

# Explaining the Concept of Syirkah on the Build Operate and Transfer (BOT) Cooperation of the Infrastructure Development in East Java Indonesia

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**Abstract** – This study aims to find, analyze and provide an overview of Syirkah Concept in the Build Operate and Transfer (BOT) cooperation of the infrastructure development in East Java. The Regional Government has limited budget to carry out development, therefore partners are needed in developing the regions. The partnership can be signed with the private or foreign companies in order to strengthen the national economic structure with the concept of Build Operate and Transfer (BOT) cooperation. The results of the study using empirical juridical research by examining the correlation between legal/ sharia rules and the environment in which the law applies, illustrates that the BOT concept has many similarities to the concept of Syirkah which is part of the pattern of cooperation in sharia economic law.

**Keywords** – Syirkah, Build Operate and Transfer (BOT), Development, East Java.

## I. INTRODUCTION

The era of globalization and the intensive trade competition has encouraged economic developments that demand the availability of adequate facilities to support the implementation of national development in order to improve the economy and people's welfare. Thus, to increase national development which emphasis on the economic field requires large amounts of fund. Therefore, government funds through the State Budget (hereinafter referred to as APBN), as well as regions through the Regional Revenue and Expenditure Budget (hereinafter referred to as APBD) are very limited for the development of infrastructure, so that mutual supportive and beneficial partnership between the government needs to be developed with the private companies, both national and foreign companies in order to strengthen the national economic structure through new models or patterns as alternative financing for the construction of Government projects.

The model or pattern of cooperation as above mentioned, one of which by using the Build, Operate and Transfer system (hereinafter abbreviated as BOT) which is currently widely used by the government and private companies to collaborate in infrastructure development sector. It can be proven from several facilities for communities in East Java, such as the construction of a new Turi market in Surabaya, which the construction is the result of a BOT agreement between PT Gala Bumi Perkasa and the Surabaya Regional Government, and a collaboration between PT. Sasana Boga (SB) and the Surabaya Regional Government to build the THR building and Surabaya Mall. Furthermore, the HI Tech Mall Building which is the biggest electronic

shopping center in East Java is also the result of the collaboration of the BOT agreement between PT. Sasana Boga and Surabaya Regional Government. Another BOT cooperation was also implemented in Pasuruan Regency, precisely in Umbulan Village, Winongan District, the construction of the Umbulan Drinking Water Supply System (SPAM) was carried out by the BOT system between the East Java provincial government and PT Sarana Multi Infrastructure, and the project resulting from the BOT agreement in Lamongan namely Essays Bahari Lamongan (WBL), formerly known as the Tanning Kodok, is the result of collaboration between the Lamongan district government and PT. Bungs Wanda Sejati.

Based on the above explanation, the central problem of this study namely: "Does the cooperation in the Build, Operate and Transfer (BOT) system of the infrastructure development in East Java Indonesia is similar with the system of Syirkah cooperation model?"

## II. THE DEFINITION OF BUILD, OPERATE AND TRANSFER SYSTEM IN SYARIAH

Regarding the definition of BOT, Munir Fuady defined that the BOT agreement or contract is: "The contract where the contractor transfers the building that has been built after the transfer period, while before the project is submitted, a grace period provided for the contractor (for example 20 years) called the conception period to operate the project and collect revenue (revenue in return for building project related).<sup>1</sup>

