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Analysis of musharakah agreement due to the bank's negligence in implementing prudential banking principle: The case of jurisprudence at the Supreme Court Cassation Verdict Number 624 K/Ag/2017

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ABSTRACT

Introduction
Many legal disputes in Sharia banking have occurred in court. However, specific discussions in scientific research are still limited.

Objectives
This study analysed the Supreme Court Cassation Verdict Number 624 K/Ag/2017, regarding the musyarakah agreement between the customer and PT. Bank Sumut Padangsidimpuan Branch, in which the latter had disbursed financing to the customer before the issuance of a life insurance policy letter.

Method
The study used qualitative research approach with case approach, statute approach, and conceptual approach.

Results
This study concludes that based on the Compilation of Sharia Economic Law (*Kompilasi Hukum Ekonomi Syariah* or KHES) Articles 209-210 if one of the parties in the agreement dies, the contract ends, and the loss caused by the death of the *mudharib* is borne by the owner of the capital. Therefore, even though in a *musharakah* contract, there is a mix of assets for both customers and Islamic banks, However, because the bank was negligent in their prudential banking principle practice and this action was against the law, then in regards to the legal protection theory, the losses experienced from the *musharakah* contract should have been borne by the bank as a form of punishment for the unlawful act due to negligence in implementing the prudential banking principle.

Implications
This study implies that in terms of Sharia compliance, the practice of *musharakah* in Islamic banking is still paradoxical. There is a binary opposition between theory and practice, a gap between expectations and reality. This can impact not only the inconsistency of the application of Islamic law in the practice of Islamic banking.

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Originality/Novelty
This study is unique in that it examines legal decisions by the Supreme Court regarding Islamic bank legal disputes. This type of study can enhance the understanding of Islamic banking practice for Islamic law practitioners in Indonesia.

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INTRODUCTION

Based on the Decree of the Board of Directors of Bank Indonesia Number 32/34/KEP/DIR dated 12 May 1999 concerning Commercial Banks Based on Sharia Principles dated 12 May 1999, Article 28, point b.2.b. as described in Appendix 6, distribution of public funds can be carried out in the form of musharakah, namely a joint venture cooperation contract between two or more capital owners to finance a type of business that is lawful (halal) and productive. Revenue or profit is distributed according to the agreed-upon ratio (Bank Indonesia, 1999; Bapepam-LK, 2007). According to the fatwa (a ruling on the point of Islamic law given by a recognized authority) of DSN MUI (Dewan Syariah Nasional Majelis Ulama Indonesia (National Sharia Board-Indonesian Council of Ulama)), musharakah financing has advantages in terms of togetherness and fairness, in which both share profits and losses (Dewan Syariah Nasional Majelis Ulama Indonesia, 2000).

The case resume was based on Decision Number 967/Pdt.G/2012/PA.Mdn, that is: initially, the customer made a *musharakah* agreement with PT. Bank Sumut Syariah Padangsidimpuan Branch on April 26, 2011, with a total financing of IDR 700,000,000.- (seven hundred million rupiahs) within 12 (twelve) months, collateralized with two Certificates of Ownership under the name of the customer. When the *musharakah* contract agreement was made, the customer, at the same time, was charged the life insurance costs in the amount of IDR. 2,170,000, - (two million one hundred seventy thousand rupiahs). However, before the life insurance policy was issued by the insurance company, PT. Bank Sumut Syariah Padangsidimpuan Branch had disbursed financing on the basis of a statement letter from the customer, known by the wife (Plaintiff I / Petitioner of Cassation I), which states that if in the future the life insurance policy letter has not been issued and something happens to the customer and threatens his life, then his heirs will not sue PT. Bank Sumut Syariah Padangsidimpuan Branch and all financing of the customer will be the responsibility of the heirs until its completion (Pengadilan Agama Medan, 2013).

However, it turned out that on July 13, 2011, the customer died due to illness. Furthermore, the customer's wife (Plaintiff/Cassation Petitioner I) made an attempt to submit an insurance claim to PT Asuransi Bangun Syariah (Defendant III), which had been paid when the contract was executed but was not accepted due to the incompletion of medical checkup requirements. Finally, PT. Bank Sumut Syariah

Padangsidimpuan Branch sent subpoenas three times to the customer's wife (Plaintiff I/ Cassation Petitioner I) to pay the ongoing installments. Based on the statement made with the threat that if the customer's wife does not make payments on the customer's debt, then PT. Bank Sumut Syariah Padangsidimpuan Branch will conduct an auction for objects belonging to the customer that were the pledged assets. Based on this, the customer's wife felt disadvantaged and filed a sharia economic dispute lawsuit to the Religious Court of Medan. The lawsuit included PT. Bank Sumut Syariah Branch of Padangsidimpuan as Defendant I, Bank Sumut as Defendant II, and PT Asuransi Bangun Syariah as Defendant III (Pengadilan Agama Medan, 2013).

