

Implementation of fiqh based on the *masalah* in *murabahah* financing in sharia banking

Abdul Atsar

*Faculty of Law University Singaperbangsa Karawang
Jl. H.S. Ronggowaluyo-Telukjambe Timur- Karawang
E-mail: abdul.atsar@staff.unsika.ac.id*

Azid Izuddin

*Ketua Pengadilan Agama Cianjur
Jl. Raya Bandung No. 45 Cianjur, Jawa Barat 43281
E-mail: azidizuddin137@gmail.com
DOI: 10.18326/ijtihad.v18i1.119-136*

The law of Muamalat gives the freedom to bind themselves to contracts and conduct transactions for mutual benefits and benefits. Islamic banking prepares various types of contracts in accordance with sharia provisions, one of the murabahah contracts. The formulation of the problem in this study is how is the application of fiqh masalah in Islamic banking murabahah financing contracts? The method used in this study is a normative juridical method, which refers to the concept of law as a rule. In this research the author of the legal approach, analytical approach. The specification of this study is descriptive analytical research. The type of data used in this study are secondary data and primary data. Data collection begins with activities to identify and inventory data sources. Drawing conclusions is done using inductive methods. Murabahah is a sale and purchase agreement between a bank and a customer where the bank buys the goods needed and resells the customer with a basic cost plus profits agreed by both parties, there is no coercion from the parties in making murabahah agreements. In making and implementing murabahah financing contracts must pay attention to public interests not just the interests of the parties. According to Islamic law in making contracts based on sharia principles, must prioritize the benefit and refuse harm to achieve the goal of shara, namely to increase the benefit of the people by guaranteeing basic needs (*dharuriyah*) and fulfilling secondary needs, needs (*hajjiyah*) and their complementary needs.

Hukum muamalat memberikan kebebasan untuk mengikatkan diri pada kontrak dan melakukan transaksi demi keuntungan dan manfaat bersama. Perbankan syariah mempersiapkan berbagai jenis kontrak yang sesuai dengan ketentuan syariah, salah satu kontrak murabahah. Perumusan masalah dalam penelitian ini adalah bagaimana penerapan fiqh masalah dalam kontrak pembiayaan murabahah perbankan syariah? Metode yang digunakan dalam penelitian ini yaitu metode yuridis normatif, yang mengacu konsep hukum sebagai kaidah. Dalam penelitian ini penulis pendekatan perundang-undangan, pendekatan analitis (*analytical approach*). Spesifikasi penelitian ini adalah penelitian deskriptif analitis. Jenis data yang digunakan dalam penelitian ini, yaitu: data sekunder dan data primer. Pengumpulan data diawali dari kegiatan mengidentifikasi dan menginventarisasi sumber data. Penarikan kesimpulan dilakukan dengan menggunakan metode induktif. Murabahah adalah perjanjian jual beli antara bank dan nasabah dimana bank membeli barang yang dibutuhkan dan menjual kembali kepada pelanggan dengan biaya pokok ditambah dengan keuntungan yang disepakati oleh kedua belah pihak (nasabah dan bank), tidak ada paksaan dari para pihak dalam membuat kesepakatan murabahah. Dalam membuat dan melaksanakan kontrak pembiayaan murabahah harus memperhatikan kepentingan umum bukan kepentingan para pihak saja. Menurut hukum Islam dalam membuat kontrak berdasarkan prinsip syariah, harus memprioritaskan *kemaslahatan* dan menolak *mudharat* untuk mencapai tujuan syara, yaitu untuk meningkatkan *kemaslahatan umat* dengan menjamin kebutuhan dasar (*dharuriyah*) dan memenuhi kebutuhan sekunder, kebutuhan (hajjiiyah) dan kebutuhan pelengkap (*tabsiiniyah*) mereka.

Keywords: *Maslahah Fiqh; contract of Murabahah; Islamic Bank*

Introduction

Islamic economics considers money as the medium of intermediary. Money should be positioned simply as money, not as a commodity that can make money by vanity. Money can benefit by spending it through productive input factor items, then can make money through profit from the spent capital. With this, the true money is indeed a media created by the government created to ease the way the economy.

Financing is one of the principal tasks of banks, namely the provision of facilities to provide funds to meet the needs of the parties which is the unit deficit. By nature of its use, financing can be divided into:

- a. Productive financing, ie financing aimed at meeting the needs of production in a broad sense, namely to increase business, whether the business of production, trade, and investment;
- b. Consumer financing, which is financing used to meet consumption needs, will be used up to meet the needs (Muhammad Syafii Antonio, 2001: 160).

Murabahah is a contract of sale and purchase of goods between the bank and the customer at the price of origin with additional benefits that have been agreed (Muhammad Syafi Antonio, 2001: 101). Murabahah is one form of sale where the seller offers his or her merchandise by mentioning the price which is the sum of the acquisition price by adding a certain par value as profit (Asyraf Thaha Abu Dahab, 2002: 549). Ibn Qudamah defines murabaha as buying and selling by calculating capital plus certain gains known (Fuad Sarthawy, 2000: 235).