Another definition of BOT is also stated in Article 1 of Government Regulation Number 27 of 2014 concerning Management of State / Regional Property, which explains that the Build, Operate and Transfer Agreement is the Utilization of State / Regional Property in the form of land by other party by erecting the building and / or facilities, then being utilized by the other party within a certain period of time that has been agreed, and being returned when the expiration of period. In the same year, the Minister of Finance of the Republic of Indonesia also issued a Regulation of the Minister of Finance No. 78 / PMK.06 / 2014 concerning Procedures for the Implementation of Utilization of State Property. In the Regulation of the Minister of Finance Number 78 / PMK.06 / 2014 Build Operate Transfer (abbreviated as BOT), is the use of State Property in the form of land by another party by constructing buildings and / or facilities, then being utilized by the other party within a certain period of time that has

been agreed, then the land will be returned along with the building and / or facilities as the expiration of period. The BOT agreement is also defined as a concept whereby the project is built at the full cost of a private company, several private companies or in collaboration with the State-Owned Enterprises, which is then operated by the contractor and after the operation phase is completed, as specified in the BOT agreement, the project is transferred to the government as the project owner.<sup>ii</sup>

Regarding the above definition of BOT, the type of BOT construction contract is generally a contract model that involves two parties, namely service users, commonly the government, and service providers, namely the private sector. Service users authorize service providers to build infrastructure and operate it for a certain time (also called the concession period) and the service provider will hand over to the infrastructure service user if the concession period has expired.<sup>iii</sup>

The concept of BOT cooperation as described above, in the concept of mu'amalah Islam is known as *Syirkah*. *Syirkah* means ikhtilath (mixing), which is the mixing of one property with another property which cannot be distinguished.<sup>iv</sup> In the Compilation of Sharia Economic Law issued by the Supreme Court of the Republic of Indonesia in the form of the Supreme Court Regulation of the Republic of Indonesia Number 02 of 2008 concerning Compilation of Sharia Economic Law, *Syirkah* is a collaboration that can be carried out between two or more capital owners to do joint business with the different amount of capital. Each party participates in the company, and the profits or losses are shared equally or on the basis of the proportion of the capital.<sup>v</sup> In regard with the definition, jumhur ulama use the word *Syirkah* to label a particular transaction, although there is no mixing of two studies, because the occurrence of a transaction is the cause of mixing.<sup>vi</sup> Furthermore, Warkum Sumitro said that *Syirkah* is a cooperation agreement between the owners of capital (money or goods) to finance a business.<sup>vii</sup>

### III. METHOD

This type of research is an empirical juridical study that examines the correlation between legal / sharia rules and the environment in which the law applies. The type of the research is juridical empirical, so that and the object of this research is a model of infrastructure development cooperation in East Java that applies the Build, Operate, and Transfer (BOT) system. The empirical legal research is also in the form of field research, which is a method to intensivel study the background, recent status, and environmental interactions that occur in social units such as individuals, groups, institutions, or communities. Field research in this study is an in-depth study of several infrastructure facility developments in East Java that collaborate with the Build, Operate, and Transfer (BOT) system, so as to produce a well-organized and complete depiction of the BOT concept applied in East Java specifically regarding infrastructure development.

The approach used in this study is qualitative approach, which according to Bogdan and Taylor in the Moleong in

Dyah Ochtorina Susanti is a research procedure that produces descriptive data in the form of written or oral words from people or institutions and observable behavior, directed to the background and individuals holistically. Thus, the descriptive data collected from actors who carry out cooperation in the BOT system, where the data is expected to be a comparison with the concept of cooperation using the *Syirkah* system.

### IV. RESULT AND DISCUSSION

In the current era of globalization and economic development, the government demands the availability of adequate infrastructure to support the implementation of development in every region including in East Java. Thus, the involvement of the community's role to actively contribute is necessary. One of the ways to achieve it is by implementing a Build, Operate and Transfer contract (hereinafter abbreviated as BOT). Collaboration with the BOT system in infrastructure development in East Java has further been carried out such as several infrastructure facilities in Surabaya, such the contract between the Surabaya Regional Government and PT. Gala Bumiperkasa on the construction and management of the Surabaya Regional Turi Market. The contract resulted in agreements in which one of them explained that PT. Gala Bumiperkasa, in this case as an Investor, is required to build a shopping center completed with the facilities, as well as the right to manage and operate Turi market for 25 years, even Investors are also required to maintain the Turi market development project. Therefore, after the construction project was completed in accordance with the agreed time, the land and building were then handed back to the Surabaya Regional Government as the project owner.<sup>viiiix</sup>

