, had consultations with the Central Bank of Indonesia, conducted comparative study tours to a number of places including the International Islamic University (IIU) in Malaysia in 2006, the International Islamic University (IIU) and the Federal Shariah Court of Pakistan in 2007, and the Islamic Bank of Britain in London in 2007. The committee was later assisted by a team of legal drafters consisting of some 17 professors and teaching staff of the State Islamic University (UIN) of Sunan Gunung Jati Bandung, with Ahmad Djazuli as the coordinator. The actual drafters were Cik Hasan Bisri on legal subjects and Amwal, Jaih Mubaraok, Anton Atoillah, Deden Effendi, and Enceng Arif Faisal on contracts (uqud), Deden Effendi and Enceng Arif Faisal on zakat (alm tax) and hibbah (donations), Anton Atoillah on Shariah retirement funds, and Jaih Mubarak on Shariah accountancy.<sup>3</sup>

The drafters claimed to have used some nine important sources as their references in drafting the KHES. These included the works of Wahbah al-Zuhaili entitled *Al-Fiqh al-Islami wa Adillatuh* (2006), Mustafa Ahmad al-Zarqa's *Al-Fiqh al-Islami Fi Thaubih al-*

*Jadid* (2006), Ali Fikr's *Al-Muamalah al-Madiyah wa al-Adabiyah* (1948), Abd al-Razzaq al-Sanhuri's *Al-Wasit Fi Sharh Qanun al-Madani al-Jadid*, Sayyid Abdullah Ali Husaini's *Al-Muqaranat al-Tashri'iyah Bayn al-Qawanin al-Wadiyah al-Madaniyah Wa al-Tashri ' al-Islami* (2001), Ali Haidar's *Durar al-Hukkam: Sharh Majllat al-Abkam* (1991), the DSN-MUI's *Himpunan Fatwa Dewan Syariah Nasional MUI* (2006), the Bank of Indonesia's *Peraturan Bank Indonesia Tentang Perbankan Syariah*, and PSAK (Pernyataan Standar Akuntansi Keuangan) No. 59 of 2002. The first draft of the KHES was completed in 2007 and having been discussed with the members of the committee of the Supreme Court, it was agreed that the draft would contain some 1015 articles distributed in four books, namely Book I on Legal Subjects and Amwal, Book II on Contract (Uqud), Book III on Zakat and Hibbah, and Book IV on Shariah Accountancy. After further discussions, the draft was revised and agreed upon in June 2008 containing only 790 or 796 articles distributed in four books. This is the draft which was later taken by the Supreme Court to constitute the Regulation No. 2 of 2008 mentioned earlier. It seemed that even after the issuance of the Regulation of the Supreme Court, the draft was still discussed and revised until September 11, 2009. The final draft was later assessed and approved by the committee chairman, Supreme Judge Abdul Manan, to become the official document of the KHES (Kompilasi Hukum Islam or The Compilation of Rules on Shariah Economy).<sup>4</sup> In the 2013 edition, the text of the KHES was supplied with an Arabic translation and contained 790 articles. The judges of Religious Courts nationwide have now been trained on the content of the KHES, while cases of Shariah economy began to be brought to them for decisions.

Wahyu Widiana, *Kompilasi Hukum Ekonomi Syariah*, (Jakarta: Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama, 2011), p. i-ii.

<sup>3</sup> Tim Penyusun KHES, "Sejarah Singkat Penyusunan Kompilasi Hukum Ekonomi Syariah Mahkamah Agung RI," pp. ii-xv.

<sup>4</sup> Tim Penyusun KHES, "Sejarah Singkat Penyusunan Kompilasi Hukum Ekonomi Syariah Mahkamah Agung RI," pp. xvi-xliv.

It was not clear which of the above nine sources were the most influential in the drafting of the KHES. Rumour said that the KHES was like the translation of the *Majllat al-Ahkam al-Adliyah* (the MAA) of the Ottoman Empire. However, a study by Abbas Arfan who made a comparison on the number and the nature of legal theories (Qaidah Fiqhiyah) applied in both the KHES and the MAA had identified that there were some 24 Qaidahs (24 percent) that had resemblances with some 99 Qaidahs used in the MAA and these were applied in some 149 out of 790 articles of the KHES. But this application was only implicitly, Arfan said, while the explicit similarities of the use of certain Qaidah Fiqhiyah occurred only on 7 Qaidahs (8 percent) out of those 99 Qaidahs used in the MAA.<sup>5</sup> In other words, while the influence of the MAA on the KHES in terms of the methodology was not deniable, it was slight and minor.

### The Fatwas of the DSN-MUI

The Council of Indonesia Ulama (Majlis Ulama Indonesia-MUI) did not have a special body to discuss and issue fatwas on Shariah economic issues until the year 2000. Since its establishment in 1975 until 1999, all of its fatwas were discussed and issued by the Fatwa Committee attached to the MUI. As Shariah economic activities grew in Indonesia, pioneered by the establishment of the Indonesian Bank of Muamalat in Jakarta in 1991, the need arose as to how to guide these Shariah economic activities with Shariah principles. As the number of Shariah banks and other Shariah economic institutions grew further, economic issues needing for the guidance of Shariah principles also grew. To respond to such challenges, the

<sup>5</sup> Abbas Arfan, "Optimalisasi Serapan Kaidah-kaidah Fikih Muamalah dalam Kompilasi Hukum Ekonomi Syariah," a paper presented at the Second Forum of Shariah Economic and Financial Researches, held jointly by the central Bank of Indonesia (BI) and the Association of Islamic Economic Experts (Ikatan Ahli Ekonomi Indonesia – IAEI) on the 12<sup>th</sup> and the 13<sup>th</sup> of November, 2013, in Jakarta.

MUI in 2000 created a special body called the DSN (Dewan Syariah Nasional-National Shariah Board) with a special task to discuss and prepare fatwas on Shariah economic issues, while the actual pronouncement of the fatwas is conducted by the MUI. This is one of the reasons why people rendered those fatwas to the DSN or of the DSN-MUI, interchangeably. Until 2006, as shown in the 2006 edition of the compilation of the DSN fatwas, the number of the fatwas issued had reached 53 fatwas. It is said that until 2014 the number of the DSN fatwas reached some 94 fatwas.