Murabahah financing practices that often occur in sharia banks are not purely as sellers of goods as in the trading industry that sells goods directly to the buyer, because in general the bank (ba ‘i) has no inventory, the bank also not as an investment agent because it does not offer goods which became the object of buying and selling. The role of the bank as ba’i in murabahah financing is more accurately described as a financier and not a seller of goods, because the bank does not hold the goods, nor take the risk with it. Bank work as ba’i is almost entirely related to the handling of documents (Bagya Agung Prabowo, 2015: 5).

Murabahah contracts are generally signed before ba’i get goods ordered by musytari ‘. In the contract the musytari should be careful and obey the laws and rules related to the delivery of goods, the ratio of profit, and the correct specification. The Jurisdiction itself shall bear all liability for any fines or legal sanctions resulting from the breach of the law. Ba’i is not willing to assume responsibilities related to the goods, therefore all the risks associated with it that theoretically must be borne by, effectively have been avoided, as with the involvement of the insurer whose financing is charged to the musytari ‘party. Likewise with the advance payment, collateral, and penalties are all a burden musytari ‘.

There is a gap between the guidance and the practice in terms of the position of collateral in murabahah financing. The provisions of the rules state that the position of collateral in murabahah financing is not to cover the possible losses incurred on the value of capital issued by ba’i as well as the guarantee is not a mandatory requirement of a murabahah financing, the guarantee is only allowed for serious musytari with the order in accordance with the agreed in advance. In practice, however, assurance is a necessity whereby if a murabahah financing is to be held without any guarantee the financing will not be granted by the ba’i party, and the amount of the guarantee must cover the value of the capital expended by the

ba'i and the risk of loss may occur (Bagya Agung Prabowo, 2015: 103).

Murabahah scheme basically does not bind the parties (ghair prevalent) and still there khiyar according to all schools of jurisprudence. Even according to the Maliki school, when price information is uncertain and the condition of the goods is less in accordance with the wishes of the buyer, the ordering of goods or people who want to buy the goods, may thwart akadnya. Meanwhile, according to Hanafi school, Shafii and Hambali buyers may take the excess price of the item. Provisions in the fatwa of the National Sharia Council murabaha contract is legally binding, that the bank offers the asset to the customer who must accept it because of the legally binding promise. Both parties must make a sale and purchase contract. This fact is a demand in practice in the banking world to avoid cancellation of the contract by the buyer that will cause losses on the banks.

In fact, murabahah practice in syari'ah bank tries not to give emphasis to purchase transaction of goods, therefore the syari'ah bank uses wakalah contract by giving power to customers to buy the goods they want. In reality, murabahah contract often precedes the giving of wakalah and granting of goods. How can it be said that the goods have become owned by the bank, if the purchase of goods is done after the murabaha agreement is signed.

Murabahah financing done by ba 'i and musytari is a sale and purchase agreement, if someone comes to the shari'ah bank and wants to borrow funds to buy certain goods, such as buying a car or house, likes or dislikes he will do the sale and purchase with bank syari 'ah. That is the way of a shari'ah bank to gain profit from profit from the sale of goods not from the advantages implied in the agreement.

Mashlahah in essence is the axis of circulation and change of Islamic law, where the interpretation of the sacred texts of sharia can rely on it (Ali Hasaballâh, 1964: 257). Mashlahah is also a method of thinking to obtain legal certainty for a case whose legal status is not determined by the sacred texts of shariah or al-ijmâ'. Thus, it can not be denied that mashlahah is a provision that contains goodness for humans (Peunoh Daly, 1988: 151). The general and genuine mashlahah, which supports the realization of the objectives of Islamic law and not contradicting the sacred texts of sharia, are the valid basis, footing and frame of reference for the legislation of Islamic law (Mohammad Hashim Kamali, 1996: 72).

According to Yûsuf al-Qaradhawî, the substance of mashlahah desired by Islamic law to

be upheld and maintained is a comprehensive, integral and holistic *mashlahah*, which includes a mixture of *al-mashlahah al-dunyâwiyyah* and *al-mashlahah al-ukhrâwiyyah*, a mixture of *al-mashlahah al-mâddiyyah* and *al-mashlahah al-rûhiyyah*, a mixture of *al-mashlahah al-fardiyyah* and *al-mashlahah al-mujtama’iyyah*, a fusion of *al-mashlahah al-qaumiyyah al-khâshah* and *al-mashlahah al-insâniyyah al-‘âmmah*, and a fusion of *al-mashlahah al-hâdirah* and *al-mashlahah al-mustaqbalah*. On this basis, Yûsuf al-Qaradhawî affirms that the concept of *mashlahah* that animates Islamic law can not be identified with utilitarianism and pragmatism, which note on the idea of materialism (Yûsuf al-Qaradhawî, 1990: 62).