Furthermore, cooperation is made between PT. Sasana Boga (SB) and the Surabaya Regional Government to build the THR and Surabaya Mall buildings, and the HI Tech Mall Building, which is the largest electronic shopping center in East Java, is also the result of the BOT agreement contract agreed between PT. Sasana Boga and Surabaya Regional Government. In the agreements, the parties agreed on a period of cooperation for 20 years, which is extended to 10 years. After the period ends, PT. Sasana Boga handed over the THR and Surabaya Mall buildings as well as HI Tech Mall to the Surabaya Regional Government.<sup>x</sup>

The BOT agreement is not only carried out in Surabaya, but also implemented by other regions such as Pasuruan and Lamongan Regencies. In Pasuruan Regency, precisely in Umbulan Village, Winongan District, the construction of the Umbulan Drinking Water Supply System (SPAM) was carried out using the BOT system between the East Java provincial government and PT. Sarana Multi Infrastructure to assist the East Java Provincial Government in preparing and implementing transactions for the Umbulan SPAM project and government guarantees through the PT. Penjaminan Infrastruktur Indonesia.<sup>xi</sup> In this project, the East Java Provincial Government provided Feasibility Support of Rp. 818 billion, while PT. Sarana Multi Infrastructure was responsible for providing some of the other funds. The result of the agreement is that the SPAM

project period lasts for 25 years, which includes the design, construction, operation, maintenance, financing of management facilities and transmission networks with a capacity of 4000 liters / second, which will be carried out by private parties in this case PT Sarana Multi Infrastructure.<sup>xiii</sup>

Furthermore, Wisata Bahari Lamongan (WBL) which was formerly known as the Tanjung Kodok, is the result of Lamongan Local Government and PT. Bunga Wangsa Sejati.<sup>xiii</sup> In cooperation in the development of tourism, the private sector acts as an investor who provides capital to build Wisata Bahari Lamongan, while the local government only provides land. This is as stated in the agreement that the private sector (in this case PT. Bunga Wangsa Sejati) provides 55 billion capital to build the area of Wisata Bahari Lamongan with 25 years periode of time, in addition, for 25 years, PT. Bunga Wangsa Sejati is required to be able to manage tourism until the agreement is renewed to be extended or returned to the Lamongan Local government.<sup>xiv</sup>

Relating with some examples of the BOT agreement on infrastructure development in East Java as above mentioned, it can be seen that the BOT agreement is in great demand by the Regional Government, because the agreement is considered beneficial, both for the Local Government and the Private Sector. Thus, with the BOT agreement, the Regional Government which initially did not have enough budget, could eventually build the infrastructure used for the benefit of the community, even the Regional Government could benefit from the development project. Other benefits are also felt by the private sector, where previously they had only limited budget, through the BOT agreement, investors could establish commercial buildings without having to buy land before.<sup>xv</sup>

The BOT agreement is an agreement made by two parties, whereby one party authorizes his land to the second party to establish a commercial building, while the second party has the right to operate the building for the defined period based on the agreement. The second party should submit the building to the land owner, when the period expired.<sup>xvi</sup> The BOT agreement is also defined as a form of cooperation between the government (the project owner) and the private sector (Investor), where the project owner grants the Investor the right to construct buildings during the BOT agreement period and transfer ownership of the building to the land rights holder after the expiry of the agreed period of time.<sup>xvii</sup> Accordingly, the BOT agreement is a concept in which the project is built at the full cost of a private company, several private companies or in cooperation with a State-Owned Enterprise (BUMN) which acts as an Investor, which is obliged to build, operate the building and after the operation phase is completed as specified in the BOT agreement, the project is transferred to the government as the project owner.<sup>xviii</sup>

There are 4 (four) elements of the BOT agreement, namely:<sup>xix</sup> 1) The parties, which consist of the Government as the project owner or exclusive rights holder, and the Investor as the party providing the funds<sup>xx</sup>; 2) The object agreed upon, namely in the form of land and building<sup>xxi</sup>; 3) Management Rights to Investors, where the Investor

handed the right to manage or operate with profit sharing patterns; 4) Transferring, that is after the period expires, the Investor must return the land and the building along with all its facilities to the Government as the project owner and exclusive rights holder.

