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THE REALITY OF SHARIA BANKING IN INDONESIA; CRITICAL ANALYSIS OF SHARIA ECONOMIC LAW PERSPECTIVE

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Abstract

This article highlights the criticism directed at Islamic banks where many parties think there is no difference between Islamic banking and conventional banks. This assumption comes from at least three realities, firstly, Islamic bank capital comes from conventional banks, secondly, mudarabah which in its implementation, banks provide non-goods funds, and thirdly, Islamic bank products that use mudarabah in practice are different from the theory of mudarabah in classical fiqh. The perspective of Islamic economic law is appropriate to be used to answer these problems. The type of research used in this paper is normative legal research. The data sources used in this paper are primary data in the form of laws and Islamic legal literature. The type of approach in this paper is a conceptual approach, the concept intended is the theories that exist in Islamic law, specifically the theory of mixing halal and haram, the concept of mudharabah and murabahah according to fiqh. This study uses a qualitative method with a literature review approach (library research). The results of the study conclude that Islamic banking capital originating from conventional banks does not damage the contracts made by Islamic banking. Murabahah and mudarabah contracts which in their application are different from classical fiqh theory are actually forms of contract innovation because they adapt to current needs and as a form of embodiment of the principles that exist in sharia economic law.

Keywords: *problematic; sharia bank; murabahah; mudarabah*

A. Introduction

Since the enactment of Law no. 21 of 2008, the development of Islamic banking in Indonesia is growing rapidly. But on the other hand, conventional banking is also growing. Islamic banks have the main task that makes a bank with a sharia system different from conventional banks, namely that all activities or products owned must comply with sharia principles of Islamic law. So the goal to seek the maximum profit as conventional banks must still be based on sharia principles. Therefore, in its development, the formulation of contracts made in Islamic banking must reflect the sharia economic legal system.

However, several problems were found in the reality of Islamic banking in Indonesia which were indicated to be different from the concept of fiqh which regulates sharia economic law, especially concerning various contracts used in Islamic financial institutions. First, some

of these problems are related to the capital for establishing Islamic banking. Based on observations and temporary information, there are several banks whose capital comes from their parent bank in the form of conventional banks, such as Bank Syariah Mandiri whose capital comes from a Bank Mandiri [1]. In this case, the capital of Bank Mandiri, or Islamic banking, which has the same system as Bank Mandiri, comes from conventional banks that apply the interest system, while the majority think that the interest system is equated with usury, so how does fiqh view this?

Second, related to *murabahah* transactions. In its application, buying and selling activities are carried out by the customer himself who buys and selects the goods needed. The bank then asks for an invoice (order invoice) as proof that the goods have been purchased. In addition to this, if one considers the *murabahah* contract transaction at a sharia bank, the amount of *murabahah* financing is the price of the goods plus a margin based on the installment period and minus the down payment (*urbun*). This gives the impression that the *murabahah* contract is calculated against the amount of bank financing, not the price of goods, making it difficult to distinguish it from the conventional banking system. In addition, there are also fines for customers who fail to pay installments in *murabahah* financing, even though fines in *fiqh* are not included in the *murabahah* contract. Therefore, it gives the impression that a contract like this is no different from applying for a loan at a conventional bank. [2].

Third, it has to do with the *mudarabah* contract. The highlight here is the *mudarabah* contract which is applied in the form of regular savings (not deposits). In this case, savers are allowed at any time to withdraw their funds (savings) in the bank. It is seen that the principle of *mudarabah* is not reflected in this type of savings. Because the principle of *mudarabah* is that the investor's fund will be used by the entrepreneur (*mudarib*) until there is a time when it is certain that the fund has brought results (profit or loss). How is it possible that a financier who attracts funds following the wishes of the time he desires can also be termed as *mudarabah*.

Then, the revenue sharing system used in the *mudarabah* contract which is applied in the form of savings also uses revenue sharing, whereas what the prophet exemplified is the profit sharing system. In addition, the *mudarabah* contract is also applied in the form of financing, wherein the application there is a guarantee that must be submitted to the bank and this guarantee is a requirement that must be provided. In fact, in jurisprudence, the guarantee is not a pillar in the *mudarabah* contract [3].

Some of the things described above are feared to have the potential to cause a negative public assessment of the view that there is no difference between Islamic banks and conventional banks. Therefore, according to the author, research related to the analysis of the reality of contract application in Islamic banking is currently important to contribute to the reform of principles in Islamic banking that is more just and oriented to the benefit of the people.