According to Abû Hâmid al-Ghazâlî, the meaning of *mashlahah* in *shari’a* is the realization of the purpose of law (*al-maqâshid al-syar’iyyah*), that is to maintain religion, to defend the right to life, to maintain the health of the mind, to keep the purity of the offspring, and to protect the right to wealth. In this context, al-Ghazâlî divides *mashlahah* into three categories, namely: First, *al-mashlahah al-mu’tabarah*, ie *mashlahah* which gets the justification of sacred texts of *shari’ah* against its acceptance (*al-mashlahah al-mu’tabarah*). *Mashlahah* in this category is *al-hujjah al-syar’iyyah* and its fruit is *al-qiyâs* which contains the meaning of plucking the law from the logical meaning-content of a *nashsh* and *ijmâ’*; Secondly, *al-mashlahah al-mulghah*, the *mashlahah* which gets the justification of the sacred text of the *shariah* against its rejection; and Third, *al-mashlahah al-mursalah*, ie *mashlahah* which does not get the justification of the sacred text of *sharia*, both to acceptance and rejection. This *mashlahah mursalah* category became a clash of scholars’ opinions (Abû Hâmid Muhammad al-Ghazâlî, 1984: 415-416).

Based on the description of the dynamics of legal development and the reality of the situation of the *sharia* banking system above, the phenomenon of actualization and acceleration of the application of *sharia* principles becomes interesting to be studied, reviewed and researched with regard to legal issues as follows: How is the application of problem-based *fiqh* in *murabahah* financing contract on Banking System?

The purpose of this research is to study the application of problem-based *fiqh* in *murabahah* financing contract on Banking System. The benefit of this research is to know about the implementation and implementation of *syariah* contract conducted by *syariah* bank in Indonesia, by reflecting to the principles of *syariah* contract.

Literary studies and theoretical framework

Law Number 21 Year 2008 Concerning Sharia Banking states that sharia banking is anything that concerns syariah bank and Sharia Business Unit (UUS), including institutional, business activities and ways and processes in conducting its business activities. Similar to conventional banks, Islamic banks are also an institution that performs three main functions, namely receiving money, lending money and serving money transfer services.

Sharia bank is a financial institution that serves as an intermediary for parties with excessive funds with parties who lack funds for business activities and other activities in accordance with Islamic law. In addition, Islamic banks are called Islamic banking or interest free banking, which is a banking system in the implementation of its operations do not use the system of interest (*usury*), speculation (*maysir*), and uncertainty or uncertainty (*gharar*).

Islamic banking or Islamic banking is a banking system developed under the Islamic law (*syariat*). The establishment of this system is based on a prohibition in Islam to levy and borrow with interest or so-called usury and prohibition of investment for categorized haram (for example: business related to the production of illegal food / beverage, un-Islamic media business and etc.), where this can not be guaranteed by the conventional banking system (Akhmad Mujahidin, 2016: 18).

Akad is “the meeting of *ijab* and *qabul* as a statement of the will of two or more parties to give birth a legal effect on the object”. Thus, the *qabul* is an act or statement to indicate a willingness in the intention between two or more persons, thus avoiding or leaving a bond which is not based on *syara* ‘. Therefore, in Islam not all forms of agreement or agreement can be categorized as a contract, especially an agreement that is not based on *keridlaan* and Islamic law (Rahmat Syafi’i, 2004: 45).

The principle of contract (agreement) in Islamic law has eight principles, namely the principle of worship (*mabda’al-’abadah*), the principle of freedom *berakad* (*mabda’al-khuriyyah al-ta’aqud*), consensual principle (*mabda’al-ridhaiyyah*) the principle of the promise is binding, the principle of equality (*mabda’al-tawazun fi al-muawadhah*), the principle of benefit (not burdensome), the principle of trust, and the principle of justice (Syamsul Anwar, 2000: 89-93). According to Fathurahman Djamil, the principles of the Shariah agreement, the principles of freedom (*al-hurriyah*), equality or equality (*al-musawah*), justice (*al-’adalah*),

willingness / consensualism (*al-ridhaiyyah*), honesty and truth (*al-* (Fathurrahman Djamil, 2000: 27), others add the principle of *ilahiyyah* or the principle of monotheism, *nubuwwah* (prophethood) and the principle is also not less important with the principles of *al-kitabah* other shariah agreements.

According to Adiwarmar Karim, in distributing funds to customers in general, sharia financing products are divided into four categories that are distinguished based on the purpose of its use, namely: 1. Financing with the principle of buying and selling 2. Financing by the principle of lease. 3 Financing with the principle of profit sharing, 4. Financing with a complementary contract (Syamsul Anwar, 2000: 83-92). *Murabahah* is the sale and purchase of goods at the original price with an additional profit agreed. In this type of sale, the seller must inform the price of the goods he purchases and determine a rate of profit in addition (Syamsul Anwar, 2000: 103).

