REACTULARIZATION OF *AL-MUSÂWAH* PRINCIPLE IN STANDARD CONTRACTS ON *MURÂBAHAH* FINANCING AT BANK SYARIAH

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ABSTRACT

Murâbahah is the sale and purchase of goods at the original price with additional profit agreed between the bank and the customer. The purpose of this research is to examine how the existence of the *al-musâwah* principle in *murâbahah* financing at Islamic Banks. The methodology used in this article is qualitative with descriptive analysis. The data were obtained from books related to *al-musâwah* in *Murâbahah* and interviews with employees and customers of Islamic banks. The results showed that the essence of the principle of *al-musâwah* is a benchmark for the validity of an agreement, then when viewed in terms of determining the price and period of payment, and risk control in *murâbahah* financing, it is clear that the principle of *al-musâwah* has not been realized because the contracts are more burdensome for the customer.

Keywords: *al-Musâwah, murâbahah,* islamic bank.

A. INTRODUCTION

The establishment of Islamic banks was initially doubted, because many considered that an *interest-free* banking system was unusual and impossible; and there were questions about how the bank would finance its operations. But on the other hand, Islamic banking is an alternative to the Islamic economic system, which can reassure the followers of Islam, because they can carry out their needs in the world without violating the rules (sharia) in the Qur'an and hadith (M. Lutfi Hamidi 2003). Some financing products from Islamic banks that are often used are *murâbahah*, *muḍârabah* and *musyârakah*.

Murâbahah is the sale and purchase of goods at the original price with an additional profit agreed between the bank and the customer. In *murâbahah*, the seller mentions the purchase price of the goods to the buyer, then he indicates a profit in a certain amount. In a *murâbahah* agreement, the bank finances the purchase

of goods needed by its customers from suppliers, and then sells them to customers at a price plus profit or marked up. *Murâbahah* transactions constitute the majority of financing of the total distribution of Islamic bank funds, so there is an impression that all fund distribution transactions are *murâbahah*.

However, there are times when Islamic banks do not want to bother with the steps of purchasing goods (acting as a seller), so a wakalah contract is used to authorize customers to purchase these goods. Against this practice, the Indonesian Ulema Council in its fatwa stipulates that if the bank wants to represent the customer to buy goods from a third party, the *murâbahah* sale and purchase agreement must be made after the goods in principle become the property of the bank.

The principles of the *murâbahah* contract, such as the law of agreements in the Civil Code (at the KUHPer level) which recognizes the principle of freedom of contract, the principle of equality and the principle of good faith. In customary law recognizes the principles of light, cash and real, so in Islamic law also recognizes the principles of treaty law: *al-ḥurriyah* (freedom), *al-musâwah* (equality), *al-'adâlah* (justice), *ar-riḍâ* (willingness), *aṣ-ṣidq* (truth and honesty) and *al-kitâbah* (written). (Bagya Agung Prabowo 2012).

Among the 6 (six) principles of agreement law in Islamic law in terms of the *murâbahah* contract, the principle of *al-musâwah* is so important, because of the six principles the principle of *al-musâwah is* the beginning of the existence of other principles: *ar-riḍâ* or willingness, *al-ḥurriyah* or freedom of a person to make an agreement, *al-'adâlah* or justice and *aṣ-ṣidq* or truth and honesty.

The principle of *al-musâwah* in a contract or agreement can be interpreted as equality (in contract law using the term balance) is the implementation of the principle of good faith, the principle of transactions based on honesty in determining something, including in terms of determining the profit margin because it will result in determining the margin basically there is a difference in installments between 2 years and installments with a period of more than 2 years (what happens is that the installment payment is greater than it should be).

The scope and working power of the principle of proportionality appear to be more dominant in commercial contracts. With the basic assumption that the character of commercial contracts places the position of the parties on an equal footing, the goals of the contracting parties who are oriented towards business profits will be realized, if there is a *fair* exchange of rights and obligations

(proportional). The proportional principle is not seen from the context of mathematical balance, but in the process and mechanism of exchanging rights and obligations that take place fairly. (Agus Yudha Hernoko 2008).

The procedure for providing a murabaha contract begins with information provided by the Islamic bank through brochures that are provided free of charge at local Islamic bank offices or brochures made by sellers of goods, *developers of* shops that sell goods that can be purchased in installments. The brochure states that consumers can buy the house or goods by paying in installments at an Islamic bank. Offers can also be made by sellers of goods by visiting offices, companies or other workplaces that need electronic equipment for example or various other ways. If there are prospective customers who are interested, they can ask for more detailed information from the marketing department of the seller of goods which will later be purchased by the bank and or the *customer service of* the Islamic bank. Then prospective customers are required to fill out the *application-form* that has been available, after agreeing on the profit margin, a *murâbahah* contract is signed which is also provided by the Islamic bank. So, all *forms are* available, although the *form* has an empty part which is then filled in by both parties from the results of the agreement.