B. Method

The type of research used in this paper is a type of normative legal research that examines laws and regulations. The

[1] Syukri Iska, *Sistem Perbankan Syariah Di Indonesia Dalam Perspektif Fikih Ekonomi* (Yogyakarta: Fajar Media Press, 2014), 297.

[2] Sugeng Widodo, *Seluk Beluk Jual Beli Murabahah Perspektif Aplikatif* (Yogyakarta: Asgard Chapter, 2010), 57.

[3] Muhammad, *Manajemen Pembiayaan Bank Syariah* (Yogyakarta: UPP AMP YKPN, 2005), 102–6.

sources of data used in this paper are primary data in the form of laws and Islamic legal literature. The type of approach in this paper is a conceptual approach, the concept intended is the theories that exist in Islamic law, specifically the theory of mixing halal and haram, the concept of mudarabah and murabahah according to fiqh. This study uses a qualitative method with a library research approach, namely data collection or scientific work related to the object of research or library data collection. This study explores new findings related to Islamic banking. In addition to conducting analytical interpretations with strict verification, the aim is to see the suitability of fiqh in the current Islamic banking context.

C. Results and Discussion

Basic Principles of Sharia Economic Law

The presence of Sharia economic law in the legal system in Indonesia, today is actually no longer just because of the demands of history and population (because the majority are Muslims) as some people think, but further than that, it is also due to the needs of the wider community after being known and it is true how fair and equitable the sharia economic system is in guarding the welfare of the people as aspired by the nation and the Unitary State of the Republic of Indonesia. The position of sharia economic law will be stronger when it is linked to the philosophy and state constitution, namely Pancasila and the 1945 Constitution of the Republic of Indonesia. In short, the Islamic economic system is not contradictory at all, let alone violates Pancasila, especially the "Belief in the One Supreme God," nor is it contradictory at all, let alone against the Constitution of the Republic of Indonesia, both in the Preamble (preamble), which includes, among other things, the sentence: " … By realizing a social justice for all Indonesian people," as well as with parts of its contents, especially those stated in Chapter XI (Religion) Article 29 paragraphs (1) and (2), as well as CHAPTER XIV Articles 33 and 34 which regulates the national economy and welfare. Indonesian social.

To find out more in-depth about Islamic economic law in practice, it is necessary to know some of the basic principles contained in Islamic economics. Some of the principles of Islamic economics are as follows:[4]

a. The law of all economic activities is allowed until there are arguments that prohibit or forbid it;
b. Economic activity or an economic process must be carried out by the agreement of both parties without any element of coercion from any party so that everything can run as it should;
c. related to benefit and harm. Every economic activity or economic activity should be carried out by always paying attention to the aspects of benefit and harm;
d. Avoid elements of usury, maysir, gharar, and other elements that are forbidden.

In addition to the basic principles, other things that are no less important to know are the principles in the contract or agreement. Why the principles in the contract, because the activity in sharia economic law is dominated by the contract or alliance, especially related to the contracts studied in this study. There are several principles in the agreement submitted by Syamsul Anwar, including the Basis of Ibahah, Basis of freedom of contract/contract, Basis of Consensualism, Basis of the binding promise, Basis of balance, Basis of Benefit (not burdensome), Basis of Trust, Basis of Justice, Basis of Personnel Akad [5].

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[4] Abdul Rahim, "Konsep Bunga Dan Prinsip Ekonomi Islam Dalam Perbankan Syariah," *Human Falah* 2, no. 2 (2015): 380.

[5] Syamsul Anwar, *Hukum Perjanjian Syariah Studi Tentang Akad Dalam Fikih Muamalat,*

In this study, the general principles and principles described above should be used as principles and implemented in Islamic financial institutions, including Islamic banking. Therefore, it is necessary to review more specifically the things that are odd as described in the background of the problem, based on the basic theory of each contract which is the problem in this study.

As for some of the basic theories needed, are theories in sharia business law used as a tool in the analysis of this research. Sharia economic law is defined as law that comes from the Qur'an and sunnah as well as ijtihad from the scholars [6]. Some of the basic theories related to this research are as follows:

1. Mixing between halal and haram

In the case of mixing between truth and falsehood, it is clearly forbidden in Islam, as Allah says in Surat Al-Baqarah verse 42:

وَلَا تَلْبِسُوا الْحَقَّ بِالْبَاطِلِ وَتَكْتُمُوا الْحَقَّ وَاَنْتُمْ تَعْلَمُوْنَ

And do not confuse the truth with the falsehood, and do not hide the truth while you know.