Research Methods

The research approach used in this dissertation is normative legal research or dogmatic law research in the western world called legal dogmatic / *rechtsdogmatiek* (Bernard Arief Sidharta, 2009: 142). Normative legal research includes the type of legal research that refers to the concept of law as a rule. The method is called the method of doctrinal-normologik that depart from the rule as a teaching that *mengkaidahi* behavior. The type of legal study that refers to the concept of law as a doctrinal rule and method is the method used in the development of legal theory and law (Teguh Prasetyo and Abdul Hakim Barakatullah 2000: 35). This normative legal research includes research on legal principles, research on legal systematics, research on the vertical and horizontal steps of synchronization, comparative law and legal history (Aminudin and H. Zainal Asikin, 2012: 67).

In this study the author uses two methods of approach, namely: 1). Statutory approach; and 2). Analytical analisis (analytical approach). The use of both approaches is intended to complement each other's approach. The specifications of this study are analytical descriptive research. It is said descriptive because the results of this study is expected to be obtained picture or painting factual about the state of the object under study (Soerjono Soekanto, 1986: 10). The analysis is then performed after a factual overview of the object under study

has been obtained. This study is descriptive analytical research that describes through the description of the object of research.

Types of data used in this study there are 2 (two), namely: secondary data and primary data. This study focuses on secondary data, while primary data is more supportive of secondary data. In other words, it can be said that this research focuses on normative research or bibliography while field research is conducted to support the validity of normative research or bibliography.

Data collection begins with identifying and inviting data sources. After determining the variable and scope of the study object, the activity of collecting secondary data is done by collecting literature and documentary. After data collection and data processing is done, then the process of data analysis begins, that is by describing the data as an explanation of the answer to the main issues that become the object of study. After the analysis process is done, then the withdrawal conclusion is done by using inductive method, that is generalization which become conclusion.

Discussion and findings

The sharia banking industry is based on Shariah principles and systems. For customers, their intention in choosing a sharia bank as a place to store funds based on the assessment of Islamic banks that run in accordance with the provisions of religion, so as to provide assurance of the next world for customers. However, in practice it is possible that the implementation of Sharia principles is wrong, so that Islamic banks are not actually in accordance with the principles and rules of sharia.

Syariah banking is very vulnerable to mistakes that are syar'i. Target demands, better profit levels, and performance appraisal will encourage sharia banks to violate sharia provisions. This will be more vulnerable to sharia banks with low levels of sharia supervision. Therefore, it is not surprising, if there are still many findings of sharia violations committed by sharia banks, especially banks that convert to sharia or open a business unit of sharia.

The conformity of sharia bank operations and practices with sharia provisions is a fundamental tool in sharia banking. To protect the adherence of sharia banks to the principles and principles of sharia, all banks operating with the sharia system must have

an independent internal institution, which is specifically in charge of ensuring the bank is running according to Islamic sharia. This is as mandated in the Banking Act no. 10 Year 1998 stating that syari'ah bank is required to have Sharia Supervisory Board (DPS). Sharia Supervisory Board (DPS) is what will provide legal protection for customers by ensuring the certainty of Islamic banks running according to the principles and rules of Islamic sharia.

Murabahah financing based on Article 1 paragraph 25 letter c of Law Number 21 of 2008 concerning Syariah Banking is the provision and / or the equivalent bill in the form of sale and purchase transactions in the form of receivables. Based on the Elucidation of Article 19 Paragraph (1) Sub-Paragraph d of Law Number 21 Year 2008 concerning Sharia Banking, murabahah financing is a financing contract of an item by confirming its purchase price to the buyer and the buyer pays it at a price more as an agreed profit. Murabahah can also be called the purchase and purchase contract between sharia banks as providers of goods with customers who order to buy goods. The Bank obtains a mutually agreed mutual profit. Because in its definition there is an "agreed advantage", the general characteristic of a murabahah transaction is that the seller must notify the buyer of the purchase price of the item and specify the amount of profit added to the cost.

Murabahah agreements made between the creditor and the debtor must be made in accordance with applicable legal provisions and must be based on sharia banking objectives set out in sharia banking laws, namely to support the implementation of national development in order to improve justice, togetherness and equity of the people's welfare -Undonesia No. 21 Year 2008 on Sharia Banking, Article 3). In contrast to the general banking objectives that emphasize on improving equity, economic growth and national stability towards improving the welfare of the people, Shariah banking is directed to improve justice, togetherness and equity of the people's welfare.

Murabahah financing by ba'i and musytari is a sale and purchase agreement, if someone comes to a shari'ah bank and wants to borrow funds to buy certain goods, such as buying a car or a house, likes or dislikes he will do the sale and purchase with sharia bank the. That is the way from Islamic banks to gain profit that is the profit from the sale of goods not from the advantages that are implied in the agreement. On the basis of such deviations, the murabahah application in the Islamic banking system can be declared not fully in accordance

with the principles of sharia economy (Syu'aibun, 2014: 37-39).

