

# Sharia Concepts in Islamic Home Financing Products in Malaysia: An Analysis on Musyarakah Mutanaqisah and the Fiqh Method "The Original Law of a Contract with Conditions is Required and Legal"

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## Abstract

Islamic Financing Products have begun to grow rapidly in the current banking and financial industry. This situation can be seen through the increase in Islamic banking assets every year in addition to the participation of more institutions that offer Islamic products. Islamic housing financing products for example feature the application of sharia concepts such as bay bi Thaman ajil (BBA), commodity BBA, ijarah thuma al bay. BBA is most widely used in offering Islamic housing financing products while the use of other concepts such as musyarakah mutaqisah is still considered new. Musyarakah Mutanaqisah is a hybrid contract based on partnership and ending with sole ownership. This concept began to be applied in banking practice in Malaysia after the year 2000. The main aim of this study is to analyze the fiqh method of Presumption of Validity and Consent Applicable to All Contracts and its application in housing financing. The purpose of this identified method is to see the extent of the contracts used by Islamic banking institutions in safeguarding the interests and benefits of customers when purchasing housing. This concept will discuss how a contract should originally be allowed. This study uses qualitative methods through content analysis.

**Keywords:** Agreements, Terms, Contracts, Housing Financing

## Introduction

Islam has set the purpose and goal of the Sharia to guide people to live in perfect life conditions. Maqasid sharia promises the preservation of reason, life, property, offspring, and lineage if what God commands through the Qur'an and Sunnah is properly obeyed. The goal of sharia also guarantees human rights and interests in life while also rejecting tyranny and destruction. One of the ways to achieve this Sharia goal is to meet the needs and demands of life such as housing, food, and education. A house or place of residence is one of the

necessities of life that must be met for every individual. Therefore, to build a house, a person needs a large amount of financial funds to achieve his dream. To cover the funds, most of us will get financing from banking institutions or others. As a Muslim, choosing an Islamic home financing product is an obligation. Nowadays Islamic housing financing products in Malaysia are offered through various contracts. Two categories of houses are bought and sold in this country, which are houses that have been completed and houses that have not been built or are still under construction. The existence of Qawa'id fiqhiyyah is to provide a more practical guide that is handed down from the original texts of the Qur'an and the Hadith to the community. With this *qawa'id fiqhiyyah* scholars and jurists can prepare life guidelines for Muslims in a different scope from time to time and place to place. As is known, Islam allows its people through those in authority, namely the scholars, to perform ijihad in various ways taught by the Prophet, through ijma', qiyas, istihsan, istishab, istislah (*masalihul-mursalah*) and so on to find the truth that has not yet been explained detailed in the Qur'an or the Prophet's Hadith. Similarly, in the context of muamalat, the use of qawa'id fiqhiyyah becomes something very important. The economic and financial system will continue to develop along with the passage of time and technological progress so many requirements need to be assessed by the Shariah to enable Islamic banking to go hand in hand and compete with conventional banking and not fall behind.

### **The Definition Of An Original Contract With Conditions Is Necessary And Legal ( الْأَصْلُ فِي الْعُقُودِ وَالشَّرُوطِ الْجَوَازِ وَالصَّحَّةُ )**

The key words in this method are aslu, 'uqud, shurut, jawaz and sihhah. In terms of language, aslu has many meanings namely root, origin, and basis. It also has many technical meanings, which will be discussed in detail later, however, in this method, it means the original rule for something, which may be overridden by counter-evidence for certain cases. It is more easily referred to by the civil law term 'presumption' because the meaning is the same (Mohamad Akram Laldin et al. 2020). While the word Uqud is the plural of the word aqd. In general, the verb aqada means 'to connect or bind. Technically, aqd is a relationship between two contracting parties that is created through an offer and acceptance that is carried out according to Sharia when that happens, the contract is legally binding. The word Shurur is the plural form of the word shart, it means provision, conditional clause, or stipulation. Technically, it means.