The Supreme Court Cassation Verdict Number 624 K/Ag/2017 would be put on trial to analyze, apart from the reasons for the cassation, without taking into account the reasons for the cassation submitted by the Cassation Petitioner I and counter-memory from the Respondent for Cassation (Mahkamah Agung, 2017). In the opinion of the Supreme Court, the Religious Court of Medan had misapplied the law based on the following considerations:

1. Defendant I's action of making Plaintiff I's statement enter the reason for the *musharakah* financing disbursement before the issuance of the insurance policy is an indication (*qorinah*) of violations of the prudential banking principle. Prior to the issuance of the insurance policy, Defendant I should not have issued a musharakah contract even though the contract was still considered valid without a policy and because insurance was not a requirement to disburse the agreed funds. However, the insurance policy is very important and urgent to ensure the security of financing if unwanted things happen in the future.
2. Disbursement of musyarakah financing before the insurance policy issuance was not following the spirit of Islamic economics and violated economic principles that are under sharia principles. Thus, the bank must be aware of its consequences because their actions had caused losses and restlessness. Thus, Defendant I had committed negligence of the prudential banking principle by not letting customers be aware of the consequences that would be borne by customers and their heirs if death occured later on, as meant in Article 21 points (e) and (j) of KHES.
3. PT. Bank Sumut Syariah Padangsidimpuan Branch had violated the principles of fairness, honesty, and responsibility, and had not implemented the prudential banking principle, and there were indications of elements of gharar, negligence and deliberate stalling in managing customer's life insurance, until, unexpectedly, the customer passed away.

Based on the *musharakah* financing agreement with the Sharia bank dated April 26, 2011, during his lifetime, the customer always timely carried out his obligation to pay monthly installments of IDR 16,500,000 (sixteen million five hundred thousand rupiahs) based on the agreement in the contract. However, three months after the death of the customer on July 13, the installment payments had become stalled. This

was certainly not intentional on the part of the Plaintiffs, since the death of the customer caused it (Mahkamah Agung, 2017).

Based on these legal facts, the Panel of Judges of the first-level court was of the opinion that the aforementioned sharia bank had been negligent and had violated the contractual principle in *musharakah* financing, as stated in Article 21 points a, b, c, d, and g; Article 26 points a, b, c, and d KHES, and Articles 2 and 3, Articles 25, 26 and 35 of the Republic of Indonesia Law No 21 of 2008. Furthermore, the bank had applied *taqabul bil hukmi*, namely disbursing *musharakah* financing, with conditions to be fulfilled later. In addition, the insurer had been in the wrong and negligent in implementing insurance administration, namely violating the bases and principles of sharia insurance, among others, based on Fatwa DSN Number 21/2001 concerning sharia insurance. Finally, the court decided to free the customer's heirs from bearing the burden of the customer's debt to PT. Bank Sumut Syariah, Padangsidimpuan Branch, which amounted to IDR 752,000,000.- (seven hundred and fifty-two million rupiahs), and stated that the customer's collateral items were returned to their heirs (Mahkamah Agung, 2017).

Regarding this case, the Plaintiffs were at a disadvantage as they were demanded to pay all the remaining debts of the customer to PT. Bank Sumut Syariah Padangsidimpuan Branch, even if the loss was not the client's intended action and was solely due to death, which no one can avoid. These results in the law that develops in society, not in accordance with the purpose of the law itself, and thus leads to legal uncertainty and the intangibility of legal protection and a sense of legal justice. This happens although PT. Bank Sumut Syariah, Padangsidimpuan Branch, has clearly ignored the principle of prudence in the *musharakah* contract.

Ideally, the implementation of the prudential banking principle is none other than to ensure that banks are always in a healthy, liquid, solvent, and profitable condition. With the enactment of the prudential banking principle, it is hoped that the level of public trust in banking will always be high so that people are willing and do not hesitate to save their funds in the bank (Sjofjan, 2015). Applying the prudential banking principle according to Law Number 10 of 1998 Article 8 is carried out based on an analysis of which debtor customers can pay off their debts or return financing per the agreement so that the risk of failure or congestion in repayment can be avoided (S. Lestari et al., 2022; Novenanty, 2018).

LITERATURE REVIEW

Aqad Theory

Akad in Bahasa Indonesia or contract comes from Arabic word al-'aqd which means engagement, agreement, agreement and consensus, which is a rope that binds because there will be a bond between the people who have an agreement (Ghofur, 2010; Zubair, 2010). In *Fiqh al-Sunnah*, the word contract is interpreted as relationship (طَبَرلاْ) and agreement (كَفِتلاْا) (Ahyunani, 2017). In fiqh terms, the contract is defined as "the connection of ijab (statement of acceptance of the bond) and qabul (statement of acceptance of the bond) in accordance with the will of the Sharia which affects the

object of the binding (Darmawati, 2018). Al-Sanhury explained that the contract is "a binding ijab qabul that is permitted by Sharia which determines the willingness of both parties" (Husna, 2019; Piryanti, 2014). There are also those who define, the contract is "bonding, strengthening and affirmation from one party or both parties". In Sharia economic law, what is meant by a contract is an agreement in an agreement between two or more parties to do or not do certain legal actions as surah Al-Maidah verse 1 (Sholihah & Suhendar, 2019).

Mashlahah Theory

The first mashlahah theory was proposed by Imam al-Ghazali (d. 1111 AD) with the term maqashid al-syari'ah. Kemaslahatan is divided into five basic principles (*al-kulliyah al-khams*), namely *hifzh al-din* (maintaining faith/religion), *hifzh al-nafs* (protecting the soul), *hifzh al-'aql* (maintaining the mind), *hifzh al-'irdh* (maintaining honor/offspring or reproductive organs), and *hifzh al-maal* (protecting wealth or property). *Mashlahah* means attracting benefits or rejecting mudharat. In Islamic law, maslahat is everything that is intended to maintain religion, soul, mind, offspring, and property. Any law that contains the purpose of maintaining these five things is called mashlahah (Abdussalam & Shodiq, 2022; Jufri et al., 2021; Syuhud & Kawakib, 2022).