The selection of murabaha as the product of a sharia bank is valid and may, of course, take into account matters relating to the rules, terms and mechanisms of murabahah in accordance with the principles of Islamic law, where there are restrictions that should not be violated by the perpetrators, including conduct transactions containing elements of usury, bathil, maysir, and gharar (Lely Sofwa Imama, 2014: 222). The Customer shall be entitled to know the purchase price / original price of the transacted goods. In addition, customers are also entitled to know the profits taken by the bank. At a glance this contract is not problematic, but if we look carefully, it will be obvious that the bank trying to cover all the risks. Therefore, before the bank holds the intended goods, the bank has entered into a sale and purchase agreement with all its terms with the customer. Thus, the bank has sold goods that have not been owned and it is forbidden. As the hadith of the Prophet Muhammad SAW: "From the companions of Ibn 'Abbas Radhiyallahu' anhu he said: Rasullah SAW said:" Whoever buys food, then do not sell it until he finishes it. "Ibn 'Abbas said: And I think that everything is law like food. "(HR Muttafaqun 'alaih). Ibn 'Abbas's understanding is supported by the history of Zaid bin Thabit R.A. As narrated in the hadith: "From the companions of Ibn 'Umar, he recounts:" At one time I bought oil in the market and when I had finished buying it, there was a man to meet me and bargain the oil, then he gave me considerable profit, then I will explore his hand (to accept the offer from that person). Suddenly, someone behind me was holding my arm, so I turned and he was Zaid bin Thabit, then he said: "Do not sell the oil where you bought it until you move to your place, because Rasulallah SAW forbids it from reselling the goods in the place of the goods are purchased, until the goods are transferred by the merchants to their respective places (HR Dawud and al-Hakim).

All types of transactions are generally allowed as long as they do not contain the elements of *usury*, *maysir*, and *garar*. If bai 'fudhuli is a category of *garar*, then sharia banking in executing murabaha has been trapped in it, since murabahah contracts are generally signed before the bank' obtains' goods ordered by the customer and delivers the consequences of the procurement of goods to the customer (Bahaudin 2003: 102) . The same thing also confirms that the role of sharia banks more as financing, not the seller of goods. The sales contract is merely a formality because the de facto bank does not at all take any sales risks

into compensation for the increase in profits so that the addition attributed to the price of the goods is in addition to the pending payment, which indirectly recognizes the principle of time value of money (Abdullah Saeed, 2004: 132-133).

Sharia banks must hold to the sharia laws, as well as adjust the demands of the times, especially the development of every aspect of the economy and adhering to the basic principles and principles of the right economy, in accordance with the ideology and rules of Islamic sharia. Sharia banks must color all their activities with the spirit and motivation of faith, which makes the practitioners always feel that their activities are not merely aimed at realizing the benefits. But it is also one of the ways of jihad in carrying the burden of the treatise and of saving people from practices that disregard the basic norms of Islam. Sharia banking activities are conducted on the basis of worship and piety that will be rewarded by God with the worldly material reward earned (Gharib al-Jamal, Tth, 47).

The leaders of fiqh schools in developing the formulation of Islamic law usually based the formulation of a case with the statement or action of the Companions of the Prophet. to be used as material for consideration of Islamic law. Even the rules that are the means of obtaining a law, the deeds obtained by collecting the detailed propositions already exist even though they have not been systematized in certain fields of science (Nazar Bakry, 1996: 7).

One of the companions of the Prophet SAW, namely Umar bin Khattab ra not only known as ordinary mujtahid or fiqh experts who have religious appreciation, understanding and actions associated with syara 'or Islamic Shari'a but the living conditions that lived did make Umar with his personality character as a personality a unique and a great role in the field of fiqh, shari'a and Islam. The existence of Umar since his encounter with Islam has placed himself in an important position in the history of Islamic development both politically and from the side of Islamic law in which his opinion, ijtiḥad and his involvement in various aspects of life with the Prophet and the Companions and more so when holding power as the second caliph post Abu Bakr ra has made many contributions which will always be taken into consideration which color the dynamics of the formulation of Islamic law (Muhammad Muhammad al-Madani, 2002: 9).

The pattern of ijtiḥad done by Umar or others after the death of Rasulullah, then we will find a significant difference with their pattern of ijtiḥad during the Messenger of Allah is

still alive. Indeed *ijtihad* Umar in applying the rules of Islamic Shari'ah rule began only after the death of the Prophet. In applying Islamic law, Umar is very concerned about religious texts and is not even capable of violating them. In fact he tried to wear it and Umar is very disciplined in implementing religious texts. Besides, he is also disciplined in realizing the common good in his position as a khalifah elected by the people. Umar is always disciplined in applying the Shari'a and at the same time ensures the realization of the common good. Umar's approach, which from the beginning seems more rational and intellectual, has led him to bear formal legal change especially in the face of Allah's revelation and the Sunnah of His Messenger. Changes in the law change are to a large extent influenced by conditions and circumstances, in which the guidance of the benefit and the public interest which is the ultimate goal of *syar'iah* requires such. Formal legal change, apparently done by Umar because of a total understanding of the message of the Qur'an and the Sunnah of the Prophet. Whatever the change has taken place, it does not mean that he abandoned, let alone cancel the texts of the Qur'an. Umar had applied it well and understood it creatively and healthily, without any doubt about the objectives of Shari'ah (Muhammad Abu Zahroh, tth: 20).