مَا يَلْزَمُ مِنْ غَدَمِهِ الْعَدَمُ وَلَا يَلْزَمُ مِنْ وُجُودِهِ وُجُودٌ وَلَا عَدَمٌ لِدَائِهِ

A factor whose absence requires the absence of a certain rule while its presence does not, by itself, require the presence or absence of that rule"

An example is the passing of a year when the ownership of gold Nisab. Ownership of nisab is an effective cause of the obligation to pay zakat, but that cause cannot occur until the conditions are met. Some contract conditions are imposed by the Legal Practitioner, for example, what is sold in the sales contract must be legal to own. Therefore, the sale of liquor will be illegal. Among other conditions proposed by one of the contracting parties is, for example, that the seller requires the buyer to provide a guarantor in the deferred payment sale. The basic rule is that if the other party agrees, the terms become binding unless they conflict with the nature of the contract. For example, the nature of a sale is that it transfers ownership of the goods sold to the buyer. If the seller stipulates that the buyer cannot take

possession of the goods sold, the condition violates the nature and implication of the sale and is void and rejected. Beyond this basic agreement, Islamic scholars have several differences regarding the parameters that distinguish legal terms in contracts from illegal terms. The word *Jawaz* is from the verb *jaza/yajuz*, which means to cross or traverse a location, to go through or through. A variant of the word was later applied to coins that would be accepted by the public because acceptability meant they would be circulated. This led to the more general use of *jawaz* to mean 'acceptability, pass for lawful, permission. The basic rule for everything created by Allah is that it is *halal* (permissible) except for what is prohibited in authentic texts. That is because God has created good things for the benefit of mankind and has warned us against things that are not good for us, God has stated that when He forbids something it is because it is harmful. He said, about the duties of Prophet Muhammad (PBUH).

'He told them to do good things and forbade them from doing bad things, and permitted for them everything that was good, and prohibited for them everything that was bad, and released from them the burdens and shackles that were on them" (Al A'raf 157).

This gives the impression that the reasons for prohibition are generally within the grasp of reason, working within the guidelines that have been provided by Allah in the Qur'an and As-Sunnah. When consent is conveyed by a general statement, there is no need to seek additional specific evidence; for example. Allah says in Surah Al Maidah verse 96:

"Permissible for you are game animals of the sea, and food obtained from the sea, as a supply for you (to enjoy its deliciousness) and also for those who are on a voyage;" (Al Maidah: 96).

The last term is *Sihhah*, which is the verb *sahha/yasihhu*, "to be or become healthy, good, right or lawful". In the terminology of *fiqh*, *sihah* describes an act that follows the *shari'a*, it includes its essential elements and fulfills the essential conditions stipulated on it. The effect of *sihah* in worship is that the person's obligation to do the act has been fulfilled. The effect of *sihah* in a transaction is that the act has the legal effect sought by doing it. Contracts and stipulations of the parties are acts done primarily for worldly gain, and the basic rule for such acts is that they are permissible. There is no prohibition against such acts unless specifically mentioned by authentic sources. Without any evidence, these acts, including contracts and terms, will remain permissible." The consequence of that principle is that contracts between Muslims and non-Muslims on basically allowed, and This is confirmed by the practice of the Prophet (PBUH) and his companions who bought and sold from non-Muslims and worked for them and with them at times. Overall, it can be concluded that the basic rule for everything created by God is that it is *halal* (allowed) except for what is prohibited in authentic texts. That is because God has created good things for the benefit of mankind and has warned us against things that are not good for us, God has stated that when He forbids something it is because it is harmful.

### **Methodology**

This study uses a qualitative method through a content analysis approach to meet the goals and objectives of the research. This approach explains and examines the Jurisprudence Method of the Origin of a Contract with Conditions that Is Necessary and Valid. The data in this research was collected through documents consisting of primary and secondary sources. Primary sources consist of al-Quran and al-Sunnah. While secondary sources are from articles,

journals, books, newspaper reports, and significant general reference sources. The data is then analyzed using descriptive and deductive methods to produce a specific conclusion.