Based on several BOT agreements on infrastructure development in East Java as previously explained, there are three stages in the implementation of the BOT agreement, namely First, Reconstruction (Build), where the project owner authorize the contractor as the right holder to build an infrastructure facility, where the design and specification of the building is proposed by the right holder to the owner of the project. Second, Operation (Operate), which is the grace period given by the project owner to the right holder to operate and manage the project, in addition, the rights holder is also obliged to maintain the project. Third, the return (Transfer) that is transferring the project management and physical rights to the owner of the project, and the imposition of fees is generally determined in the agreement by the parties.<sup>xxii</sup>

Furthermore, in the implementation of BOT agreement, each party, both government and private, should provide capital and assets in the form of money, goods and services, which are used as bargaining values with the principle of mutual support. Thus, even though the government in the BOT agreement prepares capital, but the private sector is required to play a greater role in providing the various needs needed in the process of project.<sup>xxiii</sup>

The private sector also has the right to operate the finished building project and its facilities for a certain period of time, even the private sector, as the investor has the right to take economic benefits from the project by marketing to third parties, according the designation of the building. Thus, as long as the building is used for commercial purposes, the Investor is still obliged to maintain the building until the end of the concession period, therefore when it is handed over to the landowner, the building and the facilities remain good condition and usable.<sup>xxiv</sup> Thus, when the operation of the building has ended, the investor is obliged to hand over the building and its facilities to the project owner, where the returned building must be in the proper condition as previously agreed. The transfer is done without any conditions from the project owner to pay the value of the building. However, if fees are required in the transferring process, the cost is charged to the investor, unless it has been agreed in advance that the fee is paid by both parties.<sup>xxv</sup> Below is the table of BOT cooperation system model.

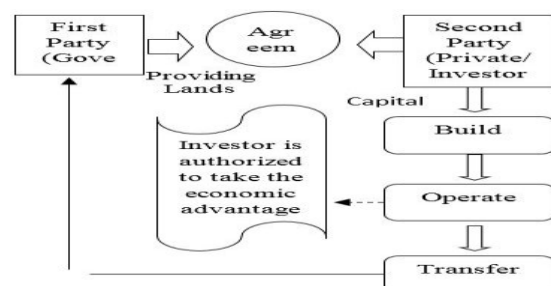


Fig. 1. BOT Cooperation System Model.

Source: Dyah OS, processed, 2018.



Relating the concept of BOT cooperation as above described, in Islamic Economic Law, this concept is similar to *Syirkah*. *Syirkah* is also known as *Musyarakah*, derived from Arabic with the basic words "*Syirkatan*", and verbs "*syarika*" which means partners / allies / partners / unions.<sup>xxvi</sup> Literally, *Syirkah* means *ikhtilath* (merging or mixing), which is the mixing of one property with another that cannot be distinguished.<sup>xxvii</sup> The terminological, *Syirkah* is defined as a collaboration carried out by two people or more related to capital, skills, or trust in a particular business by sharing profits based on the ratio.<sup>xxviii</sup> The Fiqh scholars also expresses their opinions, According to the *Syafi'iyah*, *Syirkah* is the right of two or more people on something for fellowship purposes.<sup>xxix</sup> In contrast to *Syafi'iyah's* view, the *Hanafiyah* said that *Shirkah* is an expression of a transaction (contract) on the subject of assets and profits between two people who are cooperated.<sup>xxx</sup> Another opinion was also expressed by the *Malikiyah* which defined *Syirkah* as a partnership, namely permission to manage assets (*tasharruf*) owned by two people included, in which both parties allow each other to utilize both properties.<sup>xxxi</sup> The last is *Hanabilah* Opinion which called *Syirkah* as an association that defines *Syirkah* as the right (authority) for *tasharruf*.<sup>xxxii</sup>