Barlinti studied thoroughly the position of the fatwas of the DSN-MUI on Shariah economic issues in 2010. She found that although the fatwas of the DSN-MUI were theoretically not binding, in practice they are adopted by the central Bank of Indonesia and the government of Indonesia in general to constitute governmental regulations. Barlinti further said that the position and the roles of the fatwas of the DSN-MUI in the Indonesian legal system could be observed in four components: firstly, they were presenting the Shariah principles to guide all Shariah economic activities; secondly, they constituted guidelines to the members of Shariah Supervisory Boards attached to Shariah economic institutions; thirdly, the content of the fatwas was adopted or absorbed into various governmental rules and regulations; and fourthly, they constituted the bases for Shariah economic institutions in their economic activities. Barlinti also found, however, that the fatwas were not taken seriously by the judges of Religious Courts nor by the arbiters when they were dealing with cases of Shariah economy. Instead, the judges and the arbiters preferred positive binding legal documents to fatwas because, to them, fatwas were never binding.<sup>6</sup>

<sup>6</sup> Yeni Salma Barlinti, *Kedudukan Fatwa Dewan Syariah Nasional dalam Sistem Hukum Nasional Indonesia*, (Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2010). Under the same title, the book was originally a doctoral

The position of the fatwas of the DSN-MUI in Indonesian national legal system is indeed a subject of debate. Objections to the binding nature of the fatwas are based on an argument that those fatwas are issued by a non-governmental body like the DSN-MUI. Barlinti followed up this argument by suggesting that in order for Indonesia to have fatwas that were legally binding, it was time that the government created an independent fatwa issuing body.<sup>7</sup>

Such a view might not be in line with what was stipulated in the Law No. 21 of 2008 on Shariah Banking. The Article 1 point 7 of the law stipulated the following: “Shariah banks are banks that operate based on the principles of Shariah”. Point 12 of the same Article qualified the term Shariah principles in the following: “the Shariah principles are the principles of Islamic law in banking activities based on fatwas issued by authorized institutions for issuing fatwas on Shariah issues.” Clearly the law did not mention the MUI by name nor the DSN-MUI, but it is obvious that what it meant by the authorized issuing fatwa body was none other than the DSN-MUI. The DSN-MUI has been playing major roles in providing fatwas to the government and the public. This is exactly the point where the opposite argument lies. Since the fatwas of the DSN-MUI were mentioned and referred to in the Law No. 21 of 2008, it could be understood or interpreted that those fatwas were legally higher than the text of the KHES produced by the regulation of the Supreme Court. To put it in a question, can rules and regulations included in the KHES contradict the fatwas of the DSN-MUI recognized by the law? To stretch out the question, one may ask how possible is it that the content of the KHES contradicts that of the fatwas of the DSN-MUI, and if

so, how should one reconcile them?

Probably there is no easy answer to the above question of conflict of laws. An historical context could also help explain the issue. Barlinti put it well when she said that there was a vacuum of law on Shariah banking issues.<sup>8</sup> Hence, the fatwas of the DSN-MUI played pioneering roles to fill in the gap. They provided the government and the public with the Shariah principles on economy. By the time the Law No. 21 of 2008 on Shariah Banking was promulgated, the fatwas of the DSN-MUI had been playing such important roles for about eight years. In this connection, it seemed that the Supreme Court also observed the same fact of vacuum of law and saw a need for some sort of rules on Shariah economy. The Supreme Court was prompt, soon after the promulgation of the Law No. 3 of 2006 in which the jurisdiction over Shariah economy cases was vested to the Religious Courts system in addition to its traditional jurisdiction over the issues of marriage, divorce and inheritance, the Supreme Court also took noble initiatives to offer such needed rules on Shariah economy by drafting the KHES. Probably the only note to make here is that the Supreme Court was actually a late comer on the issue, some six years behind the initiatives taken by the DSN-MUI. A question may arise as to whether or not there was coordination between the Supreme Court and the DSN-MUI in the process of drafting the KHES and whether or not there was any contradiction in the content between the KHES and the fatwas of the DSN-MUI. This is the subject of the examination of the following section.

### **Examination of the texts of the KHES and the Fatwas of the DSN-MUI**

As mentioned earlier, the KHES consisted of four books with some 790 articles, while

dissertation that she submitted to the Faculty of Law of the University of Indonesia in 2010.

<sup>7</sup> Yeni Salma Barlinti, *Kedudukan Fatwa Dewan Syariah Nasional dalam Sistem Hukum Nasional Indonesia*, p. 557.

<sup>8</sup> Yeni Salma Barlinti, *Kedudukan Fatwa Dewan Syariah Nasional dalam Sistem Hukum Nasional Indonesia*, p. 555-556.

the fatwas of the DSN-MUI numbered some 94 fatwas since year of 2000 to 2014. The following are discussion and examination of seven issues dealt with by those texts of the KHES and the fatwas of the DSN-MUI, namely Bai' Murabahah, Mudarabah, Ijarah, Shariah insurance, Kafalah, Hawalah, and Rahn.

### ***Bai' Murâbahah***

*Bai' Murâbahah* is said to be the most frequently used in Shariah banking transactions. The following are the stipulations included in the KHES on *Bai' Murâbahah* (the Articles 116 to 133 of the Book II of the KHES):

116. The seller finances part or the whole price of the purchase of an object specified. The seller must purchase first the object on his own behalf and the purchase must be free from any elements of Riba. The seller must inform the buyer honestly on the original price of the object as well as the profit margins and all real expenses to be added to the price.
117. In due time the buyer must pay the price of the object, which has been agreed upon under the scheme of *Murâbahah*.
118. The selling party in a *Murâbahah* scheme may ask the buying party to sign an additional contract in order to avoid the misuse of the original contract.
119. In case the seller wants to delegate the purchasing of an object from a third party to the buyer, the contract of *Murâbahah* scheme may only be undertaken after the object is under the full ownership of the seller.
120. When a seller receives an order from a buyer for an object, the seller must finalise and complete the purchase of the object from a third party.
121. The seller may ask for a down payment from the buyer at the time the buyer makes such an order.
122. If the buyer later refused to purchase the object that he had ordered, the buyer must compensate the seller's real expenses with the down payment.
123. If the value of the down payment could not cover the whole real expenses incurred, the seller could charge the buyer with the difference.
124. The payment under a *Murâbahah* scheme is made in full or in instalments within an agreed period. In case the buyer experiences difficulty of paying the instalments, the buyer may be given an ease period for a second chance. The ease period may take the form of the conversion of the original *Murâbahah* contract.
125. The seller may offer a contract conversion to the buyer who failed to pay instalments by producing a new contract. The seller may offer a discount to the buyer who fulfils his obligations in good faith or experiences weaker ability of paying the instalments. The amount of the discount is the seller's discretion.
126. The seller may offer an extension of the period of instalments to be agreed upon by the buyer, without imposing an additional charge, except for some real expenses.
127. A seller may ask the buyer for a guaranty at the time of the signing of the *Murâbahah* contract.
128. Shariah financial institutions may offer buyers failing to pay their instalments in time with a conversion of contract, provided that such buyers show good potentialities and prospects.
129. Contracts of *Murâbahah* may be terminated by selling back the object to the original Shariah financial institutions at the market price to cover the remaining financial obligations of the buyer.

130. If the selling-back price is higher than the value of the financial obligations of the buyer, the difference is returned to the buyer.
131. If the selling-back price is lower than the value of the financial obligations of the buyer, the difference is charged upon the buyer.
132. The Shariah financial institutions and the buyers formerly involved in a terminated *Murâbahah* contract may produce a new contract under the scheme of *Ijârah Muntahiah Bi al-Tamlîk (IMBT)*, *Mudârabah*, or *Mushâarakah*.
133. In case there was a party failing to comply with his financial obligations after such a revision of *Murâbahah* contract, or there arises some disagreements between the parties, the matter is brought to *Sulh* (deliberation or arbitration) and/or to courts.