And strengthened by the rules of jurisprudence[7]:

إِذَااجْتَمَعَ الْحَلَالُ وَالْحَرَامُ غُلِبَ الأُحَرَامُ

When the halal and the haram are merged, the haram can eliminate the halal.

However, in an emergency situation, something that is forbidden can be allowed to be utilized in accordance with the rule:

The desire occupies the position of emergency, whether it is a general desire (all people) or a special desire (one person or group). In an emergency everything that is forbidden becomes permissible.

However, the permissibility of something that is forbidden is only temporary before the existence or difficulty of obtaining what is lawful and limited to the needs that can eliminate these difficulties. As in the word of Allah in the letter al-Baqarah verse 173:

Indeed, Allah has forbidden you only carcasses, blood, pork, and animals that when slaughtered are called names other than Allah. But whoever is compelled to eat it while He does not want it and does not exceed the limit, then there is no sin for him. Surely Allah is Oft-Forgiving, Most Merciful.

2. Murabahah

There are several opinions regarding the definition of murabaha. The author concludes that murabahah is essentially a sale and purchase contract of goods with an additional profit from the original price, provided this additional condition is agreed upon by the buyer, or the seller informs the original price and the profit taken.

This *murabahah* transaction is never directly discussed in the Qur'an, except about buying and selling in general. However, although it is not explained in detail in the text, the scholars agree that the sale and purchase of the *murabahah* system are permissible [8], provided that all the pillars and conditions in the sale and purchase are met as in the usual way of buying and selling. In murabahahthe

Jakarta: PT, Raja Grafindo Persada, 2010, 83–89.

[6] Ina Nur Inayah, "PRINSIP-PRINSIP EKONOMI ISLAM DALAM INVESTASI SYARIAH," *AKSY: Jurnal Ilmu Akuntansi Dan Bisnis Syariah* 2, no. 2 (2020): 91–92, https://doi.org/10.15575/aksy.v2i2.9801.

[7] Nurul Khikmah, "Industri Bisnis Slimming Injection Perspektif Hukum Bisnis Syari'ah," *Az Zarqa': Jurnal Hukum Bisnis Islam* 13, no. 1 (2021): 146, https://doi.org/10.14421/azzarqa.v13i1.2379.

[8] Muhammad bin Idris al-Syafi'i, *Al-Risalah* (Beirut: Maktabah Al-Ilmiyah, n.d.), 33.

seller mentions the purchase price of the goods to the buyer, then he requires a certain amount of profit [9].

3. Mudarabah

Mudarabah is an agreement between the two parties, namely between the owner of the capital (sahibul mal) and the capital manager (mudarib) in the framework of a business to make a profit [10]. The distinctive feature of this contract is that if there is a loss that is not caused by negligence or intentional mudarib, then the loss on capital or funds disbursed becomes the responsibility and risk of the capital owner. With this, trust becomes the main and most important element in this transaction [11].

Mudarabah is also one of the many contracts applied by sharia banking. This agreement is widely used in fundraising products (funding) and also the distribution of funds (lending) [12]. As for what is related to this research, namely the mudarabah contract that is applied in the form of mudarabah savings. Related to this, DSN in fatwa No. 2 of 2000 has provided provisions as a basis for the implementation of mudarabah savings [13].

Analysis of the Reality of Islamic Banking in the Study of Sharia Economic Law

1. Analysis of Capital in Islamic banki Banking

Based on existing research and information, the spotlight here is how the law of capital in Islamic banks whose establishment capital comes from conventional banks. This is because conventional banks are banks that apply an interesting system, even though as fatwas of scholars and especially in Indonesia is the Indonesian Ulema Council, bank interest is included in the category of usury which is forbidden in Islam. this means that the capital of these banks comes from something that is forbidden. How does fiqh view this.

If you look at the perspective of the early establishment of BNI Syariah, for example, it can be seen that there are syar'i demands, namely so that the community is protected from usury and haram bank interest, then an adequate number of Islamic banks is needed. In fact, at that time there was only Bank Muamalat Indonesia which could not possibly fulfill all the needs of sharia economic liquidity. Likewise, individual or institutional capital that is not usurious, seems to have not been able to provide capital or support the BNI Syariah capital [14].