The method that Umar performed in *berijtihad* was very strong, accountable and accurate. The first step in establishing a legal case is to take from the Qur'an if a matter of Umar finds its law in the Qur'an then Umar decided in accordance with that in the Qur'an, If not found the law then Umar went to Sunnah Nabawiyah and if not found also the law then afterwards Umar deliberate with *ijtihad* experts like companions of Ali bin Abi Talib and then *berijtihad*. Sometimes Umar also takes the opinion of people who are considered more senior as Abu Bakr's opinion *ra*. Sometimes also collect the friends and ask for their opinions, then take the decision of the results of collecting opinions that are based on the rules of Shari'a rules by always linking it with the decision of the decision and the basic law of *tasyri islami*, which prioritizes the *terlealisasinya kemaslahatan* and the absence of *kemadaaratan*.

The general rules of Umar bin Khatab RA in *berijtihad* are: 1) Holding on the *nash / al-Quran* and Sunnah; 2) *Ijma* and *Qiyas*; 3) *Maslahah* and *Nash*; 4) *Mentarjih* one possibility that makes sense if it can be on the side of *kemaslahatan*; 5) *Maslahah* and *Sadz dzarai*; 6) *Ta'zir*, a certain punishment applied by Umar on issues not specified by Rasul SAW and this condition is different from one another; 7) *clear Qarinah*; and 8) *Lafadz* and *Niyat*.

Umar is very disciplined in applying the text of the *syara'*, as well as the discipline in realizing the common good in his position both as a *mujtahid* and as a *khalifa*. In other words that when Umar was confronted with the legal issues raised to him or the problems that arose in the life of Muslims in his time was always disciplined in applying the *Shari'a* and at the same time guarantee the realization of the common good or better known as the theory of *maqashid shari'ah*.

Murabahah is a buying and selling agreement between the bank and the customer where the bank purchases the required goods and resells the customer to the customer with the cost of the principal plus the profit agreed by both parties (the customer and the bank), in this case there is the principle of *'an-taradhin* (mutual in the contract) so there is no compulsion from the parties in making the *murabaha* agreement. The development of *sharia* banking to provide the greatest benefit to society and contribute optimally to the economy and national development in order to achieve the goal of Indonesia's national development is the achievement of a just and prosperous society, prosperous and mental, spiritual and spiritual. In making and executing *murabahah* financing contract should pay attention to the benefit of the community (community) not the interests of the parties only. Therefore, the main message emphasized in Islamic law is to establish a society of prosperity, justice, and prosperity.

One of the rules used by Umar bin Khattab is *maslahah*. One form of *maslahah* is *al-tahsiniyah* problem, ie *kemashlahatan* containing skill, for example, it is recommended to eat nutritious food, dressed in clean, tidy, and good, and perform *sunnah* worship as additional practice, including in *berekonomi* and doing business. The result of *ijtihad* Umar bin Khattab, sometimes different from the time of *Rasulallah*. This is because the level of complexity and diversity of people in the time of the Prophet was different in the time of Umar. In deciding the law of *fiqh*, Umar ibn Khattab prioritizes the benefit of the *ummah* and the considerations that are based on humanity but not deviated from the teachings of Islam. Umar bin Khatab gave birth to various legal changes formally, based on the demands of the welfare and the context of his time. In some cases there is *ijtihadnya* although without being reinforced by revelation and is only based on its intellectual empowerment by always putting *ijtihad* based on the *maslahat* Islam as a religion and for Muslims generally always

get their own place in the history of development of Islamic law which ijtihadnya will always be used as consideration.

According to Muslehuddin, ijtihad is an attempt made by mujtahids in digging and establishing Islamic Law from its source (al-Qur'an and al-Hadis). When connected with the judiciary, ijtihad is defined as the way in which the judge conducts decisions either in relation to the provisions of the Law or by concluding from the law which must be applied when the absence of *naṣh* / regulation (Muhammad Muslehuddin, tth: 97). Because, Islam itself realizes that compared with the issue that the legal provisions already exist, there are still many other problems that have not been regulated.

In doing the contract / agreement based on sharia principles must prioritize the benefit, according to Imam al-Ghazali: *maslahat* is a picture reaching *kemanfaatan* or avoid *kemudharatan*. but that's not what we mean, because to achieve the benefits and avoid that *kemudharatan* is the purpose and the benefit of human in achieving its purpose. which we mean by *al-maslahah* is maintaining the goals of the *syara* (Abu Hamid Muhammad ibn Muhammad al-Ghazali, tth: 26). The opinion of al-Ghazali is in the case of *al-maslahah* gives understanding that *al-maslahah* in the sense of *syar'i* is to benefit and refuse *mudharat* in order to maintain the goal *syara*'.sedangkan *Syar'i* goal in the formation of law according to Abdul Wahab Khalaf, that *merabahaikan kemaslahatan man* by ensuring their basic needs (*dharuriyah*) and meeting their secondary needs (*hajjiyah*) and their complementary needs/*tahsiiniyah* (Abdul Wahab Khalaf, 1985: 135).