Mashlahah according to al-Thufi is seen as more than just a legal method, but also a tool to achieve the objectives of Islamic law (*maqashid al-syari'ah*). Al-Thufi also explained the position of mashlahah in addition to being the purpose of shara'a law is also the core of the entire construction of Islamic law legislation. al-Thufi's thinking about *mashlahah fi fiqh al-mu'amalah* is included in the category of *mashlahah al-mursalah*. The theory of *mashlahah* al-Thufi in the field of *mu'amalah* law and the like, the argument that is followed is *mashlahah*, as has been determined. *Mashlahah* and other arguments of Sharia, sometimes similar and sometimes contradictory. If they agree, that is good, such as the agreement between the text, consensus, *qiyas* and *mashlahah* regarding the five *dharuri* rulings. If it is not in line and contradicts the norms of shari'a, then the legal solution can be done through a combination of the Qur'an, Sunnah, Ijma', qiyas, mashlahah, and so on (Amri, 2018; Herlinda, 2021; Hudiyani, 2019; Sarifudin, 2019).

The third *mashlahah* theory proposed by Imam al-Shatibi is the theory of mashlahah in his work, *Al-Muwafaqat*, through the concept of the purpose of Sharia law (*maqashid al-syari'ah*). The formulation of the objectives of Islamic law aims to realize the public good (*mashlahah al-'ammah*) by making the rules of sharia law the most important and at the same time being *shalihah li kulli zaman wa makan* (compatible with the needs of space and time) for a just, dignified and beneficial human life. Imam al-Shatibi provides signs to achieve the objectives of Sharia which are *dharuriyyah*, and *tahsiniyyah*, and contains five principles of Sharia law, namely: (a) maintaining religion/*hifzh al-din*; (b) maintaining the soul/ *hifzh al-nafs*; (c) maintaining offspring/*hifzh al-nasl*; (d) maintaining the intellect/*hifzh al-aql*; and (e) maintaining property/*hifzh al-maal* (Kurniawan & Hudafi, 2021; Naitboho, 2020; Rahman et al., 2018; Wafa, 2022).

Legal Protection

The initial basis for the emergence of legal protection theory comes from the theory of natural law or natural law flow. This school was pioneered by Plato, Aristotle (Plato's student), and Zeno (founder of the Stoic school). According to the school of natural law, the law comes from God, which is universal and eternal, and the law and morals cannot be separated. The adherents of this school view that law and morals are a reflection and rule internally and externally from human life which is realized through law and morals (Hattu et al., 2023; Rahardjo, 2014; Tirtakoesoemah & Arafat, 2020).

Salmond's theory of legal protection that law aims to integrate and coordinate various interests in society because in a traffic of interests, protection of certain interests can only be done by limiting various interests on the other hand (Nurhayati et al., 2019; Rahardjo, 2014; Witasari & Musthofa, 2018). Legal protection must see the stages, namely legal protection born from a legal provision and all legal regulations given by the community which is basically an agreement of the community to regulate behavioral relationships between members of the community and between individuals and the government which is considered to represent the interests of society.

Theory of Justice

In principle, all contracts in Islam must be based on the theory of justice. It means putting something only in its place and giving something only to the rightful one and treating something according to its position. Justice is defined as: (1) impartial, (2) in favor of the truth, and (3) proper/non-arbitrary (Hassan, 2002; Mohammed, 1988; Puneri, 2021; Saleh, 1998). Some areas of justice must be upheld such as follows. Justice in economics does not require economic inequality between one person and another. Therefore, (among others) monopoly (*al-ihtikar*) or whatever the term is, absolutely cannot be justified. The government must intervene to uphold economic justice. When certain individuals monopolize, so that many parties are economically disadvantaged, the government cannot remain silent let alone even take part in it. Allowing and or approving their actions is tantamount to committing injustice itself (Hamid, 2020; Nasution et al., 2022).

Rasyid Ridha defines justice as what is ordered or assigned in accordance with the law, not deciding cases or determining the law based on the contents that have been determined in religion. While the basis of equality according to Sayyid Quthub is everything that is regulated by God's teachings for the benefit of humans, so justice is the right of all humans. In addition to the word 'adl is "equal", justice is also called "balanced" as mentioned in the Qur'an the Word of Allah Swt: "Who created you and then perfected your creation and made you balanced", so that justice in the meaning of "balanced" raises a belief that God is the all-wise and all-knowing one who creates and manages everything with its size, level, and certain time in order to achieve a goal (Zamakhsyari, 2013).

Musharakah Theory

Musharakah is one of the Islamic business contracts. In business connotations, especially in Islamic banks, it is known as a profit-sharing contract, which is characteristic of the Islamic banking industry. Basically, there is no guarantee for profit-sharing contracts, such as *mudarabah* and *musharakah*, except as a guarantee against the possibility of moral hazard by the contract partners (Rahayu & Hasbi, 2022). The fatwa of Dewan Syariah Nasional Majelis Ulama Indonesia on *musharakah* emphasizes that the guarantee in both contracts is because it is a trust contract, but to anticipate deviations, Islamic financial institution can withdraw the guarantee (Harahap et al., 2019; Janah & Fanani, 2020; D. M. Lestari, 2021; Sugiarto et al., 2022).

The withdrawal of guarantees made by Islamic financial institutions to their customers in profit-sharing contracts must be interpreted: first, as an encouragement for customers to be serious in managing the business entrusted to them so that no losses occur. Second, as an anticipation that in the event of moral hazard that may be committed such as making mistakes, negligence or breach of contract. In this case the collateral can be executed (Islami, 2021). Encouraging customers to be serious in managing their business is in line with the principle of maslahat as a sharia objective (maqasid ash-shariah) where one part is the protection of wealth. The protection of wealth is one of the objectives of sharia. The law of musyarakah financing in Islamic Banks is a relationship between syarik/partners, namely between customers and banks to mix their funds/capital in a certain business with the distribution of profits and losses among the owners of funds/capital based on a predetermined ratio or profit sharing (S. Siregar et al., 2023).