According to the author, it means that at that time there was a greater and urgent need and importance (hajj) that had to be answered even if one had to take advantage of something that was haram. Even then, bank interest was still allowed because it was classified as an emergency. In that case, then something that is forbidden becomes permissible to be utilized. This is by the rule of law:

الحاجة تنزل منزلة الضرورة عامة كانت
ام خاصة الضرورات تبيح المحظو رات

The desire occupies a position of emergency, whether it is a general desire (all people) or a special desire

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[9] Surayya Fadhilah Nasution, "Pembiayaan Murabahah Pada Perbankan Syariah Di Indonesia," *AT-TAWASSUTH: Jurnal Ekonomi Islam* 6, no. 1 (2021): 135, https://doi.org/10.30829/ajei.v6i1.7767.

[10] Abu Al-Walid Muhammad Ibn Rusyd Al-Hafiz, *Bidayah Al-Mujtahid Wa Nihayah Al-Muqtasid*, Jilid II (Bairut: Dar Al-Fikr, n.d.), 181.

[11] Abdullah Saeed, *Menyoal Bank Syari'ah: Kritik Atas Interpretasi Bunga Bank Kaum Neo-Revivalis*, *Paramadina*, 2004, 77.

[12] Muhammad Sadam et al., "Bank Syari'ah: Dari Teori Ke Praktik," *Jurnal Ilmiah Mahasiswa FEB* 6, no. 1 (2017): 97.

[13] Wiroso, *Produk Bank Syariah*, *Angewandte Chemie International Edition, 6(11), 951–952.*, 2011, 143.

[14] Dahlan Siamat, "Manajemen Lembaga Keuangan," *ED III Jakarta, LPEE UI*, 2001, 124.

(one person or group). In an emergency all things that are forbidden become permissible.

However, the permissibility of something that is forbidden is only temporary before the existence or difficulty of obtaining what is lawful and limited to the needs that can eliminate these difficulties. as the word of Allah in Surah al-Baqarah verse 173:

فَمَنِ اضْطُرَّ غَيْرَ بَاغٍ وَّلَا عَادٍ فَلَآ اِثْمَ عَلَيْهِ ۗ اِنَّ اللّٰهَ غَفُوْرٌ رَّحِيْمٌ

Whoever is forced (to eat) while He does not want it and does not (also) transgress, then there is no sin for him.

This verse is also supported by another rule:

ما ابيح للضرورة يقدر بقدرها

Anything that is allowed because of an emergency, is measured according to the emergency.

Islamic jurisprudence is the basis for a fatwa which is a manifestation of the ijtihad of the scholars in answering various problems of the people. Of course, in the current era, the fatwa of ulama is decided by making legal breakthroughs or innovations. This is based on the principle that the basic law in muamalah fiqh is permissible /ibahah until there is proof that forbids it. (*al-ashl fi al-asyya' al-ibahah hatta yadull al-dalil 'ala al-tahrim*). Thus opening the door wide for ijtihad and innovations in the formulation of Islamic law related to sharia economics. Among the innovations applied are the use of theories *tafriq al-halal 'an al-haram dan i'adatu an-nadhar* in several fatwas of Nusantara scholars [15].

Seriously to explain the law on the mixture between the halal and the haram, the scholars revealed the rule "If it is mixed between the halal and the haram, then the mixing is considered haram" (*idza ijtama' al-halal wa al-haram ghuliba al-haram*). In some fiqh books, this rule is used to explain the law of objects that are mixed between halal and haram, or between unclean objects and sacred objects. This rule is considered appropriate to be applied to liquid and soluble objects so that they cannot be distinguished.

Meanwhile, if the separation between the halal from the haram can be done, for example in the case of mixing between halal and non-halal properties, then this rule (*idza ijtama' al-halal wa al-haram ghuliba al-haram*) cannot be applied, and the more precisely is to use the rule of separation of the halal from the haram (*tafriq baina al-halal 'ani al-haram*).

This separation theory can be formulated that property or money in the perspective of fiqh is not haram because of its substance (*'ainiyah*) but haram because the method of obtaining it is not following sharia (*lighairih*). Therefore, if a person's property which is the result of a lawful business is mixed with the property which is the result of an illegal business, the following two ways can be done: differentiate between what is lawful and which one is unlawful), then the unlawful assets must be removed (separated) so that all that is left is the lawful property.

Second, if the mixed assets are assets that cannot be separated (eg money), then a careful calculation must be carried out, then the proportion of the unlawful part must be separated and the rest is the lawful part of the property. That part of the property that is haram means that it is obtained in a way that is not justified by Islamic law, it must be returned to its rightful owner. If the owner is not known, then the property is donated in the name of the owner.