At the academic level, An-Nabhani in Burhanuddin stated that *Syirkah* is a contract between two or more parties, which agrees to undertake a business with the aim of obtaining profits.<sup>xxxiii</sup> Another definition is also explained by Antonio *Syafi'i* in Maratun *Shalihah*, which states that *Syirkah* is a cooperation contract between two or more parties to conduct certain businesses with the capital provided by each party, and an agreement that the benefits and risks will be shared in accordance with the agreement made.<sup>xxxiv</sup> In line with the opinion of *Syafi'i* Antonio, Muhamad emphasized that *Syirkah* is an association between two or more parties in a project where each party has the right to all profits and is responsible for all losses incurred in accordance with their respective investments.<sup>xxxv</sup> The definition of *Syirkah* was also stated by Muhamad Sadi is, who in his book uses the term *musharaka*, namely cooperation between two or more parties for a particular business that each party provides a portion of the funds that the profit will be divided according to the agreement, while the loss is borne in accordance with portion of each fund.<sup>xxxvi</sup>

Based on several definitions of *Syirkah* as above explained, it can be concluded that *Syirkah* is a form of cooperation carried out by two or more people on a particular business and purpose, where each party provides capital, and profits or losses are carried by both parties in accordance with the agreement made. In this regard, there are conditions that must be met for the legitimacy of the agreement. According to *Hanafiyah*, the pillars of *Syirkah* are *ijab and qabul*, while the *Hanafiyah* do not mention other elements as *jumhur fuqaha*, because the existence of the subject and object of *shirkah* has become absolute.<sup>xxxvii</sup> In this regard, there are three *Syirkah* pillars which were also opined by Muhammad *Syafi'i* Antonio, namely:<sup>xxxviii</sup>

1. *Shighat (ijab and qabul)*.
2. Two parties who cooperate or who contract (*al-qaqida-*

*-ni*)

3. Object of the contract, also called *al-ma'qual-ihalaih*, which includes work (*al-'amal*) and / or capital in the form of assets.

The *Syirkah* pillars as above mentioned must be fulfilled so that cooperation can be said to be legitimate, and in addition to these pillars, there are also special conditions that apply and must be considered by the parties. First, the parties that make the *Syirkah* agreement are authorized to take legal action in the name of the partnership with the permission of other parties. In connection with the consequences of the actions as intended, both profits and losses will be borne jointly by the parties. Second, the profit sharing system must be clearly defined, both in terms of the ratio and the period of distribution according to the agreement. Third, before the division is made, all profits obtained either by one party or the parties constitute the ownership of *Syirkah* or become a joint property.<sup>xxxix</sup>

Regarding the terms and conditions of the above *Syirkah*, it has been stated previously that one of the pillars of *Syirkah* is the existence of an object of contract, one of which is the capital provided by the parties. In the implementation, the amount of capital given does not have to be the same, meaning that capital is adjusted to the ability of the parties. The results of the business in the form of profits will be divided based on the requirements determined by each party, while the distribution of losses is adjusted to the form of the contribution given.<sup>xl</sup>