METHOD

The research method used was qualitative research, which is descriptive in nature, tends to use analysis, and reveals more of the meaning process which also aims to describe, in precision, the characteristics of an individual, condition, symptom, or certain group to see the relationship between symptoms (Soekanto & Mamudji, 2015) and the research approaches administered included case approach, statute approach, and conceptual approach. The primary research data source consisted of interviews with the panel of judges who handled the Supreme Court Cassation Verdict No. 624 K/Ag/2017, and parties involved at PT. Bank Sumut Syariah. Meanwhile, the secondary data were obtained through reading books, journals, laws, regulations, and DSN-MUI fatwas related to *musharakah* agreement.

The theory used in this study is the theory of legal protection, functioned as a research data analysis tool. The theory is hoped to describe the function of law, namely the concept of law must provide justice, order, certainty, benefits, and peace to everyone, especially in matters related to the *musharakah* contract decided by the judge. Furthermore, the conclusions drawn in this study were carried out by analyzing the cassation level decision with the principles and theory of legal protection, Kompilasi Hukum Ekonomi Islam (KHES) provisions, and the DSN MUI fatwas, and

comparing the theories or legal rules applied and practices of the prudential banking principle in society.

RESULTS

Legal Basis of the Prudential Banking Principle in Indonesian Banking

The term prudent is closely related to the function of bank supervision and bank management. The literal meaning of the word prudent in Indonesian means wise, but in the banking world, the term is used for the principle of prudential banking. Both prudent which means wise, and the principle of prudence are not new terms, but they contain a new concept in responding more decisively, in detail, and effectively to various risks in every business carried out by a bank. Therefore, prudent is a concept that has elements of attitudes, principles, policy standards, and techniques in bank risk management to avoid even the slightest consequences that could harm the bank itself or customers who have entrusted their money in the bank. The broader goal is ultimately to maintain the security, soundness, and stability of the banking system.

The birth of the concept of the prudential banking principle departs from a thought process that goes through a series of observations on the increasingly dynamic and complex development in banking. The bank's business is no longer focused on the local market but also targeted to take advantage of new opportunities that are much broader, namely by going international and participating in the global market. These changes have made the growth and development of banking to become less controllable, which impact banking business activities significantly.

The juridical basis of the prudential banking principle can be seen in the provisions of the Banking Law No. 10 of 1998 as a change from Law No. 7 of 1992, as well as those of the Sharia Banking Law No. 21 of 2008. Apart from that, the regulations issued by Bank Indonesia must also be considered as the legal basis for the application of this principle. The Articles in the Banking Law and Sharia Banking Law related to the principle of prudential banking, namely:

a. Article 2 Law No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
b. Article 8 Law No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
c. Article 11 No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
d. Article 29 No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
e. Article 34 No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
f. Article 35 No. 10/Banking/1998 concerning Amendments to Law No. 7/Banking/1992.
g. Article 2 of Law No. 21/Sharia Banking/2008 concerning Sharia Banking.
h. Article 23 of Law No. 21/Sharia Banking/2008 concerning Sharia Banking.

i. Articles of 34-40 of Law No. 21/Sharia Banking/2008 concerning Sharia Banking.

The Supreme Court Cassation Verdict Number 624 K/Ag/2017 Related to Musyarakah Agreement

The dispute between the customer and PT. Bank Sumut Syariah Padangsidimpuan Branch started when Mr. OSH as a customer made a musyarakah agreement with PT. Bank Sumut Syariah Padangsidimpuan Branch (Defendant I/ the Respondent to Cassation) on April 2, 2011, with a total of IDR 700,000,000.00 (seven hundred million rupiahs) within a period of 12 (twelve) months with collaterals of a Certificate of Ownership on behalf of Mr. OSH and a Certificate of Ownership No. 395/Pasar Gunung Tua dated June 7, 2007 under the name of Mr. OSH.

At the same time the musyarakah agreement was made, the late Mr. OSH was also charged to pay a life insurance fee of IDR. 2,170,000.00 (two million one hundred and seventy thousand rupiahs). However, before the life insurance policy was issued by the insurance company, PT. Bank Sumut Syariah Padangsidimpuan Branch had disbursed financing on the basis of a statement from Mr. OSH, which was known by the wife, named Mrs. YD (Plaintiff I/Cassation Petitioner I) which states that if at a later date when the life insurance policy has not been issued and something happens to Mr. OSH and threaten his life, then his heirs will not sue the bank and all of Mr. OSH's financing will still be the responsibility of his heirs until it is completed.

It turned out that on July 13, 2011, Mr. OSH died due to an illness. Then, Mr. OSH's wife (Mrs. YD) made an attempt to claim the insurance to PT Asuransi Bangun BA Syariah (Defendant III), which had been paid at the same time it was made. However, the claim was declined based on the reasoning that the medical checkup requirement had not been completed.

PT. Bank Sumut Syariah Padangsidimpuan Branch finally sent subpoenas 3 times to Mrs. YD to demand payment of the installments according to the statement made with the threat that if Mr. OSH's wife does not pay the debts of Mr. OSH, PT. Bank Sumut Syariah Padangsidimpuan Branch will conduct an auction for objects belonging to Mr. OSH which have been pledged as collateral.