For comparative purposes, the following are the statements of the fatwas of the DSN-MUI on *Murâbahah* as they are included in its numerous fatwas. In the fatwa of the DSN-MUI No. 4 of 2000, it is stated as the general rules of *Murâbahah* the following:

1. Shariah banks and their customers must agree to undertake *Murâbahah* scheme free of Riba.
2. Goods to be the object of sales are not prohibited for sale in Islam.
3. Shariah banks provide with part or the whole cost for buying the object whose specifications have been agreed upon.
4. Shariah banks must purchase the ordered object on their own behalf legally and free of Riba.
5. Shariah banks have to inform the customers on the way the purchase of the object was made, as to whether it was done with cash or on loan.
6. Shariah banks later sell the ordered object to the customers with the price of the purchase as well as the profit margin and other real additional expenses. The Shariah banks must inform the customers honestly.
7. The customers make the payment of the object within an agreed period of time.
8. To avoid the misuse or improper validity of the contract, a Shariah bank may ask customers for special additional agreements.
9. If Shariah banks want to delegate to the customers the purchase of the object from a third party, the sale under *Murâbahah* scheme can only be undertaken after the object is legally and fully owned by the banks.

As far as rules on the customers of *Murâbahah* scheme are concerned, the fatwa stated the following:

1. Customers lodge applications to Shariah banks for the purchase of an object.
2. Having approved such applications, the banks proceed to purchase the object from a third party legally.
3. Shariah banks offer such an ordered object to the customers who are bound to buy the object, followed by proper sale contracts.
4. At the time of the approval of the application, Shariah banks may ask the customers for a down payment.
5. In case the customers refuse to buy the object they have ordered, the Shariah banks may ask for compensation for the real expenses incurred which are to be deducted from the down payment.
6. If the value of the down payment is less than the value of the real expenses, the banks may ask the customers to pay the difference.
7. If the customers decide to continue to buy the object, the down payment is part of the payment for the object. If they decide to cancel the buying, the

down payment is taken partly by the banks to cover the real expenses caused by the cancellation; and if the value of the down payment is less than the real expenses incurred, the customers are charged to pay the difference.

As far as guaranty in a *Murâbahah* scheme is concerned, the fatwa stated the following rules:

1. Guaranty is permitted in a *Murâbahah* scheme to show the seriousness of the customers.
2. Shariah banks may ask for a guaranty to the customers.

As far as rules on debt, the fatwa stated the following:

1. In principle the obligation of the customers to pay off the whole amount due is not related to any act of the customers to a third party. If the customers sell the object to a third party with a profit or loss, they are obliged to continue to pay their instalments with the bank.
2. If the customers sell the object to a third party prior to the completion of its instalment period, they are not obliged to pay off the full payment due to the bank at the time of the sale.
3. If the sale of the object to a third party causes some loss, the customers are still obliged to pay the amount due to the bank according to the agreed schedule; they may not postpone the payment nor asking for some consideration from the bank.

On the postponement of payment by the customers of a *Murâbahah* scheme, the fatwa stated the following:

1. Customers with the ability to pay instalments may not postpone the payment.
2. If the customers intentionally postpone the payment of instalments, or either party does not comply with its obligations,

the matter is brought to the Shariah Arbitration Board after some negotiation failures.

On bankruptcy, the fatwa stated that as soon as the customers were proclaimed bankrupt, the bank must reschedule the instalments to suit the customers' new ability or be based on new agreements.

It must be noted here that some other fatwas have been issued by the DSN-MUI on *Murabahah* issues, which compliment the fatwa No. 4 of 2000. These are the fatwa No. 13 of 2000 on the permissibility for Shariah financial institutions to ask the customers for some amount of down payment, the fatwa No. 16 of 2000 on the obligation for the Shariah banks to forward to the customers any discount of price offered by third party suppliers, the fatwa No. 17 of 2000 on the possible fines charged against the customers who keep postponing payment of instalments intentionally despite of his good financial ability provided that those fines will go to social institutions or social activities, the fatwa No. 23 of 2002 on the permissibility for Shariah banks to offer discounts to the customers who have completed their instalment payments in time or sooner than the schedule, the fatwa No. 46 of 2005 on the permissibility for Shariah banks to offer discounts to the customers who experience weakening financial capabilities of paying instalments, the fatwa No. 47 of 2005 on the permissibility for the customers to resell the object to the bank or to a third party to cover the unpaid instalments due to the weakening financial ability of the customers or to discharge the remaining instalments altogether, fatwa No. 48 of 2005 on the possibility of rescheduling the timetable of instalments provided that no additional charges are put against the customers except for the real costs, and the fatwa No. 49 of 2005 on the possibility of converting a *Murâbahah* scheme into that of *Ijârah Muntabiah Bi al-Tamlîk (IMBT)* after the termination of the *Murabahah* by

reselling the object and the paying off all the debts. Some of those fatwas maintained that in the case of disagreements between the Shariah banks and the customers, the matter would be brought to the National Arbitration Board. This repeated mention of and insistence on bringing matters of disagreement to the National Arbitration Board was probably to ensure that the matters did not go to the general courts whose jurisdiction was to apply civil law rather than Islamic law. Indeed, it was also due to the fact that by then the Law No. 3 of 2006 on Religious Courts had not been promulgated yet, according to which Islamic (Shariah) economic issues are vested to the jurisdiction of the Religious Courts. It is also worth noting that *Murâbahah* issues have been frequently explained by the fatwas of the DSN-MUI, some nine times so far, giving an impression that some fatwas are reiterating the others.

It appears from the above comparative quotations that rulings covered by both of the texts of the KHES and the fatwas of the DSN-MUI include the following: definition, general rules, procedure, guaranty, legal action on the object of *Murâbahah*, debt payment, down payment, forms of *Murâbahah*, discount, sanction, discount on remaining instalments, rescheduling, and the conversion of contract. Definition of *Murâbahah* is dealt with by the KHES, but not by the fatwas of the DSN-MUI. The Article 20 of the KHES defines the *Murâbahah* as a mutually benefitting financing system involving the owner of the finance (*sahib al-mal*) and those who need such finance through contracts of sale of goods in which the value of the sale includes the value of the original purchase of the object and the profit margin for the *Sâhib al-Mâl*, while the payment of the sale may be done in full at the time of the contract or in instalments. The peculiarity of the definition made by the KHES lies in the use of the term *Sâhib al-Mâl* which

is not commonly done by the schools of Islamic law as shown in the literatures of *fiqh*. Instead, such a use of the term *Sâhib al-Mâl* is commonly seen in the literature on *Mudârabah* schemes. Al-Shâfi'i, for example, gave an example of *Murâbahah* by denoting to a person who asked someone else to purchase for him certain goods with some profit margins. The Mâliki school defines *Murâbahah* as a contract of sale in which the owner of the goods inform the buyer on the original price of the goods and the profit margins that he added to it, while the Hanâfi school defines it as the handover of goods for a price consisting of the original price and some profit margins.<sup>9</sup>

On the general rulings of *Murâbahah*, both the texts of the KHES and the fatwas of the DSN MUI similarly made mention of the prohibition of *Riba*, the requirement that the object of *Murâbahah* had to be own legally, procedure, guaranty, the possibility of payment in full or in instalments, rescheduling, and the conversion of contract. What is not mentioned by the KHES but it is by the fatwa of the DSN-MUI, is on the rights of the customer to do certain legal acts on the object (such as reselling the object before the completion of the instalments). What also not mentioned in the KHES, but stated clearly in the fatwas were concerned with down payment, discount, sanction and *ta'zîr*. What is differently mentioned by the KHES and the fatwas of the DSN-MUI is on the forms of *Murâbahah* contract. The fatwas of the DSN-MUI opens the possibility of not continuing the buying, while the KHES presumed that the customer was bound to buy the ordered goods. In any case, if such a cancellation occurred, the rules of compensation apply.