The basis of this rule can be referred to from the statements of the scholars. Ibn Salah stated as quoted by

[15] Ma'ruf Amin, *Era Baru Ekonomi Islam Indonesia: Dari Fikih Ke Praktik Ekonomi Islam* (Jakarta: Elsas, 2011), 51–56.

as-Suyuthi in the book *al-Asbah wa al-Nadzair* [16]:

لو اختلط دراهم حلال بدراهم حرام و لم تتميز فطريقه ان يعزل قدر الحرام ويتصرف الباقي، والذى عزله ان علم صاحبه سلمه إليه وإلا تصدق به عنه

If halal money is mixed with haram money and cannot be distinguished, then the solution is to separate the haram and use the rest. As for the haram part that is issued, if he knows the owner then he must give it up or if not then it must be given in charity.

In line with this, there is a scholarly opinion which states:

من اختلط بماله الحلال والحرام أخرج قدر الحرام والباقى حلال له

If a person's wealth is mixed between lawful and unlawful elements, then the unlawful elements must be issued in nominal terms, and the rest is lawful for him.

Theory of *tafriq al-halal 'an al-haram* is used in the fatwa of the scholars of the archipelago with the consideration that in the Indonesian context economic activities to support Sharia GDP have not been completely separated from the conventional economic system that is ribawi. At least sharia economic institutions are related to conventional economic institutions that benefit from the aspects of capital, product development, as well as profits obtained from these transaction processes.

The theory of *tafriq al-halal min al-haram* is an exception to the general rule known to the public, namely *idza ijtama'a al-halal wa al-haram ghuliba al-haram*. This exception is important to develop, especially in the case of mixing halal assets with haram assets not because of the substance (*lidzatihi*), but haram because of the process (*lighairihi*).

From the description above, according to the author, the legal certainty of the use of funds is unclear, and the majority of scholars believe that these funds are haram, in this case, Islamic banking capital originating from conventional banks cannot be included in the emergency category. Therefore, based on the theory of separation of the lawful from the unlawful (*tafriq baina al-halal 'ani al-haram*), Islamic banks, which initially used conventional bank capital, must return the establishment capital that belongs to conventional banks and end their institutional relationship and replace them with funds that have a clear halal status and funds whose status is not subject to legal debate, and currently, there are many Islamic Financial Institutions that growing rapidly so that it has large funds, such as the Islamic Development Bank.

2. Analisis Aplikasi Akad Pembiayaan Murabahah

What has been done by the Islamic Banks above regarding the difference in the selling price of goods due to the different payment periods or installments in murabahah is reasonable. This has been applied to all Islamic banking.

Clearly (*sharih*) the Qur'an and Sunnah have never outlined legal provisions on higher credit prices in sales and purchases due to delayed payments. Except for the opinion of the jurists classical and contemporary scholars. Para fukaha such as Maliki and Syafi'i, do not agree with the high price of credit compared to the price of cash payments, although the followers of *Mazhhab Syafi'i* allow [17].

[16] As-Sayuthi, Al-Asybah Wa an-Naza'ir, (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.), 132.

[17] Saeed, *Menyoal Bank Syari'ah: Kritik Atas Interpretasi Bunga Bank Kaum Neo-Revivalis*, 78.

The impossibility of increasing the price of goods because of time is because time is not money or an object that gets a reference value of an increase in debt. The Hanafi school, Imam al-Shaibani, as stated by Abdullah Saeed, does not approve of selling at a lower price for cash and more expensive for credit.

Observer murabaha such as al-Kaff argued that price increases due to time were usury. The Countil of Islamic Ideology (CII) Pakistan stated that doubts may arise because of the additions that the seller receives in the sale and purchase with delayed payments (i.e. instead of the grace period of payment given to the buyer), so this kind of addition can resemble usury [18].

From a different point of view, some scholars and Islamic experts argue that the difference in cash prices with installments is permissible. Among them is the opinion of the Hambali scholar, Ibn al-Qayyim who said: "When someone sells something at a price of a hundred delays, or a price of fifty if paid in cash, then there is nothing haram in this case [19]. If from the very beginning the seller said that he would sell the item at such a price for cash and that much for credit, there would be no problem in this case.

In another version, Warkum Sumitro stated that several concepts become the basis for calculating mark-ups in Islamic banks, namely:

a. Margin or mark-up is a form of cost consisting of administrative costs and a reasonable level of profit.
b. Administrative costs are calculated from the burden of Islamic banks to pay all operational costs that exist in all banks in general.
c. The appropriate level of profit is determined based on the results of the bargaining of savers and Islamic banks by looking at the ability of the customer [20].