Based on this, Mr. OSH's wife (Mrs. YD) felt wronged and filed a sharia economic dispute lawsuit to the Religious Court of Medan. Later, PT. Bank Sumut Syariah Padangsidimpuan Branch become Defendant I, PT Bank Medan Sumut Syariah became Defendant II, and PT Asuransi Bangun BA Syariah became Defendant III, with the following injunctions:

a. To grant the Plaintiffs' claims to the fullest extent,
b. To declare that Defendants I, II, and III have committed actions that are contrary to the principles of sharia economics and nash shar'i and/or actions against the law,
c. To declare that Plaintiffs I, II, III, and IV as the heirs of Mr. OSH are freed from the burden of musyarakah financing debt from Defendants I, II, III in the amount of IDR 752,000,000.00 (seven hundred and fifty-two million rupiahs),

d. To state that the statement made by Mr. OSH with the knowledge of his wife/ Plaintiff I dated April 28, 2011, as well as other letters made by Plaintiffs I, II, III, and IV to bear the burden of musyarakah financing debt from Defendants I, II, and III in the amount of IDR 752,000 000.00 (seven hundred fifty-two million rupiahs), were considered and void or had no legal force,
e. To convict Defendants I, II, and III for their negligence in paying the musyarakah financing debt of Mr. OSH in the amount of IDR 752,000,000.00 (seven hundred and fifty-two million rupiahs) jointly and severally,
f. To punish Defendants I and II to return the collateral of Certificate of Ownership No. 457/ Pasar Gunung Tua dated December 19, 2008, under the name of Mr. OSH and Certificate of Ownership No.395/ Pasar Gunung Tua dated June 7, 2007, under the name of Mr. OSH,
g. To determine and order Defendant I and Defendant II to cancel the auction of Mr. OSH's assets,
h. To declare the lawful and value-based confiscation of property (revindicatoir beslag) carried out in this case,
i. To state that this decision can be executed immediately even though there is a legal appeal of cassation from the Defendants.

The Decision of the Religious Court of Medan

The Religious Court of Medan had issued Decision No. 944/Pdt.G/2015/PA.Mdn. dated March 10, 2011 AD coinciding with the 1st of Jamada Al-Thani 1437 H, with the following injunctions:

In Exception:

Rejecting the exceptions of Defendant, I, Defendant II, and Defendant III

In the Main Case:

a. Granting the Plaintiffs' claims in part,
b. Canceling the musyarakah financing agreement No.120/KCSY 02-APP/MSY/1211 dated April 26, 2011, signed by the head of PT. Bank Sumut Syariah Padangsidimpuan Branch (Mr. AM), Mr. OSH, and Mrs. YD,
c. Releasing the plaintiffs from the obligation to pay all the obligations of the late Mr. OSH to PT. Bank Sumut Syariah Padangsidimpuan Branch (Defendant I) due to musyarakah financing agreement No 120/KCSY 02-APP/MSY/1211 dated April 26, 2011,
d. Ordering PT. Bank Sumut Syariah Padangsidimpuan Branch (Defendant I) to return collateral to the Plaintiffs in the form of Certificate of Ownership No. 457/ Pasar Gunung Tua dated December 19, 2008 under the name of Mr. OSH and Certificate of Ownership No. 395/ Pasar Gunung Tua dated June 7, 2007 under the name of Mr. OSH,
e. Rejecting the other claims of the Plaintiffs,
f. Punishing Defendant I and Defendant II to pay the costs of the case jointly and severally in the amount of IDR 1,641,000.00 (one million six hundred and forty-one thousand rupiahs).

The Decision of the High Religious Court of Medan

Considering the appeal requested by the defendants, the Religious Court of Medan decision was annulled by the High Religious Court of Medan with Decision No.68/Pdt.G/201/PTA.Mdn dated October 5, 2011 AD and the 4th of Muharram, 1438 H, with the following injunctions:

a. To receive the appeal of Defendant I/Appellant I and Defendant II/Appellant II,
b. To cancel the decision of the Religious Court of Medan No. 944/Pdt.G/2015/PA.Mdn dated March 10, 2011 AD, coinciding with the 1st of Jamada Al-Thani 1437 H,

AND PROSECUTING ON OWN AUTHORITY
In Exception:
Rejecting the exceptions of Defendant I, Defendant II, and Defendant III
In the Main Case:

a. Rejecting the claim of the plaintiffs in its entirety,
b. Punishing Defendant I and Defendant II to pay the costs of this case in the amount of IDR 1,641,000.00 (one million six hundred and forty-one thousand rupiah):

Ordering the Plaintiffs/Appellants to pay costs of the appeal of IDR 150,000.00 (one hundred fifty thousand rupiah)

Cassation Decision (Judex Jurist)

The decision of the Religious High Court Medan: The Plaintiff I filed an appeal for cassation and decided on a verdict No. 624 K/Ag/2017 dated October 25, 2017 with the following injunctions:

PROSECUTING

To grant the Cassation Appeal from the Appellants: 1. Mrs. YD (1.1. AUH, 1.2. RMH), 2. FDAH, 3. EMH 4. EAH;

To cancel the decision of the Religious High Court Medan No. 68/Pdt.G/201/PTA.Mdn dated October5, 2011 AD or the 4th of Muharram 1438 Hijriah.