It appears from the above comparison that there is not any contradiction between

<sup>9</sup> Al-Shâfi'i, *al-Umm*, vol. III (al-Mansûra: Dâr al-Wafâ, 2005), p. 33; Ibn Juzay, *al-Qawânin al-Fiqhiyah*, (al-Qâhirah: Dâr al-Hadîth, 2005), p. 263; and Ibn Qudâmah al-Maqdisi, *al-Mughnî*, vol. VI, (Bayrût: Maktab al-Islâmi), p. 199.

the two texts, the KHES and the fatwas of the DSN-MUI. What exists is that some issues are touched upon by one text but not by the other. None of the texts are contradictory to one another, however. They are mutually complimentary. The exception is for the issue of the forms of *Murâbahah* where the KHES assumes that all orders of goods must be followed by the actual sale of the goods. But both agreed to mention the possibility of some compensation in case that the sale is, for one reason or another, not taking place. Furthermore, chronologically one may say that since the fatwas of the DSN-MUI on *Murâbahah* had been issued since year 2000 while the KHES was only drafted in 2007 and officially announced by the Supreme Court in 2008, almost a decade apart, it is only logical to assume that the text of the KHES on *Murâbahah* has adopted at least partly the injunctions laid down by the fatwas of the DSN-MUI.

### ***Mudârabah***

Let us move on now to the issue of *Mudârabah*. The Article 20 of the KHES defines *Mudârabah* as a form of cooperation between two parties in which one party provides with the capital and the other with the work or the management to run certain businesses based on an agreement of profit sharing. The rulings of the KHES on the *Mudârabah* are included in 24 articles namely the Articles 231 to 254 of the Book Two, stipulating as the following:

231. The capital owner is obliged to hand over the capital or any precious goods to the other party to run businesses. The receiver of the capital runs the business agreed upon by both parties. The agreement on the type of businesses to run is mentioned in the contract.
232. Pillars of the cooperation of *Mudârabah* include the following: the capital owner (*Sâhib al-Mâl*), the party who runs the business (*Mudarib*), and the contract.
233. The agreement on the type of businesses to run may take the forms of free choices of business (*Mutlaq*) or limited (*Muqayyad*) to certain branches, locations, and times of business.
234. The party running the business has to have the needed expertise to run the business.
235. The capital takes the forms of goods, cash, or precious objects. The capital is handed over to the party who runs the business. The amount of the capital in a *Mudârabah* scheme has to be stated clearly in the contract.
236. The distribution of profit to the *Sâhib al-Mâl* and the *Mudarib* must be stated clearly and in a precise manner in the contract.
237. *Mudârabah* contracts which do not meet the above requirements are invalid.
238. The status of the capital handed over to the *Mudarib* by the *Sâhib al-Mâl* is solely capital. The *Mudarib* acts as the representative of the *Sâhib al-Mâl* in managing the capital. The profit resulted from the *Mudârabah* is jointly owned.
239. The *Mudarib* has the rights to buy certain goods and sell them for a profit. The *Mudarib* has the right to sell the goods with high or low price in cash or in instalments. The *Mudarib* has the right to receive the payment for the goods by way of the transfer of credit. The *Mudarib* is not permitted to sell goods for a period uncommonly practiced in the market.
240. The *Mudarib* is not permitted to donate or lend the asset of the *Mudârabah* without the permission of the *Sâhib al-Mâl*.
241. The *Mudarib* has the right to delegate to a third party to represent him for buying or selling goods in accordance with the contract. The *Mudarib* has

- the right to deposit or invest the asset into a system of business run under Shariah rules. The *Mudarib* has the right to sign contacts with a third party to buy and sell goods in accordance with the contract.
242. The *Mudarib* has the right to profits earned in accordance with the contract. The *Mudarib* does not have any right to profits when the business is losing.
  243. The *Sâhib al-Mâl* has the right to profits earned in accordance with the contract. The *Sâhib al-Mâl* does not have any right to profits when the business is losing.
  244. The *Mudarib* is not permitted to mix his own asset to that of the *Mudârabah*, unless such a practice is commonly seen in the business.
  245. The *Mudarib* may mix his own asset to that of the *Mudârabah* with the permission of the *Sâhib al-Mâl*.
  246. The profits earned by the mixed assets are shared proportionally by the parties in accordance with the contract.
  247. Travel expenses of the *Mudarib* for running the business are charged against the capital of the *Sâhib al-Mâl*.
  248. The *Mudarib* is obliged to protect and implement all limitations laid down by the *Sâhib al-Mâl*.
  249. The *Mudarib* is responsible for any loss or damage caused by his actions that go beyond or in violation of limitations set out in the contract.
  250. The contract of *Mudârabah* terminates at the date set out in the contract.
  251. The *Sâhib al-Mâl* may terminate the contract if the *Mudarib* violates the contract. Such a termination of contract is informed to the *Mudarib*. The *Mudarib* is obliged to return to the *Sâhib al-Mâl* the capital and the profits that belong to the *Sâhib al-Mâl*. Any dispute between the *Sâhib al-Mâl* and the *Mudarib* is solved by deliberations (*al-Sulh*) or by bringing the matter to the court.
  252. Losses and damages caused not by the negligence of the *Mudarib* are charged against the *Sâhib al-Mâl*.
  253. The *Mudârabah* contract is terminated when either party, the *Sâhib al-Mâl* or the *Mudarib*, passes away or loses legal capacities.
  254. The *Sâhib al-Mâl* has the right to press for payment of the debt of a third party as shown in the documents after the death of the *Mudarib*. Losses caused by the death of the *Mudarib* are charged against the *Sâhib al-Mâl*.
- General rulings on *Mudârabah* were stated in the fatwa of the DSN-MUI No. 7 of 2000 issued on April 4<sup>th</sup>, 2000. The fatwa stated the following:
1. *Mudârabah* is a type of financing by Shariah economic institutions to the customers to support certain productive businesses.
  2. In a *Mudârabah* scheme, the bank acts as the *Sâhib al-Mâl* and provides 100% of the capital, while the customers are the *Mudarib*.
  3. The length of time, the procedure of returning the capital, and the distribution of profits are based on an agreement between parties.
  4. The *Mudarib* may undertake different lines of business agreed upon in the contract, while the *Sâhib al-Mâl* does not intervene into the management of the business although he does have the right to supervision.
  5. The value of the capital must be explicitly mentioned in the contract in full and in cash.
  6. All damages caused by the *Mudarib* are charged against the *Sâhib al-Mâl*, unless the *Mudarib* is negligent of or intentionally violating the contract.
  7. In principles, there is no need for

guaranty in a *Mudârabah* scheme, but the Shariah economic institutions may ask the *Mudarib* for a guaranty to avoid any violation by the *Mudarib*.