Al-Khawarizmi gives *al-maslahat* understanding is maintaining the goal of *syara* 'by avoiding the mafia of man. Said Ramadan al-Buthi, explains *al-maslahah* is a benefit intended by God who is wise for the benefit of his servants, whether in the form of preserving the religion, soul, intellect, descendants, and their property according to the specific order contained in the category of maintenance (Muhammad ibn Ali ibn Muhammad As-Syaukani, tth: 242).

The purpose of banking development based on sharia principles is based on the principle of *maslahah* which is based on "consideration of public / community interest" which is "public interest". Hasbi ash-Shidiqeqy is of the opinion that Islamic law is dynamic and elastic, in accordance with the development of time and place. Its scope covers all aspects of human

life, both in relation to neighbor and God. Islamic Shariah that comes from the revelation of Allah SWT is then understood by Muslims through *ijtihad* to be able to anticipate any developments that arise in society. *Ijtihad* is what gave birth to *fiqh*. However, according to Hasbi ash-Shidiquey, many Muslims especially in Indonesia, who do not distinguish between the direct *shari'a* of Allah SWT, and *fiqh* which is the understanding of the *mustahid* clerics against the *shari'a*. The legal jurisprudence adopted by Indonesian Muslim society is not compatible with the personality of the Indonesian nation. Muslims should be able to create the legal jurisprudence in accordance with the background of socioculture and religion of Indonesian society. However, the result of *ijtihad* ulama of the past does not mean thrown away at all, but must be studied carefully and studied freely, critically and regardless of fanatic attitude. Thus, the opinion of the scholars of any school, as appropriate and relevant to the situation of the Indonesian people, is acceptable and applicable. *Ijtihad* is a necessity that can not be avoided from time to time. According to him, to lead to Islamic *fiqh* with insight into Indonesiaan, there are three forms of *ijtihad* that need to be done. First, *ijtihad* by classifying the laws of past clerical products. This is intended to be selected opinion that is still suitable to be applied in our society. Secondly, *ijtihad* by classifying laws based solely on the customs and circumstances of the society in which the law develops. This law, according to him, changes according to the changing times and circumstances of society. Thirdly, *ijtihad* by seeking laws against contemporary problems arising as a result of the advancement of science and technology, such as organ transplants, banks, insurance, breast milk and artificial insemination.

In overcoming the economic problems, which also affect other aspects. According to Hasbi ash-Shidiquey, it is necessary to *ijtihad jama'i* (collective *ijtihad*). Its members are not only among the *ulama*, but also from various other Muslim scholars, such as economists, doctors, cultural, politicians, who have a vision and insight into the problems of Muslims. Each of those who sit in this collective *ijtihad* institution is trying to contribute thoughts according to the expertise and discipline of science, so that the formulation of *ijtihad* decided by this institution is closer to the truth and much more in line with the demands of the situation and the welfare of society. In the idea of taking and determining the law (*istinbath*) which has been formulated by scholars such as *qias*, *istihsan*, *maslahah mursalah*

and urf. Indonesian Muslims can formulate their own fiqh in accordance with the personality of the Indonesian nation through collective ijtihad. The formulation of the jurisprudence does not have to be attached to one of the schools, but it is an amalgamation of opinion which is in accordance with the state of society. According to Hasbi ash-Shidiqueqy, good law is to consider and take into account the social, economic, cultural, customs and trends of the people concerned.

Conclusion

In the murabahah contract application in syari'ah banking there are some deviations (deviation), among which murabahah financing practices that often occur in the bank is not purely shari'a as a seller of goods such as the trading industry that sells goods directly to the buyer, because in general the bank ba'i) has no inventory. The role of the bank as ba'i in murabahah financing is more accurately described as a financier and not a seller of goods, because the bank does not hold the goods, nor take the risk with it. Bank work as ba'i is almost entirely related to the handling of documents.

Murabaha agreements made between the creditor and the debtor must be made in accordance with applicable legal provisions and should be based on sharia banking objectives established in sharia banking law, namely to support the implementation of national development in order to improve equity, togetherness, and equity of the people's welfare. In contrast to the general banking objectives that emphasize on improving equity, economic growth and national stability towards improving the welfare of the people, Shariah banking is directed to improve justice, togetherness and equity of the people's welfare.

Selection of murabahah as a product of sharia bank is valid and may, as long as it is in accordance with the rules, terms, murabaha mechanism and in accordance with the principles of Islamic law, where there are restrictions that should not be violated by the perpetrators, including the prohibition to conduct transactions containing elements of usury, bathil, maysir, and gharar. In making and executing murabahah financing contract should pay attention to the benefit of the community (community) not the interests of the parties only. As the objective of Islamic banking development, it is implemented based on the principle of maslahah which is based on "consideration to public / public interest" which is "public interest" in order to create a just and prosperous society.