PROSECUTING ON OWN AUTHORITY
In Exception:
Rejecting the plaintiff's exception
In the Main Case:

a. Grant the claim of the plaintiffs in part,
b. Declare Defendant 1 had committed an unlawful act,
c. Determine the loss from the musyarakah contract between Mr. OSH and Defendant I in the amount of IDR 752,000,000.00 (seven hundred and fifty-two million rupiahs),
d. Sentence the Plaintiffs to bear losses and pay to Defendant I an amount of 53.22% x IDR 752,000,000.00 = IDR 400,214,400.00 (four hundred million two hundred and fourteen thousand four hundred rupiahs),

e. Sentence Defendant I to bear a loss of 4.78% x IDR 752,000,000.00 = IDR 351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand eight hundred rupiahs),
f. Sentence Defendant I to return the remaining auction proceeds from the mortgage objects to the Plaintiffs after all costs and obligations of the plaintiffs have been incurred as stated in point 4 (four) above,
g. Reject the other claims of the Plaintiffs,
h. Sentence the cassation Appellees/Defendants to pay court fees of the cassation court in the amount of IDR 500,000.00 (five hundred thousand rupiahs)

Considerations of the Cassation Council

a. Considering the aforementioned reasons, the Supreme Court considered the following:
b. Considering that apart from the reasons for cassation, without having to consider the reasons for cassation submitted by the Plaintiffs for cassation and counter-memory from the Defendants of cassation, in the judgement of the Supreme Court, the Religious High Court of Medan has wrongly applied the law with the following considerations;
c. The actions of Defendant I which had made Plaintiff I's statement as the reason for the disbursement of the musyarakah financing before the issuance of the insurance policy is an indication (qarinah) of Plaintiff I's lack of caution. Prior to the issuance of the insurance policy, Plaintiff I should not have issued a musyarakah contract although the contract is valid without a policy because insurance is not a requirement to disburse the agreed funds. However, the policy is very important and urgent to guarantee the security of financing if unwanted things happen later. In addition, these actions are not within the spirit of Islamic economics and violate economic principles that are following sharia principles. Therefore, the bank must know the consequences as their action has caused loss and anxiety. Defendant I has committed negligence by letting Mr. OSH as a consumer not be aware of the consequences that will be borne by him and his heirs if death occurs at a later date, as meant in Article 21 points (e) and (j) of KHES.
d. Therefore, the decision of the Religious High Court of Medan must be annulled and the Supreme Court will examine this case with the following considerations.
e. Considering that Defendant I as a part of the bank has neglected the prudential banking principle, in which banks must be very careful in carrying out their business activities in raising funds, especially in distributing funds to the public.
f. The purpose of carrying out this precautionary principle is to ensure that banks always protect public funds and that banks are always in good health to carry out their business properly and in compliance with the provisions and legal norms that apply in the banking world, as referred in Article 2 and Article

29 paragraph (2) Law No. 10 of 1998 concerning banking. Based on this, it can be concluded that Defendant I has committed an unlawful act.

g. Considering that the first party (Defendant I) made a musyarakah contract on April 26, 2011, and on that date, a statement was made by the second party (Plaintiff I) stating that if the insurance policy had not been issued and something happened then all the financing would be the responsibility of the heirs. However, with the death of the second party which was considered a business risk as mentioned in Article 6, the first party easily disbursed funds before the insurance policy was issued with only a statement letter which was certainly full of risks. Therefore, because this contract is a musyarakah contract, the risk must be borne proportionally between the plaintiff (as the second party) and Defendant I (the first party).
h. Considering, that the existence of a musyarakah contract between Mr. OSH and Defendant I has created a risk of loss despite the absence of life insurance which guarantees the return of the principal capital of the musyarakah contract received by the customer if the customer dies is an act that can harm the heirs who are obligated to pay IDR 752,000,000.00 (seven hundred and fifty-two million rupiahs), the payment that should be borne by the insurance party. However, since the act of disbursing funds without prior insurance policy is an act that is contrary to Article 1 Contract No. 120/KCSY-02-APP/MSY/2011 and this is a loss caused by the bank's carelessness and because the contract is a musyarakah contract, such loss must be borne jointly by the contracting parties. Furthermore, since the contract is a musyarakah contract, the losses must be shared proportionally and the capital money amounting to IDR 752,000,000.00 (seven hundred fifty-two million rupiahs) must be repaid by the Plaintiff in the amount of 53.22 (fifty-three point twenty-two) percent and Defendant I is 46.78 (forty-six point seventy-eight) percent, according to Article 3 paragraph (2) of the musyarakah financing agreement No.120/KCSY02-APP/MSY/2011 dated April 26.
i. Considering, based on the above considerations, without considering the reasons for the cassation of the applicants, in the opinion of the Supreme Court there are sufficient reasons to grant the cassation request from the cassation applicants (Mrs. YD and friends) and cancel the Religious High Court of Medan Decision No. /Pdt.G/2016/ PTA.Mdn dated October 5, 2016 AD which coincided with the 4th of Muharram 1438 Hijriah, the decision which canceled the Religious Court of Medan Decision No. 944/Pdt.G/2015/PA.Mdn dated March 10, 2016 coinciding with the 1st of Jumadil Al-Thani of 1437 Hijri.

DISCUSSION

Review of the Supreme Court's Cassation Decision No. 624 K/Ag/2017 Based on the Prudential Banking Principle as a Form of Legal Protection

There are several crucial things that should be done in the consideration conducted by the panel of cassation judges as legal protection for customers in this case;

a. In general, in making contracts, the bank must pay attention to the provisions regarding the principles of the contract as specified in KHES Article 21 points (e) and (j):

   i. Mutual benefit in each contract is carried out to fulfill the interests of the parties to prevent manipulation practices and harm to one of the parties.
   ii. The good faith of the contract is carried out in order to uphold the benefit and does not contain elements of traps and other bad deeds (Mahkamah Agung, 2008).

b. The consideration of the cassation panel in substance provides protection to customers in banking practices that are wrong and detrimental to customers and bank institutions themselves, particularly in musyarakah financing contracts that do not implement the principle of prudential banking (prudential banking system) as referred to by Article 2 and Article 29 paragraph (2) of Law No. 10 of 1998 concerning banking
c. The practices carried out by the bank by disbursing funds to the customer before the insurance policy is issued when in fact the bank is aware of the risks that will be borne by the customer in the future is an indication of bad faith, negligence and even including traps for customers
d. The panel of cassation judges emphasize that in sharia economic activities in which the death of the customer is a form of risk that may arise in the future, in musyarakah contracts, the risks incurred are borne by both parties, namely the bank and the customer with a proportionate amount.