### **The Application of Jurisprudential Methods in Islamic Financial Products in Malaysia**

According to Muhammad Mustafa az-Zarqa, as written by Jazuli (2006), mentions that there are at least 25 qawa'id related to mu'amalah transactions and in line with the development of time and era. Nowadays the need for the existence of more jurisprudential methods cannot be denied anymore. Among the Qawaid Fiqhiyyah that are used in the Islamic Financial System is that the Origin of a Contract and its Conditions are Necessary and Valid. This method is used in the Islamic financial system in issuing Islamic Financial products such as Musharakah Mutanaqisah which is still above the main goal, which is to protect Muslims free from financial constraints in providing basic needs. There are several issues faced by Bank Islam in implementing Musharakah Mutanaqisah, such as the use of rental rates that are highly influenced by location, taxation regulations, as well as wear and tear (Meera and Abdul Razak, 2005). In addition to issues related to property revaluation such as redemption, default, and contract termination (Meera and Abdul Razak, 2009). Local Islamic banking in Malaysia also faces problems related to the preparation of documentation, due to the lack of Shariah lawyers who are experts and understand Musharakah Mutanaqisah contracts well (Shahwan, 2013).

One of the main problems faced by Musharakah Mutanaqisah financing is the issue of double taxation where customers are required to pay taxes twice (Smolo & Hassan, 2011). Ezani (1987), analyzed qualitatively and quantitatively how the financing of buying a house can be implemented through Musharakah Mutanaqisah. This method is said to further increase cooperation between Muslims because through this method capitalists (investors) help home buyers to own houses through joint investment. Therefore, he suggested that financial institutions in Malaysia explore the concept of Musharakah Mutanaqisah as an alternative solution for home buyers in Malaysia. Ahamed Kameel Mydin Meera and Dzuljastri Abdul Razak reviewed the comparison of Musharakah Mutanaqisah and Bay Bithama Ajil in theoretical housing financing practice. Finding Musharakah Muatanaqisah as the best alternative to replace the Bay Bithama Ajil concept. In addition, a survey was also made on writing related to housing financing. Basyir (2002), elaborates on the law of house purchase and sale contracts according to the Islamic perspective. Among those debated is the use of BBA contracts in Islamic housing financing. The results of this study include looking at the extent to which the Bay Bithama Ajil contract practiced in Malaysia is in line with the will of Islam. The proposal of this study also brings the concept of alternative muamalah instead of Bay Bithama Ajil such as Musharakah Mutanaqisah and Ijarah Thumma Bay '. Fadzilla (2003), debated on the issue of housing financing schemes based on BBA contracts. The question was debated regarding the Bay Bithama Ajil contract practiced by Bank Islam Malaysia Berhad, which is said to not comply with Syariah requirements. He covered these issues objectively and scientifically by examining the profit determination method of Bank Islam Malaysia Berhad compared to conventional bank interest rate statistics. The results of the analysis, among other things, support the statement that Bay Bithama Ajil financing is more expensive than conventional financing even though this does not conflict with Sharia. Thus, he suggested using other Sharia concepts in Islamic housing financing such as Musharakah Mutanaqisah or AITAB contracts. While Mohd (1991) and Ezani (1987) presented qualitatively

and quantitatively how the financing of buying a house can be implemented through a Musharakah Mutanaqisah contract.