8. Business criteria, procedures for cashing the capital, and profit distributions are regulated by the Shariah economic institutions under the light of the fatwas of the DSN-MUI.
9. Day to day operational expenses are covered by the *Mudarib*.
10. In case of the violations of contract by the *Sâhib al-Mâl*, the *Mudarib* may ask for some compensation to the *Sâhib al-Mâl*.

On the pillars and requirements of a *Mudârabah* scheme, the following rulings were stated in the fatwa:

1. Both *Sâhib al-Mâl* and the *Mudarib* must have legal capacities.
2. The statement of Ijab (offering) and Qabul (acceptance) must be stated clearly in writing in the contract which takes effect at the time of the signing of the contract.
3. Capital is the amount of money or an asset handed over by the *Sâhib al-Mâl* to the *Mudarib* with a fixed value in cash or in instalments.
4. A profit resulted from *Mudârabah* is any value of asset on top of the capital, shared proportionally by the *Sâhib al-Mâl* and the *Mudarib* as it is agreed upon in the contract. Losses of business are charged against the *Sâhib al-Mâl*, except for cases of the *Mudarib*'s negligence, intentional mistakes, or violations of contract.
5. The *Mudarib* has the freedom to choose any line of businesses without the intervention of the *Sâhib al-Mâl*, except for his role as the supervisor. The *Mudarib* may not violate Shariah rules and the customs commonly practiced in the business.

The fatwa also stated the following additional rulings:

1. *Mudârabah* may be limited to certain periods of time.
2. The contract of *Mudârabah* may not be associated with any possible future events.
3. In principles, there is no compensation system under the *Mudârabah* scheme, except for negligence or intentional violations of the contract.
4. In case of disputes between the parties, the matter is brought to the shariah Arbitration Board after the failure of deliberations.

Other fatwas of the DSN-MUI on *Mudârabah* transactions include the fatwas No. 1 of 2000 on checking accounts, No. 2 of 2000 on saving accounts, No. 3 of 2000 on deposits, No. 8 of 2000 on *Mushâarakah* Financing, No. 22 of 2002 on *Mudârabah* Shariah obligations, and No. 38 of 2002 on Inter-bank *Mudârabah* Investment Certificates. These fatwas have preceded, reinforced and in some cases explained rulings that have been stated or outlined in the fatwa of the DSN-MUI No. 7 of 2000 mentioned above.

It appears from the above comparative quotations that both of the texts of the KHES and the fatwas of the DSN-MUI speak of the same thing on issues of the pillars of *Mudârabah* as well as on the rights and obligations of *Sâhib al-Mâl* and *Mudarib*. However, the fatwa of the DSN-MUI speaks of the requirements of *Mudârabah*, while the KHES leaves it open. On the other hand, the KHES lays some rulings on termination of *Mudârabah*, while the fatwa of the DSN-MUI leaves it open. What is more striking is that both of the texts are of different views on the contracts of *Mudârabah* *Musharakah*. The fatwa of the DSN-MUI opens the possibility of undertaking contracts under *Mudârabah* *Mushâarakah*, but the KHES as stated in the Article 244 to 246 limits the *Mudarib* from

being a *Musharik* without the permission of the *Sâhib al-Mâl*, except for cases which are already commonly practiced. Differences of opinion between the KHES and the fatwa of the DSN-MUI on *Mudârabah Mushâarakah* is indeed understandable, as the 'Ulama are also of different opinions on multiple contracts. Ibn Qudâmah, for example, maintained the permissibility of *Mudârabah Mushtâarakah*, while the Mâliki and the Shâfi'i schools forbade such a combination of contracts. The Shâfi'i school argued that the combination of *Shirkah* and *Qirâd* might result in profits but that would not constitute works.<sup>10</sup>

### ***Ijârah***

The next examination is on *Ijârah*. The Article 20 of the KHES stipulated that *Ijârah* was a payment for the use of certain goods for a period of time. The texts of the KHES on *Ijarah* are included in the Articles 295 to 334 of the Book Two, as the following:

295. Pillars of *Ijârah* are: *Musta'jir* (the person who hires goods), *Mu'ajir* (the person who hires out goods), *Ma'jûr* (the goods being hired out), and *Aqad* (contract).
296. The contract of *Ijârah* must apply clear sentences. The contract of *Ijârah* may take the forms of oral, written, or signal expressions.
297. The contract of *Ijârah* may be changed, extended, or terminated based on agreements.
298. The contract of *Ijârah* may take an effect for a specified future. The parties involved may not terminate the contract just because the contract has not taken an effect.
299. The contract of *Ijârah* which has been agreed upon by the parties may not

be terminated for a higher offer of rent by a third party.

300. When the *Musta'jir* changes his status into becoming the owner of the goods, the *Ijârah* contract terminates automatically. This ruling is also applied to collective contracts.
301. For the legality of an *Ijârah* contract, all the contracting parties must meet legal capacities.
302. An *Ijârah* contract may be validated by the contracting parties face to face or far apart.
303. The *Mu'ajir* must be the owner, or the representative, or the protector of the goods.
304. The use of the rented goods must be included in the contract of *Ijârah*. If the use of the rented goods is not mentioned in the contract, it goes according to the general rules and traditions.
305. If one of the requirements of an *Ijârah* contract is absent, the contract is invalid.
306. When an *Ijârah* contract is invalid, no payment is due. A rent (*Ujrah al-Mithli*) is fair when it is recommended by experienced and honest experts.
307. A payment for a rent may take the forms of cash, bonds, or other goods as agreed by the parties. Rent may be paid without down payments, with payment in advance, payment after the completion of the use of goods, or debt as agreed by the parties.
308. A paid down payment of rent may not be returned, except for a special clause in the contract. A paid down payment must be returned by the *Mu'ajir* to the *Musta'jir* if the former initiates the termination of the contract. A paid down payment does not have to be returned by the *Mu'ajir* to the *Musta'jir* if the latter initiates the termination of the contract.

<sup>10</sup> Ibn Qudâmah, *al-Mughni*, vol. 5, p. 28; Ibn Qudâmah, vol. 6, p. 348; and Muḥammad Uthman Shibir, *al-Mu'âmalât al-Mâliyah al-Muashirah fî al-Fiqh al-Islâmi*, (Jordan: Dâr al-Nafâis, t.t.), p. 346.