According to the author's analysis, ascertaining the difference in the value of money between the cash payment period and the delayed payment or credit period, based on these increased credit prices, clearly denies the existence of something that will or will not be possible, but has been confirmed by humans. Including in this case the possibility of currency value, it is possible that the value of the currency will decrease compared to before, called inflation. However, it may also increase, so that the price of goods becomes cheap, called deflation [21].

Thus, according to the author the basis for distinguishing the cash price from the credit price, is the differences in financing by banks. By the rule:

ا لاصل في المعا ملات الاابا حة حتى يدل الدليل على تحريمها

All forms of muamalat can be done unless there is evidence that prohibits it.

الضرر الاشد يزال با لضرر الاخف

Major harm can be eliminated by (performing) minor harm.

The way Islamic banks determine the price of goods sold in murabahah transactions, for example, by considering various things as also reinforced by Adiwarman above, is

[18] Al-Kaff, *Does Islam Assign Any Value,Consolidated Recommendations on the Islamic Economic System,* (Islamabad: Countil of Islamic Ideology, 1983).

[19] Shauqy Isma'il Shihata, *Nazariyyat Al-Mahasabah Al- Maliyah Min Mandurin Iskamiy* (Kaherah: al-Zahra li al-I'lam al-'Arabi, n.d.), 134.

[20] Warkum Sumitro, *Asas-Asas Perbankan Islam Dan Lembaga-Lembaga Terkait, PT Grafindo Persada*, vol. 119, 2004, 72.

[21] Adiwarman A. Karim, "Pengembangan Ekonomi Islam Dan Perannya Dalam Peningkatan Kesejahteraan Umat," *Tarjih* Edisike-9, no. 23 (2017): 176.

following Islamic teachings. If in practice there is an abuse of money by the customer, which was previously agreed upon for the purchase of goods and then transferred without being noticed by the bank, then the bank cannot anticipate it. Because no pattern can monitor savers unless proof of purchase of the goods is submitted to the bank.

If there are arrears in installment payments, due to the inability of the customer, the usual solution for Islamic banks is to renew the contract or extend the installment period (rescheduling), so that the value of each installment becomes smaller, without adding the price of goods [22].

This method is clearly by the principle of muamalah in Islam, because of the nature of helping (ta'awun) customers who are in trouble. However, if the customer intentionally delays or delays payment, the customer will be subject to a fine as agreed. The fines in question are used for social funds.

This fine was criticized by Abdullah Saeed in his book, as well as other authors. According to them, sanctions or "fines" describe the losses suffered by banks due to not paying debts on time. Islamic banks see a "normal level of profit" with the "fine" sanction. So this is tantamount to the objectives of the practice of interest sanctions in conventional banks when the debt is not repaid on time.

The criticisms of these experts, according to the author, are irrelevant to the facts in Indonesian Islamic banking. The fines applied in murabahah that intentionally fail to pay the installments cannot be equated with the pattern of interest sanctions in conventional banks. Some of the author's reasons are, including:

a. The fine is not used as part of the bank's income unless it is used for social activities.
b. The sanctions are intended to be more educational and preventive to anticipate losses to the bank, as an institution to collect public funds (Third Party Funds). Efforts to prevent harm in Islam can be based on the *sadd al-dzari'ah*.

3. Application Analysis of *Mudarabah* Contract

Based on information obtained by the author from interviews with several sharia banks in Indonesia, funds in mudarabah savings can be added and withdrawn at any time, when there is an addition or withdrawal of funds by customers, no new contract in mudarabah savings, or no renewal in the contract. Indeed, the mudarabah is in principle a jaiz (may and may not bind) and not a common (obligatory, must, and binding) according to all sectarian jurists [23]. It is therefore permissible for both parties (*mudarib* and *sahib al-mal*) to cancel it whenever they wish, provided that the capital is already in cash.

In the pillars of mudarabah, there is a provision that there is capital that must be mudarabah, where the capital must be clear in amount and submitted in cash at the time of the contract. Most scholars of jurisprudence require that mudarabah capital must be known in size, nature, and type. This is to avoid the element of ignorance (jahalah) in

[22] Irfan Harmoko, SE.I., MM, "MEKANISME RESTRUKTURISASI PEMBIAYAAN PADA AKAD PEMBIAYAAN MURABAHAH DALAM UPAYA PENYELESAIAN PEMBIAYAAN BERMASALAH," *Qawãnïn Journal of Economic Syaria Law* 2, no. 2 (2018): 142, https://doi.org/10.30762/q.v2i2.1042.