### **Home Financing Using Musharakah Mutanaqisah Contracts**

The concept of Musharakah Mutanaqisah is a concept of partnership decreasing, decreasing, and ending with Sole ownership (Muhammad, 2003). Musharakah in terms of language is derived from Arabic whose basic word is sharika. Sharika or sharikah means to associate it with him, share it, do business together, or a partnership (mixture) between two parties is also called Al-Shirkah (Manzur, 1990) Sharikah also means a mixture or partnership between two or more parties in the form of property or work (Qal'ahji, 2000). Mutanaqisah, on the other hand, comes from the root word naqasa which means less it, shrinking it, or little it. Naqasa, on the other hand, means to continue to decrease reciprocally. So Musharakah Mutanaqisah from the language point of view can be said to be a partnership that is decreasing or shrinking (ending with sole ownership). Musharakah Mutanaqisah in terms of the term also means a concept of partnership agreement, that is between the financier who is a partner, giving the right to the other partner to own assets with one or several payments that is gradually, based on the conditions agreed by both sides. Musharakah Mutanaqisah is a musharakah contract formed and determined by the transfer of ownership from one party to another until it ends with the full ownership of the party that receives the transfer of ownership (the financed party) solely Musharakah Mutanaqisah contract is required even if it involves several contracts in one agreement document. With the condition that the contract is done (contracted) separately. To see the necessity and validity of this Musharakah Mutanaqisah contract, we can refer back to the verse from Surah al-Ma'idah verse 1.

“O believers, fulfill and perfect the covenants. It is lawful for you (to eat) livestock (and so on, except for what will be read (about its prohibition) to you. (The halal of stars and so on) does not mean that you can allow hunting when you are in Ihram. Indeed, Allah set the law What is desired”.

The verse clearly explains to us that God told us to complete a contract (agreement) that was made. To be clearer, a contract or agreement must be implemented if the contract is proven to have no elements that can deny it from being implemented (elements that are prohibited by syariah). Although this verse refers to the law of fulfilling promises in general, indirectly it is also proof of the necessity of the Musharakah Mutaqisah contract itself. This is because the Musharakah Mutanaqisah contract is a contract that has enough elements of a valid contract in terms of Shariah. A valid contract is a contract that is perfect or complete in its basic elements, i.e. there is a signah (offer and acceptance), two people who agree, the goods that are agreed upon, the subject of the agreement, and the perfect conditions of syarak. Regarding the combination of three contracts in one contract, it must also be on the condition that the contracts are done separately. The contracts contained in the Musharakah Mutanaqisah contract have also been recognized as valid and have been discussed since the early era of Islamic civilization and have even become the sharia of the previous Prophets such as in the story of Prophet Musa being hired (explained) by Prophet Shuaib for the services he performed. The contracts involved in Musharakah Mutanaqisah have been identified as having three types, namely musharakah, ijarah, and al-bay. The proofs of the necessity of these three contracts have been mentioned a lot in the discussion of previous Islamic scholars who make the Al-Quran and As-Sunnah the main reference sources of Islamic

law. There is no specific clause in this contract. On the other hand, the principles of this contract are based on the principles of the contracts involved in Musharakah Mutanaqisah, which are the principles of musharakah, ijarah, and Al-bay. This is because in ensuring that the musharakah mutanaqisah contract is implemented in its terms, it is necessary to ensure that the terms of the contract involved need to be fulfilled with appropriate improvements on several points. Among the pillars of musharakah are partners (shareholders), capital, projects, profit and the last is also the most important which is sighah (Ijab and Qabul) or the offer and acceptance of the sharing party. The Pillars of Ijarah (in the sense of rental) consist of the renter, the tenant, the rented property, the benefit of the rented item, the rental payment, and sighah (offer and acceptance).

The pillar of buying and selling (al-bay) on the side of the Hanafi scholars is the existence of an offer (ijab) and acceptance (Qabul) which indicates the exchange of goods. In other words, the principle of buying and selling is words or actions that show the willingness to exchange the goods that are owned. According to popular scholars, the sales contract has four pillars, namely the seller, the buyer, the wording, and the contracted item. The perfect conditions here are such that the person who contracts consists of those who are qualified and the contracted goods are pure and halal. In addition, there is the opinion of Ulama' Hanafi which requires that a contract only at least requires a sighah (offer and acceptance).