The researcher argues that in sharia economic transactions the parties must be positioned equally and must receive mutual benefits. In addition, benefits must be obtained fairly and conducted with the good faith of both parties. The panel of the cassation judges considered that the bank's action in disbursing financing to customers "only" based on a unilateral statement from the customer witnessed by his wife to carry out his obligations in the event of a risk of death until the issuance of an insurance policy is full of risks and an indication of dishonesty on the part of the bank. Even though the issuance is based on Bank Sumut Syariah SOP, disbursement of financing is not justified before the issuance of the policy from the insurance company unless the customer is not willing to be covered by insurance or there is a separate policy from the authorized official (Mahkamah Agung, 2008). Adi Saputra further explained that the disbursement of funds to the customer was based on a unilateral statement from the customer before the insurance policy issuance, so it can

be said that it was not negligence on the part of Bank Sumut (Mahkamah Agung, 2008).

Related to this issue, Amran Suadi believes that basically, the policy is proof that the customer and the insurance company are bound by an insurance agreement, in which the insurance company becomes the insurer and the customer is the insured. If the agreement between the customer and the insurance company has been made and both are only waiting for the issuance of the policy as evidence of an agreement between the insurance company and the customer, as long as it can be proven that one of the parties has fulfilled the contents of the agreement, then the party has the right to get his/her rights and the other party is obliged to fulfill his/her obligations. However, if the issuance of the policy is delayed, because there are requirements that have not been met by the insurance participants, then the agreement is deemed to not exist. On the other hand, if the customer and the banking party agree that the heir is willing to be responsible until the end of the financing if something happens to the customer and the insurance policy has not been issued, then the customer must fulfill the contents of this agreement, and that includes if the heir is unable to fulfill his/her obligations, then the bank can auction off collateral belonging to customers (Mahkamah Agung, 2008). The obligation of the heir to pay the customer's debt to the bank is based on a statement, and this is in accordance with the provisions of Article 1338 paragraph (1) of the Civil Code (Mahkamah Agung, 2008).

This is, however, in contrast to the opinion of the researcher, who believes that even though the insurance policy is not a condition for fund disbursement and the fund can be disbursed before the issuance of the policy letter, based on a statement from the customer indicating that the bank's action is meant to only protects itself without thinking about the protection of its customer from risks in the future. In addition, the statement letter from the customer was considered a trap on the bank's part because the customer could not be separated from the risks he/she would face in the future, while the bank knew from the start that it was a risk. Thus, because the bank did not implement or neglect the prudent banking principle, the bank is considered to have committed an unlawful act.

The principle of prudential banking is regulated in general in the provisions of Article 2 of Law Number 10 of 1998 concerning Banking. Normatively, this precautionary principle has become a legal rule that is mandatory for banks to implement in carrying out their business activities (Mahkamah Agung, 2008). If there is a violation of this precautionary principle in extending credit by a bank, it will have legal consequences, in which the party who commits the violation can be given a legal sanction in the form of a criminal sanction of a maximum of IDR 100,000,000,000.00 (one hundred billion rupiahs), as stipulated in Article 49 paragraph (2) point b of Law No. 10 of 1998 concerning Banking.

The researcher argues that in this case, the bank did not apply or was negligent in implementing the prudential banking principle, thus, the bank is considered to have committed an unlawful act, which results in the application of the provisions of Article 208 of KHES which stipulates that "business losses and damage to merchandise in

mudharabah cooperation/*musharakah* financing that occurs not because of the mudharib's negligence, is borne by the owner of the capital"; of Article 209 KHES, namely "the *mudharabah* contract ends automatically if the owner of the capital or *mudharib* dies, or is unable to carry out legal actions"; and of Article 210 paragraph (2) KHES which states "losses caused by the death of the mudharib shall be borne by the owner of the capital" (Mahkamah Agung, 2008).

Besides that, PT. Bank Syariah Sumut Padangsidimpuan violated the Articles contained in Law No. 21 of 2008 concerning Islamic Banking. The Articles violated by PT. Bank Syariah Sumut Padangsidimpuan Branch are as follows: Article 25 point b and Article 26 paragraph (1) which highlight that Sharia People's Financing Banks in terms of their business activities as well as sharia products and services must comply with sharia principles and do not conflict with sharia principles (Mahkamah Agung, 2008). One of the business activities in Islamic banking is the musharakah financing contract and if the bank carries out its business activities based on sharia, then the bank must comply with sharia principles. One of the principles in Islamic economics is the principle of benefit. The objective of this principle is to gain happiness both in the world and in the hereafter by taking benefit and rejecting harm.

From the statement letter contained in the Musyarakah Financing No. 120/KCSY02-APP/MSY/2011 (Mahkamah Agung, 2008) between Mr. OSH and PT. Bank Syariah SumutPadangsidimpuan Branch, it can be seen that there was no principle of benefit acting as a form of legal protection for customers contained in this financing. The insurer had not issued an insurance policy from the customer because the customer had not submitted a medical check-up result as a requirement for issuing an insurance policy. However, the bank did not inform the customer regarding the medical check-up result that must be submitted. By not submitting this medical check-up result, it indicates that the customer is not protected by insurance. Thus, when the customer's death resulted in the arrears of the payment of the musyarakah financing capital to the bank, the insurance party should be the one that compensates for the loss. In reality, however, it is the customer's heirs who bore the loss.