[23] Muhammad Syakur, "Sekema Multi Akad Mudharabah Musytarakah Dan Implikasinya," *Jurnal Hukum Respublica* 21, no. 2 (2021): 76, https://doi.org/10.31849/respublica.v21i2.8336.

the contract because ignorance in the capital will result in ignorance in profit [24].

The clarity of capital in *mudarabah* savings is also under the Fatwa of the National Sharia Council number 02/DSN-MUI/IV/2000 dated April 1, 2000 regarding savings where the amount of capital must be clearly stated, in cash and not receivables. The amount can be seen from the provision that the funds that are considered capital in the *mudarabah* savings are only the average balance for each period, and based on the existing regulations in the *mudarabah* savings, the funds saved must be submitted in cash and not accounts payable.

Furthermore, related to the revenue sharing system that is currently used in *mudarabah* contracts in sharia banking. One of the provisions of the *mudarabah* contract is that if there is a profit distributed to the parties based on the percentage agreement at the beginning of the contract, and if there is a loss as long as the loss is not due to negligence on the part of the *mudarib*, then the capital loss is fully borne by *sahib al-mal*. Regarding the profit in *mudarabah*, the distribution of the profit of *mudarabah* hidayah savings is by the provisions in the *mudarabah* contract itself. That is, the profit is divided between the customer (sahib al-mal) and the bank (mudarib) according to the percentage of the revenue share ratio agreed at the beginning of the contract, which is 80% for the bank and 20% for the customer. This is also following the opinion of the scholars who state that the benefits of the mudarabah contract must be shared between the parties to the contract. If the profit is only allocated to one of the parties then the mudarabah is damaged [25].

However, for losses, based on interviews with representatives of several Islamic banks, losses have never been experienced, and even if the bank suffers a loss, it will not be borne by the customer who in this case is a shahib al-mal. Based on information obtained from interviews, all customer savings funds using any contract, including mudarabah savings, are guaranteed by the Deposit Insurance Corporation, so that customer funds are safe and will never suffer losses.

Moreover, according to information from interviews, people are not ready and unwilling to fully use the fiqh system, in terms of bearing the risk of loss in mudarabah, because it is undeniable that the goal of people to keep their money in banks is to want their funds to be safe and make a profit.

Based on the author's analysis, until now there is no Islamic bank that applies the principle of profit sharing in the distribution of business results. Even though this principle was applied by Rasulullah SAW in conducting trade. There are at least two factors that make this principle difficult to apply. First, is the internal factor of Islamic banking itself, namely the unpreparedness of Islamic banking management to apply this principle. In the principle of profit and loss sharing, the income from operating results that is distributed is net income, namely gross profit minus expenses related to managing customer funds. With such a mechanism, Islamic banks are required to be more honest and transparent in determining the burdens to be borne in managing customer funds. And this will be very difficult in its application because Islamic banks must make two

[24] Masykur Hasyim, "Studi Analisis Pendapat Ibnu Abidin Tentang Penuntutan Kembali Muhal Kepada Muhil Selama Tidak Ada Syarat Khiyar Skripsi," *Library.Walisongo.Ac.Id*, 2010, 262.

[25] Imam Rofi'i, *Syarhul Kabir* (Beirut: Darul Kutub al-Ilmiyah, 1997), 15.

reports at once, namely reports relating to the management of mudarabah funds and reports of Islamic banks as Islamic Financial Institutions that manage funds and other activities.

The second factor is the unpreparedness of the people who deposit their funds in Islamic banks. Savings customers must be ready to accept their share of losses if in the management of funds it occurs not because of the negligence of Islamic banks so that the funds invested will also decrease. In addition, the costs of managing funds will also be charged to the mudarabah fund which results in a small amount of income to be distributed. If the profit sharing distributed is small, the public's interest in saving in Islamic banks will decrease which will result in Islamic banks themselves.

However, the principle of revenue sharing also has a weakness, namely if the income of Islamic banks is low, the bank's share will be very low because they have to bear the costs of managing funds, which will greatly burden shareholders in Islamic banks. While savers will not feel a loss [26].

However, according to the author, it does not mean that the principle of revenue sharing is also not sharia, because both the principle of profit sharing and revenue sharing has been established by Majelis Ulama Indonesia (MUI), through DSN fatwa number 15 of 2000 [27], and this principle has been approved to be applied in financial institutions. Sharia. Even in the general provisions in the second point, it is stated "From the point of view of benefit (*al-aslah*), at this time, the distribution of business results should use the principle of Profit Sharing (Net Revenue Sharing)."