Bibliography

- Ghazali, Abu Hamid Muhammad bin Muhammad Al-. *al-Mustasyfa Min 'Ilm al-Ushul*, Juz I. Beirut: Dar al-Kutub al Ilmiyyah, tt.
- Jamal, Gharib Al-. *Al-Mashborif Wa Buyut at-Tammiel al-Islamiyah*. tt.
- Madani, Muhammad Muhammad Al-. *Nazarat fi Fiqhi al-Faruq Umar bin Khattab*. Cairo: Kementerian Waqaf Majelis A'la Urusan Islam, 2002.
- Qaradhawi, Yusuf Al-. *Madkhal li Dirâsat al-Syari'ah al-Islâmiyyah*. Kairo: Maktabah Wahbah, 1990.
- Aminudin dan H. Zainal Asikin. *Pengantar Metode Penelitian Hukum*. Jakarta: Raja Grafindo Persada, 2012.
- As-Syaukani, Muhammad bin Ali bin Muhammad. *Iryad Al-Fuhul Ila Tabqiq Al-Haqq Min Ilm Al-Ushul*. Beirut: Dar al-fiqr, tt.
- Bahaudin. *Evaluasi Produk Pembiayaan Murabahah pada Bank Syari'ah; Studi Kasus pada BNI Syari'ah Yogyakarta*, Tesis Ekonomi Islam. Yogyakarta: MSI UII, 2003.
- Bakry, Nazar. *Fiqh dan Ushul Fiqh*. Cet. III. Jakarta: RajaGrafindo Persada, 1996.
- Bernard Arief Sidharta, *Penelitian Hukum Normatif: Analisis Penelitian Filosofikal dan Dogmatikal dalam Metode Penelitian Hukum Konstelasi dan Refleksi*, Yayasan Obor Indonesia, Jakarta, 2009.
- Compbell, Enid et all. *Legal Research*. Sydney: The Law Book Company Ltd., 1996.
- Daly, Peunoh. "Menelusuri Pemikiran Maslahat dalam Hukum Islam", dalam Munawir Sjadzali dkk., *Polemik Reaktualisasi Ajaran Islam*. Jakarta: Pustaka Panjimas, 1988.
- Hasaballâh, Ali. *Ushûl al-Tasyrî' al-Islâmî*. Mesir: Dâr al-Ma'ârif, 1383 H/1964 M.
- Imama, Lely Sofwa. "Konsep Dan Implementasi Murabahah Pada Produk Pembiayaan Bank Syariah " *Jurnal Al-Iqtishad*, Vol. 1 No. 2, (2014): hal 222.
- Kamali, Mohammad Hashim. "Fiqh and Adaptation to Social Reality", dalam *The Muslim World*, Vol. 86, No. 1, (1996): hal 72.
- Karim, Adiwarmar. *Bank Islam Analisis Fiqih dan Keuangan*. Jakarta: Raja Grafindo, 2004.
- Khalaf, Abdul Wahab. *Kaidab-Kaidab Hukum Islam* (terjemahan). Bandung: Risalah, 1985.
- Mujahidin, Akhmad. *Hukum Perbankan Syariah*. Jakarta: Raja Grafindo Persada, 2016.
- Muslehuddin, Muhammad. *Filsafat Hukum Islam dan Pemikiran Orientalis: Studi Perbandingan Sistem Hukum Islam*. Yogyakarta: Tiara Wacana, t.t.
- Prabowo, Bagya Agung. "Kedudukan Dhoman Dalam Akad Murabahah Pada Perbankan Syari'ah (Analisa Kritis Terhadap Aplikasi Konsep Akad Murabahah di Indonesia dan Malaysia)" dalam *Equality, Jurnal Hukum, Fakultas Hukum Universitas Sumatera Utara*, Volume 16, Nomor 1, (2011): hal 103.

Prasetyo , Teguh dan Abdul Hakim Barakatullah. *Filsafat, Teori & Ilmu Hukum, Pemikiran Menuju Masyarakat Yang Beradilan dan Bermartabat*. Depok: PT. Raja Grafindo Persada, 2012.

Saeed, Abdullah. *Menyoal Bank Syariah: Kritik atas Interpretasi Bunga Bank kaum Neo- Revivalis*. terjemah dan pengantar oleh Arif Maftuhin, dari *Islamic Banking and Interest: a Study of Riba and Its Contemporary Interpretation*, cet III. Jakarta: Paramadina, 2004.

Soekanto, Soerjono. *Pengantar Penelitian Hukum*. Jakarta: UI Press, 1986.

Syafi'i, Rahmat. *Fiqh Muamalah*. Bandung: Pustaka Setia, 2004.

Syu'aibun. "Tinjauan Kritis Terhadap Deviasi Akad Murabahah" dalam Aplikasinya Pada Perbankan Syari'ah", *Human Falah*, Volume 1 No. 2. (2014): hal 37-39.

Zahrah, Muhammad Abu. *Tarikh al-Madzhab al-Islamiyah*. Mesir: Dar al-fikr al-Arabi, tt.