In addition to legal protection and the principle of benefit, other Islamic economic principles also include the principles of honesty and truth. These principles are the cornerstone of noble characters (*akhlakul karimah*). Contract transactions must be firm, clear, and certain, and this extends to the object of the contract as well as the price of the object being contracted. Every transaction made does not harm the first, second, or any other parties involved. Everyone has a free will when establishing contracts, without being subject to the implementation of any transaction, except for things adhering to the norms of justice and the benefit of society. However, these Islamic economic principles are not contained in Musharakah Financing No. 120/KCSY02-APP/MSY/2011 which results in the customer's heirs bearing losses that should not be borne due to the unilateral agreement made by the aforementioned bank. In the Decision No. 624/K/Ag/2017, the Supreme Court judges issued a decision that the customer's heirs must bear the loss and pay the bank an amount of 53.22% x

IDR 752,000,000.00 = IDR 400,214,400.00 (four hundred million two hundred fourteen thousand four hundred rupiahs). Meanwhile, the bank was required to pay 46.78% x IDR 752,000,000.00 = IDR 351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand eight hundred rupiahs).

According to the Sharia Economic Law Compilation, if in a contract one of the parties dies, then the contract ends (N. H. Siregar, 2019; Suhendi, 2013; Sup et al., 2020). Because the customer had passed away, the musharakah contract between the Islamic bank and the customer also had ended. When the contract ended, it means that the customer's heirs should be free from returning capital, even though at the beginning of the musharakah contract there was a mix of assets between the customer and PT. Bank Syariah SumutPadangsidimpuan Branch. However, because the bank omitted or was negligent in the principle of prudential banking and the bank's actions were against the law, the losses suffered from the musharakah contract, in this case, should only be borne by PT. Bank Sumut Syariah Padangsidimpuan Branch as a form of punishment for unlawful acts due to negligence in applying the precautionary principle. By determining the heirs of the customer to bear the loss and pay the bank an amount of 53.22% x IDR 752,000,000.00 = IDR 400,214,400.00 (four hundred million two hundred and fourteen thousand four hundred rupiahs) and the bank to pay the remaining 46.78% x IDR 752,000,000.00 = IDR 351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand eight hundred rupiahs) does not reflect legal protection for customers and eliminates the value of justice as it indicates that someone must bear the sentence of a crime he/she did not commit.

Based on this, the researcher concluded that Decision No. 624/K/Ag/2017 and the practice of financing musharakah contract at PT. Bank Syariah SumutPadangsidimpuan Branch bear no proportion of sharia principles, namely the principles of honesty, truth, and benefit which signify a form of legal protection for customers. In fact, they bring harm to the customer and his heirs by implementing *taqabul bil hukmi*, namely disbursing *musharakah* financing with the following conditions to be fulfilled at a future time.

CONCLUSION

Based on the results of the analysis and discussion, the study concludes. First, the principle of providing *musharakah* financing by Bank Syariah Indonesia is based on prudential banking regulation which is based on Islamic sharia principles with the objective to prevent problematic financing. In addition, Bank Syariah Indonesia in providing financing must not violate religious and moral norms as well as conduct businesses that are prohibited by the government. Second, In the practice of financing *musharakah* contract in the Supreme Court Cassation Decision No. 624/K/Ag/2017, acts against the law, namely negligence/ignorance of the prudent banking principle by the bank were found. Therefore, it should be regulated by laws and regulations by imposing sanctions/penalties on the bank without involving the customer/heir to bear losses from the consequences of unlawful acts as a form of punishment for negligent

acts in implementing the prudent banking principle and as a form of legal protection to customers.

The results of data analysis and discussion show that the results of this study have several implications. First, in terms of Sharia compliance, the practice of *musharakah* in Islamic Bank X is still paradoxical. That is, there is a binary opposition between theory and practice, a gap between expectations and reality. This can have an impact not only on the inconsistency of the application of Islamic law in the practice of Islamic Bank X but also set a bad precedent where public trust in other Islamic banks can decline. This implication reinforces the current dubious stereotype through incredulous questions such as Is Islamic Bank Islamic? This question refers to the reality of the case that became the findings of this research.

Second, in terms of Islamic legal philosophy, the practice as in the case of Islamic Bank X shows that Islamic banks that carry the issue of justice have not even shown the practice of justice as in the case of this study. Islamic economic law in the practice of *musharakah* cannot be separated from the content of justice, a value that is lost in the frenzy of modernity. The presence of Islamic banks is ideally to position this value of justice in real practice, but in this case the spirit of injustice is put forward. This fact implies that the practice of Islamic banking - in this case - does not reflect justice or on the contrary reinforces the injustice that is charged from the value of Islamic economic justice.

Third, in terms of humanity, the case of musharakah practices in Islamic Bank X really does not reflect humanitarian values, especially those who hope to get what should be their rights. This neglect has an impact on the strength of materialism in the personality of bank employees who deliberately ignore the human side and the religious side, namely rights and obligations.

Author Contributions

Conceptualization	S.A. & M.S.	Resources	S.A. & M.S.
Data curation	S.A. & M.S.	Software	S.A. & M.S.
Formal analysis	S.A. & M.S.	Supervision	S.A. & M.S.
Funding acquisition	S.A. & M.S.	Validation	S.A. & M.S.
Investigation	S.A. & M.S.	Visualization	S.A. & M.S.
Methodology	S.A. & M.S.	Writing – original draft	S.A. & M.S.
Project administration	S.A. & M.S.	Writing – review & editing	S.A. & M.S.

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Informed Consent Statement

Informed consent was not required for this study.

Data Availability Statement

The data presented in this study are available on request from the corresponding author.

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Conflicts of Interest

The authors declare no conflicts of interest.

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