Furthermore, mudarabah in Islamic banks as a form of financing contract, quantitatively, has very little reality. the reason is because of the difficulty of the sahib al-mal (bank) in carrying out supervision and looking for mudharib (savers). Because of the consequences of Mudarabah which has a profit-sharing pattern, honesty is needed. For this reason, not every customer proposal in mudarabah financing can be approved, but which is already known, but still with a guarantee.

There are some views that in the Islamic economic system, an investor should not demand a guarantee from the manager and that guarantee is identical to the capitalist economic system. Whereas the Prophet Muhammad, in one form of his economic interaction with other people, made his armor as collateral. Sharia Banks also require it to customers as security for the bank [28].

However, a further issue is whether the guarantee will become the property of the bank, or be sold as a substitute for funds spent by the customer if there is a risk (default)? According to Barno Sudarwanto, an employee of one of the Islamic Banks, the use of collateral for banks is to ensure the orderliness of the return of financing funds and the profit-sharing ratio in carrying out the mandate based on the agreement. However, if it is intentional or due to negligence, mismanagement, or misuse by a

[26] Rahmayati Nasution, "Optimalisasi Skema Bagi Hasil Sebagai Solusi Pembiayaan Berdasarkan Prinsip Bagi Hasil Bank Syariah Di Indonesia," *Kumpulan Jurnal Dosen Universitas Muhammadiyah Sumatera Utara*, 2017, 96.

[27] Ranaswijaya Ranaswijaya, "Implementasi Konsep Bagi Hasil Produk Pembiayaan Ditinjau Dari Fatwa DSN-MUI Nomor 14 DAN 15 Tahun 2000 (Study Kasus Bank Syariah Mandiri KCP Curup)," *Disclosure: Journal of Accounting and Finance* 1, no. 1 (2021): 72, https://doi.org/10.29240/disclosure.v1i1.2932.

[28] Muhammad bin Ahmad bin Muhammad Ibn Qudamah, *Al-Mughny* (Riyadh: Maktabat al-Riyad al-Hadithah, 1981), 64.

customer that cannot be forgiven, the guarantee may be taken by the bank. Except for losses caused by natural factors, for example, the bank also suffers losses.

If you look at Bank Indonesia Regulation No: 7/46/PBI/2005 article 6, banks bear the risk of business losses being financed unless the saver commits fraud, neglects, or violates the agreement resulting in business losses [29]. This means that risk assignment only occurs to the bank if the cause is not the customer (*mudharib*) [30].

Moreover, there will also be a clash between paying attention to the losses incurred due to losses by mudharib (customers) and losses experienced by many people as owners of funds distributed by banks. This means that this case is faced with two disadvantages, so the solution must carry out the smaller harm by executing the guarantee, because it considers the larger harm. This method is based on fiqh rules [31]:

اذا تعا رض مفسد تان روعي اعظمهما ضررا با رتكا ب اخفهما

When there are two mafsadah (losses), then what will be observed is that the greater the loss by doing the smaller the level of loss.

D. Comclusion

This study concludes that Islamic banking capital originating from conventional banks does not damage the contracts made by Islamic banking. Some of the realities of murabahah and mudarabah contracts that are applied to Islamic banking products as described above, do not damage the two contracts, because the pillars and conditions are still fulfilled in this practice. However, to avoid the assumption that it is not different from conventional banks, several provisions in the application of murabahah and mudarabah contracts need to be reviewed and improved.

For the development of murabahah and mudarabah contracts, practical and theoretical studies on an ongoing basis must continue to be carried out, to obtain an application system without losing the syar'i elements. Dewan Syariah Nasional (DSN) and the Dewan Pengawas Syariah (DPS) and Otoritas Jasa Keuangan (OJK) also need to periodically improve supervision over the implementation of sharia principles in sharia banking in Indonesia so that they are always following sharia principles.

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[29] Muhammad Adfan Yhu'nanda, "Analisis Unsur Kesalahan Dan Kelalain Mudharib Dalam Akad Pembiayaan Mudharabah Bermasaah Sebagai Dasar Eksekusi Jaminan," *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, no. Sarjana Ilmu Hukum, Juli 2014 (2014).

[30] Abd al-Rahman al- Al-Jaziri, "Alfiqh Ala Madzahib Ala Arbaah," *I*, 2003, 34.

[31] Mudrik Al-Farizi, "Al-Qawa'id Al-Fiqhiyyah," *Al-Mabsut: Jurnal Studi Islam Dan Sosial* 9, no. 2 (2016): 350.

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