309. The *Musta'jir* may use the goods (*Ma'jûr*) freely when no limitations are stated in the contract. The *Musta'jir* may use the *Ma'jûr* in a limited manner when the contract qualifies such limitations.
310. The *Musta'jir* is prohibited to rent out the goods (*Ma'jûr*) to a third party without the permission of the *Mu'ajir*.
311. Rent must be paid by the *Musta'jir* although the *Ma'jûr* is not used.
312. The maintenance is the responsibility of the *Musta'jir*, unless it is stated differently in the contract.
313. Damages of the *Ma'jûr* caused by the *Musta'jir*'s negligence are the responsibility of the *Musta'jir* unless it is stated differently in the contract. The damages of the *Ma'jûr* caused not by the *Musta'jir*, calls for the *Mu'ajir* to fix or replace the *Ma'jûr*. If the contracts does not mention any rule on the damages of the *Ma'jûr*, traditions in the business prevail.
314. If the damages of the *Ma'jûr* occurred before the agreed use was completely transferred to the *Musta'jir*, the *Musta'jir* is obliged still to pay off the rent for the period that he uses. The amount of the rent to be paid in the above circumstances is based on deliberations between parties.
315. The value of *Ijârah* is among other things determined by the length of time in terms of minutes, hours, days, months, and/or years.
316. The *Ijârah* contract takes an effect as stated in the contract or on the basis of traditions. The length of time of the *Ijârah* contract may be changed based on agreements between parties.
317. The extra time of use by the *Musta'jir* is charged against the *Musta'jir* as agreed or according to traditions.
318. The *Ma'jûr* must be halal or mubah. The *Ma'jûr* may only be used for purposes that are in line with the Shariah. Every item which is permitted for a sale is also permitted to be a *Ma'jûr*.
319. *Ijârah* contract may cover the whole *Ma'jûr* or the part of it. Additional rights of the *Musta'jir* on the *Ma'jûr* must be stated in the contract. When those additional rights are not stated in the contract, they go by traditions.
320. An *Ijârah* contract 322 terminates at the time specified in the contract.
321. How the *Ma'jûr* is returned to the *Mu'ajir* follows what is stated in the contract. If such a rule is not stated in the contract, it goes according to traditions.
322. Pillars and requirements of *Ijârah* may be applied to *Ijârah Muntahiah Bi al-Tamlîk (IMBT)*.
323. An IMBT between *Mu'ajir* and *Musta'jir* may end in the transfer of the ownership of goods. Such a transfer of ownership may be undertaken through contracts of sale (*Bai'*) or grant (*hibah*).
324. An IMBT must be stated explicitly in the contract. The contract of the transfer of ownership may be undertaken only after the completion of the IMBT contract.
325. The *Musta'jir* of IMBT is prohibited to hire out or sell the *Ma'jûr* unless it is stated otherwise in the contract.
326. The prices of *Ijârah* of goods and their later sales based on IMBT are stated in the contract.
327. The *Mu'ajir* may terminate an IMBT contract if the *Musta'jir* is not capable of paying off his debt within the time framework stated in the contract. Such a termination is undertaken through deliberations (*Sulh*) and/or court decisions.
328. The court may decide to sell the *Ma'jûr* of an IMBT at the market price, if

the *Musta'jir* is not capable of paying off his debt.

329. If the value of the *Ma'jûr* of an IMBT contract is higher than the amount of the debt of the *Musta'jir*, the *Muá jir* returns the difference to the *Musta'jir*. If the value of the *Ma'jûr* is less than the amount of the debt of the *Musta'jir*, the difference is charged against the *Musta'jir*.
330. The use of Safe Deposit Boxes may be undertaken based on *Ijârah* contracts.
331. Pillars and requirements of *Ijârah* contracts are applicable for contracts of Safe Deposit Boxes.
332. Goods stored in Deposit Boxes are precious goods which are neither forbidden in Islam nor prohibited by the state.
333. The value of rent of Safe Deposit Boxes is stated in the contract.
334. The rights and obligations of the *Mu'ajir* and the *Musta'jir* in Safe Deposit Boxes contracts are based on agreements between the parties as long as they are not contradicting the pillars and requirements of *Ijârah* contracts.

Fatwas on *Ijârah* scheme can be found in the fatwas of the DSN-MUI No. 9 of 2000 on *ijarah* financing, No. 24 of 2002 on safe deposit boxes, NO. 27 OF 2002 on *Ijârah Muntabiah Bi al-Tamlik (IMBT)*, No. 29 of 2002 on financing for the cost of pilgrimage to Mecca, No. 44 of 2004 on financing for multi-services, and No. 56 of 2007 on Review of *Ijârah*.

Both the KHES and the fatwas of the DSN-MUI have similarities in designing rules on the pillars and requirements of *Ijârah*, the responsibility of the *Musta'jir* on the *Ma'jûr*, criteria on the object of *Ijârah*, safe deposit boxes, and multi-services financing. However, they have different stipulations on the rights and responsibilities of the *Musta'jir* which are mentioned in a

great detail in the KHES text, while they are absent in the text of the fatwas of the DSN-MUI. Conversely, the responsibilities of Shariah financial institutions are mentioned in a great detail in the text of the fatwas of the DSN-MUI, while they are absent in the text of the KHES. It seems here that the KHES is concerned more with the consumers, while the fatwas of the DSN-MUI are more concerned with Shariah financial institutions. The KHES mentions about the termination of *Ijârah* contracts due to special circumstances, while the fatwas of the DSN-MUI is silent about it. Finally, two important issues are mentioned by the fatwas of the DSN-MUI namely financing for the purpose of pilgrimage to Mecca and the review of *Ujrah*, while the KHES is silent about both issues. Overall, however, the rulings of both texts are complimentary to one another.

#### **Tâ'mîn (Shariah Insurance)**

Chapter XX of Book II of the KHES laid down rules on *Tâ'mîn* (Shariah insurance) and *I'âdah Tâ'mîn* (Shariah Reinsurance), namely the Articles 548 to 568. The following are the summaries:

548-553. *Tâ'mîn* and *I'âdah Tâ'mîn* may apply the schemes of *Wakâlah Bi al-Ujrah* (representation with fees), *Mudârabah* (joint venture between the *Shâhib al-Mâl* and the management), and *Tabarru'* (charity). If the *Wakâlah Bi al-Ujrah* scheme is applied, the individual members deposit their money into their accounts as *Shâhib al-Mâl* or as charity, while the insurance company acts as the *Mudarib* or as the representative of the members to invest the money. If the *Mudârabah* scheme is applied, members deposit their money into their accounts as *Shâhib al-Mâl* and the insurance company acts as the *Mudarib*. If the *Tabarru'* (charity) scheme is applied, the insurance company acts as the representative of the donors who are at the same time the members and targets of the scheme. The rights and obligations of

the members and the insurance company, including the amount of the fee, have to be stated clearly in the contract.

554-559. If the *Mudârabah* scheme is applied, contracts take the form of *Mudârabah Mushtarakah* where members deposit their money into their accounts as the *Shâhib al-Mâl* and the insurance company as the *Mudarib* and *Shâhib al-Mâl* at the same time.

560-566. If the *Tabarru'* scheme is applied, the members donated their money as charity into the scheme and the insurance company acts as the representative of the members who are also targets of the scheme at the same time.

567-578. A special scheme for those who are performing Hajj (pilgrimage) to Mecca is called *Tâmîn Haji (Hajj Tâmin)*. The scheme allows pilgrims to pay an amount of money as charity to help one another in case of sick or accident, while the insurance company acts as the representative of the pilgrims to manage the collected charity and to administer those at risk and in need for help. The Minister of Religious Affairs is here acting as the sole representation of the pilgrims to communicate with the insurance company.