Furthermore, in the concept of *Syirkah* cooperation, the capital provided is not only in the form of money or goods, but also in the form of reputation. This can be understood through various forms of *Syirkah*, which are divided into two parts, namely: 1) *Syirkah Amlak*, namely *Syirkah* that occurs not due to a contract, but of a certain effort (*ikhtiar*) or occurs naturally / automatically (*ijbari*). *Syirkah Amlak* is divided into two types, namely *Syirkah Amlak ikhtiar*, a *shirkah* that occurs because of the will of each party concerned, such as the grant agreement, will, and purchase, and *Syirkah Amlak ijbari* namely *Syirkah* between two or more people which occurs out of the will of each party, or due to natural events that occur automatically such as the death of a father which causes the division of property among the heirs.<sup>xli</sup> 2) *Syirkah Uqud*, namely two or more parties that agree to integrate assets to conduct business activities, and the outcomes are divided between the parties in the form of profits and losses. This *Syirkah* is categorized into 4 (four) types, namely *Syirkah inan*, *Syirkah mufawadhah*, *Syirkah abdan*, and 4) *Syirkah wujuh*.<sup>xlii</sup>

First, *Syirkah inan* is collaboration between two or more people to run a business with mutual benefits or losses.<sup>xliii</sup> In this type, the given capital must be realized in the form of money. This means that goods are not applicable for *Syirkah* capital, unless the items have been calculated at the time of the contract.<sup>xliiv</sup> It does not required parties provide the same amount of capital, in other words that there is no prohibition if one party provides higher amount off capital than the other, as well as the authority of the management and the benefits obtained.<sup>xliv</sup> Thus, it is permissible if one party is responsible for the business, while the other is not.

With regard to profit sharing, it can be determined based on mutual agreement, whereas if the parties experience losses, the responsibilities of each party are adjusted to the amount of capital given or can be agreed upon.<sup>xlvi</sup>

Second is *Syirkah mufawadhah*. Literally, *mufawadhah* means equality, meaning that *Syirkah mufawadhah* is a form of communion between two or more people to run a business through the equality of capital participation, division of labor, and profits.<sup>xlvi</sup> *Syirkah mufawadhah* is also defined as a cooperation contract between two or more people, where each party provides a portion of the total funds and participates in work, and divides the profits and losses equally. Thus, *Syirkah mufawadhah* is basically similar with *Syirkah 'inan*, but the portion of capital, work, profit sharing, and losses of *Syirkah mufawadhah* borne equally between the two parties.<sup>xlvi</sup>

Third, *Syirkah Abdan* is a cooperation between two or more people who rely on their power or expertise without their assets to receive work.<sup>xlvi</sup> It does not require similar skills or abilities, but halal work. Regarding to the profits obtained, it will be shared based on mutual agreement.<sup>1</sup>

Fourth, *Syirkah wujud* is collaboration between two people with capital from outside the parties. Meaning, one gives capital to two or more people, who act as *mudharib*, so that the two managers become state-owned companies who can both benefit from the capital of other parties.<sup>li</sup> The capital is given on the basis of one's position, figure, or expertise in the community.<sup>lii</sup>

Based on the explanation of *Syirkah* concept as above described, the BOT concept contains one of the concepts of *Syirkah*, in which the Investor provide capital for costs ranging from construction to operations, while the Regional Government as the project owner provides land for construction projects that are used as agreement object. Thus, by considering the point of view of the agreement or cooperation concept carried out in BOT, some similarities between the BOT and the *Syirkah* concept can be found.

The financial activities carried out by the project owner, the government, is giving permission to the private sector, in this case as the Investor to take economic benefit from the project that was built by marketing to third parties, according to the designation of the building, while the government provides capital in the form of land and run the business directly. Based on this concept, BOT can be compared to *Syirkah Uqud*, more precisely the *Syirkah Inan*. This is due to the fact that the capital and profits are united. Moreover, the authority of the management and the benefits obtained are not required equal, meaning that the project manager or business is allowed only from one party only, and the distribution of profits divided according to mutual agreement.