1. The customer makes a down payment/advance to buy a house. The bank will issue the remaining contribution to the purchase of the house. Both parties entered into a house purchase agreement through Musharakah Mutanaqisah.
2. The bank leases the right to the house to the customer.
3. The customer pays monthly to the bank because the bank leases its rights to the customer.
4. The percentage of the bank's ownership of the house will decrease when the customer pays the bank every month.

According to Imam al-Syafi'i based on the general permission of sale in his ruling, it is permissible for a man to buy goods with a deferred payment and then sell them back to the original seller with a direct payment that is less than the deferred payment. As long as the two sales are not linked separately, it has no reason to suspect the intention of the contracting parties. According to the Hanafi School, if the seller stipulates that he will only sell the goods on an existing basis, that is, on the condition that the buyer will not be responsible for any damage, and if the buyer agrees, the seller will be free from liability.

All types of business muamalah are basically obligatory unless there is an argument or reason that prohibits it. *الأصل في المعاملة الإباحة إلا أن يدل دليل على تحريمها*.

This method is the main method for every halal of all forms of economic and financial transactions except when there is a Syariah reason that prohibits it. There are five basic methods known as al-Asasiyyatul-Khamsah. In qawaid fihiyyah, there are five main principles in determining a legal method. Fiqh scholars discuss and find various methods that can be used in facing the current situation that require scholars to issue laws according to the current situation. Convenience and lightness in muamalat and Islamic finance certainly take into account the elements of justice and human kindness to protect the interests of the

contracting parties. This state and situation can certainly attract the interest of the community to switch and restructure financing from conventional loans to Islamic banking including non-Muslims because they will see from the point of view of ethics and transparency.

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In general, there are two views of scholars related to the application of the Musharakah Mutanaqisah contract, the first of which is the one that requires the Musharakah Mutanaqisah contract. Second, the view of scholars who reject or prohibit it. Scholars and Islamic economists currently require Musharakah Mutanaqisah contracts based on the view of Sharia, as long as it has met the Standard (dawabit) and Sharia legislation that must be used in its application. This is intended so that the implementation of the Musharakah Mutanaqisah contract is free from the elements of doubt (shubhah) from various doubts that can sometimes cause it to deviate from the scope of Sharia. Among the current Islamic scholars and economists who require Musharakah Mutanaqisah contracts are Jasim 'Ali Salim al-Shamisi, 'Ajil Jasim al-Nashimi, Ahmad Muhyi al-Din Ahmad, 'Abd al-Sattar Abu Ghuddah, Hasan 'Ali al-Shadhili, Wahbah al-Zuhayli, Nazih Kamal Hammad, 'Abd al-Salam al-'Ibbadi, Qutb Mustafa Sanu, and Muhammad 'Uthman Shabir (al-Kiwamilah, 2005). The scholars are of the view that they have not found a specific argument that explains that by prohibiting the concept of combining contracts. Scholars who reject or prohibit Musharakah Mutanaqisah contracts rely on 'aqli arguments based on their understanding of sharikah and its dawabit in Islamic jurisprudence. As for the essence or conclusion from their view, they have stated that at the essence of the Musharakah Mutanaqisah contract, there are many elements of doubt.

### **Conclusion**

Islam prioritizes the implementation of certain sharia taking into account the benefits and welfare of individuals and society. Muamalat and Islamic finance is one of the branches of Sharia law that involves human transactions. The main goal of Islamic finance is to distinguish and avoid the elements of riba, gharar, and oppression as practiced by the conventional financial system that prioritizes worldly profit alone. The breadth of Islamic muamalat law gives the impression that people need each other to lead a safer and more prosperous life. Musyarakah Mutaqisah home financing contracts are different from previous products. More than that, the concept of justice and welfare is also clearly practiced in this Musyarakah Mutaqisah-based product. The justice can be seen among other things in the case that the house is not completed by the developer, the bank will return the customer's money based on sharing found in the concept of Musyarakah Mutaqisah.

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