The issue of Shariah insurance is dealt with by a number of fatwas of the DSN-MUI, namely the fatwa No. 21 of 2001 on the general rules on Shariah insurance, the fatwa No. 51 of 2006 on Shariah insurance under *Mudârabah Mushtarakah* scheme, the fatwa No. 52 of 2006 on Shariah insurance and reinsurance under *Wakâlah Bi al-Ujrah* scheme, and the fatwa No. 53 of 2006 on Shariah insurance and reinsurance under *Tabarru'* scheme. While the first fatwa was general in nature, the succeeding three fatwas were very specific. Those fatwas maintained that basically there were two types of Shariah insurance, namely *Tijâri* dan *Tabarru'*. The *Tijâri* Shariah insurance applies the *Mudârabah Mushtarakah* dan *Wakâlah Bi al-Ujrah* schemes, while the *Tabarru'* insurance

applies the charity scheme.

The above comparison showed that there was no difference between the rules of Shariah insurance and reinsurance as they are laid down by the KHES and those by the fatwa of the DSN-MUI. Far from being in contradiction to one another, both of the texts reinforce one another.

The only difference between the text of the KHES and the fatwa of the DSN-MUI is apparently on the definition of Shariah insurance. The Article 20 of the KHES defined Shariah insurance as an agreement between two parties, the guarantor and the guaranteed, where the former by receiving some premium commits himself to provide with some compensation to the latter in case of loss, damages, or the loss of some expected benefits, or commits himself with legal responsibility to a third party with whom the guaranteed party will possibly experience out of an event that occurs in the uncertain future. This is indeed the definition used in the conventional insurance system as stated in the law no 1 of 1992. The fatwa of the DSN-MUI, on the other hand, defined Shariah insurance as a business to undertake mutual protection and mutual help among a number of people through investments or donations by introducing a pattern of return in case of risks through contracts according to Shariah. This is probably the most contrasting position of the KHES to the fatwas of the DSN-MUI on Shariah insurance. As both of the texts go into describing the actual rules and types of contracts to be applied, however, both the KHES and the fatwas of the DSN-MUI go hand in hand and with the same concept. They introduced the concepts of *Wakâlah Bi al-Ujrah*, *Mudârabah Mushtarakah*, and *Tabarru'*.

### ***Kafâlah***

*Kafâlah* (guaranty) is a form of Shariah economic transactions that can be used to substitute many conventional economic schemes such as credit cards and licences

of import and export, where the bank guarantees the users of the credit card and the licences of import and export to purchase goods or services in cash payable by the bank as loans to the credit card users while the latter return the loan in cash or in instalments to the bank with certain fees. The KHES laid down the rulings on *Kafâlah* among others in the following Articles 335 to 350 of the KHES:

335-337. Pillars of *Kafâlah* are: the *Kâfil* (the guarantor), the *Makfûl 'Anhu* (the guaranteed), the *Makfûl Lahu* (the owner of goods or services to be purchased), the *Makfûl Bihi* (the object of transactions), and the Aqad (contracts). The Aqad must be stated by the parties orally, in writing, or in the forms of signals. The parties must have legal capacities. The *Makfûl 'Anhu* (the guaranteed) must be known to the *Kâfil* (guarantor) to whom the former must submit the object of guarantee. The *Makfûl Lahu* (the owners of the goods or services) must indicate their identities.

338-341. The *Makfûl Bihi* (the object being guaranteed) may take the forms of money, goods or services and are clear in their values, amounts, and classifications. They are also not part of forbidden goods or services. The guaranty is valid on conditions and agreed time limits. The guaranty ceases when the borrowers refuse the scheme. The *Kâfil* (guarantor) may consist of more than one person.

342-346. *Kafâlah* contracts may be applied with conditions (*Muqayyadah*) or without conditions (*Mutalaqah*). In the *Kafâlah Mutlaqah* contracts, the payment may be due instantly. In the *Kafâlah Muqayyadah* contracts, the payments are due only when the conditions are met. In *Kafâlah* contracts with a limited time of guaranty, payments are due only within the period agreed. The guarantor may not withdraw itself from being parties of a contract after the contract is agreed and signed by the parties.

347-350. *Kafâlah* contracts may guarantee persons or goods or services. The owner of goods and services may direct the due payment to either the guarantor or the guaranteed persons. The guaranteed persons may share collectively the loans which make each one of them responsible for the whole loan.

*Kafâlah* contracts are dealt with by the DSN-MUI in the fatwa No. 11 of 2000. The fatwa stated that a contract consisted of an Ijab (offer) and a Qabul (acceptance) to express their willingness to produce a contract. It is said that a guarantor in a *Kafâlah* contract may receive fees which bind the guaranteed person and may not be revoked unilaterally by any one party. Pillars and conditions of *Kafâlah* contracts include the legal capacities of the guarantor and the guaranteed person as well as their being familiarity with one another, the clarity of the amount and classifications of the object or services being guaranteed, and the lawfulness of the object and services. If any party failed to comply with the contract, or in case of disputes, the matter is brought to the Shariah Arbitration Board.

The above comparison shows that the texts of the KHES on the issue of *Kafâlah* were taken from the fatwa of the DSN-MUI, although the KHES went into a greater detail. In principles, they were similar and no contradiction existed between the two texts. The only difference was that the fatwa of the DSN-MUI of 2000 mentioned explicitly the procedure to bring cases of dispute to the National Arbitration Board, as the jurisdiction of Religious Courts over Shariah economic issues was in place only in 2006.

### ***Hawâlah***

*Hawâlah* is a contract which may take place after the failure of a *Kafâlah* contract or is designed as an original scheme agreed upon by parties. The *Hawâlah* is a contract to transfer the responsibility to pay debt

from the debtor to a third party with the consent of the creditor (second party). The KHES laid down rules of *Hawâlah* in the Articles 362 to 372, some of which will be highlighted here, as the following:

362-365. Pillars of *Hawâlah* includes the *Muhil* (debtor), the *Muhal* (the creditor), the *Muhal 'Alaih* (the new debtor), the *Muhal Bih* (the debt), and *Aqad* (the contract). The *Aqad* may take place in an oral form, in writing, or by exchange of signals. All parties must have legal capacities to do the contract. The debtor (first party) must inform the creditor (second party) on the intention to apply the *Hawâlah* scheme. The *Hawâlah* contract may take place only with the consents of both the creditor (the second party) and the third party (the new debtor) who will assume the debt responsibility. The transfer of debt responsibility does not necessarily mean that the third party already has debt to the first party. The first party should not consider the transfer of debt responsibility as a gift from the third party to the first party.

366-372. First party in *Hawâlah* scheme must pay back the debt to the third party. In case of death of the first party, the payment is made by the heirs with his/her property and it takes priority over other debts. In a conditional *Hawâlah* contract, the debt responsibility returns to the first party when the conditions are not met. The contract of transfer of debt responsibility may specify a certain period of time for the third party to pay off the debt. In case of death of the third party before the payment of the debt is made, the transferred debt responsibility is not inherited by the heirs.