It is evidenced by the difference in capital handed over by the parties, where the government issues capital in the form of land, while the private party or Investor provides capital in the form of funds for the project to be built. Furthermore, it also relate to differences in authority, where the project manager starting from reconstruction and the operation is handed over to the second party as the Investor, besides that each party agrees to share the outcomes and risks of the business or project carried out in accordance

with their respective agreements. The combination of diverse types of capital, and the sharing of outcomes and various risks are also the applications of the *Syirkah Inan* contract. Therefore, other similarities between the BOT concept and the *Syirkah* concept can also be examined in terms of the usefulness of the use of the two systems.

With regard to usefulness, Jeremy Bentham in Nurhadi in Dyah Ochtorina Susanti argued that the law aims to realize what is beneficial or appropriate with the interests of the people, as famous sayings, the Greatest Happiness for the Greatest Number.<sup>liii</sup>

Referring to Bentham's opinion, the cooperation of the BOT system is basically aimed at obtaining benefits, both for the government and the private sector (Investors), and aims to provide adequate services and facilities for the community. The benefits obtained by the private sector, indeed, cannot be separated from the involvement of its employees, this is due to the existence of these benefits, employees of companies that are business partners will also obtain these benefits, therefore the employees welfare is guaranteed.

Other benefits are also felt by the government under cooperation of the BOT system, which initially did not have enough funds to build infrastructure facilities, may be aided by capital or funds from the private sector, so that the availability of infrastructure can be fulfilled, and the public can use the facilities to meet daily needs. This was exemplified by the construction of Pasar Turi, the THR building and Surabaya Mall, as well as the HI Tech Mall Building in Surabaya, which provided job vacancies that might increase community income. Likewise, in the *Syirkah* system cooperation, the parties benefit equally due to mix of capital between the parties, so the parties can make the maximum effort. Each party can also directly manage the business established, because it is a business-owned business, and the distribution of profits is divided according to mutual agreement. It will certainly improve the economy of the community.

Bentham's thoughts were later developed by John Stuart Mill with several modifications. K. Bertens in Richard Schoch recorded 2 (two) important opinions from Mill in the effort to reformulate utilitarianism, namely: First, the opinion which states that the quality needs to be considered as well, because there are higher and lower quality of pleasures. Second, happiness which is an ethical norm is the happiness of all people involved in an event, not the happiness of one person who might act as the main actor.<sup>liv</sup>

Based on Stuart Mill's opinion, in the BOT system cooperation, the interests of the parties are equally considered, where the government has an interest in building infrastructure with insufficient funds, while the private sector has an interest in finding or making an effort to make a profit. Likewise the cooperation of the *Syirkah* system, where each party has an interest in a profit-making business, but with insufficient funds, the funds are merged to be used in opening a business.

Regarding the above explanation, the concept of benefit in Islamic law is known as *masalah mursalah*. *Maslahah* is a synonym for the word benefit. Al-Ghazali argued in Abdul Mannan that according to the origin, *masalahah* was

interpreted as something that brought benefits and avoid harm (damage) which in essence was to maintain the purpose of shara 'in establishing the law.<sup>lv</sup> With regard to the definition, mursalah is independent, it is not bound by religious theorem (Al-Qur'an and Al-Hadith) which allow or prohibit it,<sup>lvi</sup> meaning that there is no particular proposition that justifies or cancels the benefit. Maslahah can also be interpreted as anything that can bring benefits, which includes all efforts to achieve something that is seen as positive or otherwise, all efforts to resist and avoid something that is seen as negative.<sup>lvii</sup> In connection with the definition of maslahah mursalah itself, Wahbah Zuhaili in Abdul Mannan expresses the notion of maslahah mursalah, namely some characteristics that are in line with the actions of the goal of shara ', but there is no particular theorem of shara' that justifies or cancels.<sup>lviii</sup>