The issue of *Hawâlah* was dealt with by the fatwa of the DSN-MUI No. 12 of 2000. The fatwa stated that the pillars of *Hawâlah* were the *Muhil* (debtor), the *Muhal* or *Muhtal* (creditor), the *Muhal 'Alaih* (debtor to the *Muhil*), the *Muhal Bih* (debt), and the *Sighat 'Aqad* (exchange of statements of offer and acceptance). The

*Aqad* must be stated orally, in writing, or by exchange of signals. A *Hawâlah* scheme may take place only with the consents of the *Muhil*, the *Muhal*, and the *Muhal 'Alaih*. The positions and obligations of each party must be stated clearly in the contract. After the signing of the contract of *Hawâlah*, the responsibility of debt payment is transferred to the *Muhal 'Alaih* who will pay the debt directly to the *Muhal*.

The above quotations showed that in principles there was no contradiction between the rulings of *Hawâlah* in the KHES and those in the fatwa. However, it appeared that the concept of *Hawalah* in the KHES was more complicated than that in the fatwa, even often vague or confusing. Probably it was because of the conceptual complication of the terms *Muhil*, *Muhal*, *Muhal 'Alaih*, and *Muhal Bih* to the drafters.

### **Rahn**

*Rahn* is an Arabic word, a noun, which literally means guaranty. In Shariah economy, *Rahn* is defined as a contract where a borrower of money hands over some valuable goods to the creditor to secure the repayment of the loan. The KHES dealt with the *Rahn* in the following Articles 373 to 408:

373-384. Pillars of *Rahn* are the *Murtahin* (the creditor), the *Râhin* (the debtor), the *Marhûn* (valuable goods), the *Marhûn Bih* (the loan), and the *Aqad* (contract). The *Rahn* is often applied in combination with other contracts such *Qard* (interest free loan) and *Ijarah*. The *Aqad* may be in the forms of oral statement, in writing, or exchange of signals. The parties in a *Rahn* contract must have legal capacities. The *Rahn* contract is complete when the *Marhûn* (the valuable goods) have been handed over to the *Murtahin*. The *Marhûn* may be replaced along the way with other valuable goods when the parties agree. The amount of the loan may be increased with the same *Marhûn*. A *Rahn* contract may be void when the *Marhûn* is not submitted to

the *Murtahin*. The *Murtahin* may unilaterally revoke the *Rahn* contract, but the *Râhin* can not do so except with the agreement of the *Murtahin*. The *Murtahin* may keep the *Marhûn* after the contract is declared void until the loan is fully paid.

385-408. The *Râhin* may not submit to the *Murtahin* the *Marhûn* which does not belong to him, unless with the permission of the owner. In case of death of the *Râhin*, the *Murtahin* has priority over others to regain his money from the inherited property of the *Râhin*. The *Râhin* may take back the *Marhûn* when the *Marhûn Bih* is paid off. *Rahn* contracts are not void with the death of either *Râhin* or *Murtahin*. Their heirs may continue the contract when they have legal capacities. The *Râhin* or *Murtahin* may sell the *Marhûn* to repay the loan in full and return the difference to the *Râhin* or the heirs of the *Râhin*. The *Murtahin* may not use the *Marhûn* without the permission of the *Râhin*. The *Murtahin* may keep the *Marhûn* himself, or put it to a third party. Costs for keeping the *Marhûn* is on the *Râhin*. In case of damage of the *Marhûn*, the *Murtahin* is responsible for it if it is caused by his negligence.

In the fatwa of the DSN-MUI, the issue of *Rahn* is dealt with by the fatwa No. 25 of 2002. The fatwa stated that loans secured by guaranties in the form of valuable goods were permitted in Islam with a number of conditions. The *Murtahin* may keep the *Marhûn* until the loan is fully paid. The *Murtahin* may not use the *Marhûn* unless with the permission of the *Râhin*. The cost for keeping the *Marhûn* is borne by the *Râhin*. The *Marhûn* may be sold by the *Murtahin* when the *Râhin* did not pay in full his loan after the completion of the agreed period. The difference of the value of the sale of the *Marhûn* with the loan is return to the *Râhin*. When the parties of the *Rahn* contract do not comply with the contract or in case of disputes, the matter is brought to the National Arbitration Board.

The above quotations showed that there was not any contradiction between the KHES and the fatwa of the DSN-MUI. The rulings of the issues on both texts were similar, except for the fact the KHES goes in a greater detail. Both texts reinforce one another, rather than conflicting to one another.

### Concluding Remarks

The above examination showed that the rulings of the KHES and the fatwas of the DSN-MUI on those seven categories observed, namely *Murâbahah*, *Mudârabah*, *Ijârah*, *Tâmîn* (Shariah insurance), *Kafâlah*, *Hawâlah*, and *Rahn*, could be identified in three forms. First, rulings stipulated both in the KHES and the fatwas of the DSN-MUI; secondly, rulings stipulated only in the KHES but not in the fatwas of the DSN-MUI; and thirdly, rulings stipulated in the fatwas of the DSN-MUI but not in the KHES. It appeared that in any form of the rulings, both the texts of the KHES and the fatwas of the DSN-MUI had similar concepts on most issues. Both of the texts of the KHES and the fatwas of the DSN-MUI were far from being in conflict to one another. Instead, they are rulings of mutually complementary.

Out of those seven categories observed, *Murâbahah*, *Mudârabah*, *Ijârah*, Shariah Insurance (*Tâmîn*), *Kafâlah*, *Hawâlah*, and *Rahn*, only in three issues were they conflicts between the KHES and the fatwas of the DSN-MUI. These were on the forms of *Murâbahah*, the limitations of *Mudârabah Mushtarakah*, and the definition of Shariah insurance. As discussed earlier, for the DSN-MUI there were two forms of *Murâbahah*, while for the KHES there was only one. The DSN-MUI did not put any limitations to the undertaking of *Mudârabah Mushtarakah*, while the KHES limited such an undertaking only with the permission of the *Sâhib al-Mâl* or based on common practices and traditions.

In other words, there was no need to be worried about conflicts of law between the KHES and the fatwas of the DSN-MUI, as they were almost non-existent. After all, the legal basis of the KHES itself, the Regulation of the Supreme Court No. 2 of 2008, maintained that the KHES did not limit the judges of Religious Courts from exercising their free and independent legal reasoning to come up with the right and just decisions. This was not to mention the debate over the issue of whether or not a Supreme Court regulation had a legislating power. On the other hand, the fatwas of the DSN-MUI, being not legally binding theoretically, they were referred to in the Law No. 21 of 2008 on Shariah banking and most of them had been transformed into rules and regulations of the central Bank of Indonesia and many other governmental bodies, as some studies had shown. Perhaps, what was important was that any effort to socialize the KHES to the judges of the Religious Courts needed to be accompanied by resource persons on the fatwas of the DSN-MUI since both of the rulings, the KHES and the fatwas, were complementary to one another.

It must be admitted, however, that this study has been limited and preliminary in nature. It has examined only seven categories: *Murâbahah*, *Mudârabah*, *Ijârah*, Shariah Insurance, *Kafâlah*, *Wakâlah*, and *Rahn*. Certainly there are many other categories to be examined, such as capital market, and others. This may, perhaps, be the subject of further studies. Another subject of study which is also important in this area is how the judges of the Religious Courts have actually applied the KHES and the fatwas of the DSN-MUI in court decisions.

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