Based on the definition of maslahah mursalah as previously stated, one of benefits of BOT system is to prevent abandonment of the reconstruction due to

insufficient funds, and prevents the government from debts. This is certainly in accordance with the concept of maslahah mursalah, where the BOT system brings many benefits to all parties, and avoid damage that will actually harm the State and society itself. With regard to the *Syirkah* system, in line with the benefits of the BOT system, the existence of cooperation of the *Syirkah* system provides an opportunity for the parties to establish a large business or project, because there is a merger of assets or capital in it, so the parties do not need to borrow from the bank or elsewhere to establish a business, because this will cause debt and loss to the party itself. The outcomes of the established business can also be used to develop the business, or to make a new business, due to mutual benefits. It proves that *Syirkah* system cooperation also brings many benefits, and avoids the parties or the community from harms. The equation of the BOT concept and the concept of *Syirkah* as above described is clearly describe in the following table.

Table 1. Computation of BOT and *Syirkah*.

| No. | Explanation                    | BOT Concept  | Concept of <i>Syirkah</i>   |
|-----|--------------------------------|--|---|
| 1.  | Subject                        | Consist of two or more parties   | Consist of two or more parties  |
| 2.  | object                         | Capital and benefits   | Capital and benefits  |
| 3.  | Form of Capitals               | Goods, Money, Land   | Goods, Money, Service, or Reputation  |
| 4.  | Source of Funds                | Private Sector   | Each Party  |
| 5.  | Aims                           | Gaining Profits  | Gaining Profits   |
| 6.  | Project or Business Management | Managed by Investor  | Projects or businesses are managed by the parties, unless making other agreement. For example, the first party is responsible for the business, while the other party is not. |
| 7.  | Stages                         | 1. Building (reconstruction)<br>The project owner authorize the contractor to build an infrastructure facility.  | 1. Collection of Capital<br>Each party issues capital for business activities, whether in the form of goods, money or expertise.  |
|     |                                | 2. Operation<br>Investors are given a period of time by the project owner to operate and manage the project. During the operation process, the project owner can give Investor permission to take economic benefits from the project being built | 2. Business Activity<br>Each party can divide the business management according to the agreement  |
|     |                                | 3. Transfer<br>After the period over, the Investor should transfer the building and its facilities to the project owner.   | 3. Profit sharing<br>The proportion of profits is divided according to mutual agreement. It can be equated with the provided capital, or it can also be different.            |
| 8.  | Profits and Losses             | Profits and losses are borne jointly in accordance with the agreement between the parties  | Profits and losses are borne jointly in accordance with the agreement between the parties   |

Source: Dyah OS, processed, 2018.

Relating to the table above, it can be concluded that basically the concept of BOT system cooperation and *Syirkah* system cooperation is the same, namely in the form of a partnership, where the partnership itself is a combination of two or more capital owners to gain profits in business.<sup>lix</sup> In this regard, there are also differences

between the two concepts, namely in terms of the division of ownership, which in the BOT system, ownership of the building project can be separated because from the beginning of the agreement it was determined that after the term of the agreement ends, the building and other facilities are handed over and become the property the government



as the project owner. In contrast to the *Syirkah* system cooperation, in which a mixture of the parties' assets has been set in the beginning of the agreement, the building or business becomes joint property, and cannot be separated.

### V. CONCLUSION

The BOT system cooperation in infrastructure development in East Java and the *Syirkah* system are similar. The similarity is proven by the following elements:

1. Agreement subject, consisting of two or more parties (fellowship).
2. Objects that are aligned in the form of capital and profits.
3. The capital collected is not required to be the same for both parties (It can be in the form of goods, land or money).
4. Authority in management should not be equal; it means that the project manager or business is allowed only from one party.
5. Benefits are adjusted according to mutual agreement.
6. Both systems (the BOT system and the *Syirkah* system) provide benefits to both parties, especially with regard to the availability of sufficient and fulfilled capital for infrastructure development.

Relating to the above similarities, the differences between the cooperation model of the BOT system and the *Syirkah* system are found, namely in terms of the division of ownership, where in the BOT system, ownership of the building project can be separated, whereas in the *Syirkah* system, ownership property cannot be separated.

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