Every transaction carried out by Islamic banks is realized in written form, namely the contract. The agreement made between the Islamic bank and the customer is set forth in the form of a standard contract, as is done by conventional banks. Standard contracts in the business world in practice are not only carried out in conventional transactions but are also widely carried out in transactions based on sharia principles by bank financial institutions or non-bank institutions. This shows that the enforceability of standard contracts has indeed become a business necessity which can be accepted by the community with all its advantages and disadvantages.

The use of standard contracts as a form of business efficiency by business actors, especially those who have a dominant position in conducting transactions, is also used to obtain profits by including exclusion clauses which are burdensome for one party (Munir Fuady 2007). Not least in the practice of Islamic banking, murabaha financing is set out in the form of a standard contract, that the customer receiving the financing facility is not given the opportunity to negotiate about the clauses in the murabaha financing contract.

Such a process is an important question from this *murâbahah* contract,

namely: how is it different from the credit procedure for purchasing goods from conventional banks, this is used to see the realization of whether the customer as the buyer of goods gets the freedom to determine the profit margin which is then stated in the *murâbahah* contract? Do the clauses in the contract, which are standard contracts, support the promise of the price of goods which are then paid in installments, have also fulfilled the principles that exist in Islamic treaty law, especially in Islamic banking?

There are basically two opinions about standard contracts. The first opinion is that allows standard contracts to be made unilaterally by entrepreneurs and / or owners of capital or *creditors on* the grounds that the standard contract is such that it can protect their interests, namely that their capital must be returned and they get a share of the profits, as long as the standard contract does not conflict with legislation Number 8 of 1999 concerning Consumer Protection. So the customer of the *murâbahah* contract is one of the consumers as referred to in the law.

The second opinion, which does not allow it, is more on the grounds that making a standard contract by only one party will definitely benefit the party making it and on the other hand will be burdensome for the customer or recipient of capital (debtor). Therefore, the agreement is a limited agreement. The customer or recipient of capital is limited in his choice, accepting capital or in the case of *murâbahah* buying a house through a Sharia Bank, means accepting all the conditions in the standard contract available (Andrian Sutendi 2009).

In connection with the second opinion which tends to be practiced by Islamic banks, the author needs to examine how the existence of the principle of *al-musâwah* and whether it has been realized in the *murâbahah* financing contract in Islamic Banking. The research methodology in this article is a qualitative study using a descriptive analysis approach. This study examines the reactivation of the principle of *al-musâwah* in the standard contract on *murâbahah* financing in Islamic Banks. The data used in this article consists of primary data and secondary data. Primary data is obtained from books that discuss *murâbahah* while secondary data is obtained from interviews with Islamic banks. The data were collected and then analyzed using descriptive method.

B. FINDINGS AND DISCUSSION

1. Existence of al-Musâwah Principle in Standard Agreement

The legal relationship between Islamic banks and customers receiving financing facilities is not solely based on

the relationship between creditors and debtors as in conventional banks but is based on various kinds of legal relationships between Islamic banks and customers. The agreement which underlies the legal relationship between the customer and the Islamic bank is outlined in the form of a contract.

Etymologically, the agreement in Arabic is termed *mu'âhaḍah at-tifa*, or Akad. In Indonesian, it is known as a contract, consen or agreement, which means an act in which one or more people bind themselves to another person or more (Abdul Ghofur Anshori 2006). The equivalent of the word agreement in Arabic is al-'Aqad. In fiqh terms, in general, a contract means something that a person is determined to carry out, whether it arises from one party such as waqf, talak, and oath, or arises from two parties such as buying and selling, renting, wakalah and also pawning (Ascarya 2007). Thus, it can be concluded that a contract is an agreement that creates an obligation to perform for one party, and the right for the other party to that performance, with or without making a counterparty (Abdul Ghofur Anshori 2006).

In particular, 'Aqad, which is a bond between ijab and kabul in a way that is justified by sharia which results in legal consequences on its object. Ijab is the first party's statement regarding the desired content of the engagement, while kabul is the second party's statement to accept it. A contract or agreement in Islamic law is valid if it fulfills the pillars and conditions. A pillar is something that must be present in the contract. While conditions are requirements that must be met by these pillars. Contracts or agreements are basically made based on the principle of freedom of contract between two parties who have equal positions and both parties try to reach an agreement through the negotiation process. In its development, many agreements in business transactions do not occur through balanced negotiations between the parties. One party has prepared standard terms on an existing agreement form and then presented it to the other party for approval with almost no freedom at all for the other party to negotiate on the terms presented. Such agreements are referred to as standard agreements or also *adhesion* agreements (Trisadini Prasastinah Usanti 2013).

The word standard means a benchmark that is used as a benchmark or guideline for every consumer who signifies a legal relationship with an entrepreneur, which is standardized in a standard agreement including models, formulations and sizes (Abdul Kadir Muhammad 1992). Putting the contract in

a standard contract is a manifestation of the principle of freedom of contract. The scope of freedom of contract can be in the form of freedom of determining the object of the agreement; determining the form of the agreement; proposing conditions in formulating rights and obligations; determining the parties to the transaction; determining a method of settlement in the event of a dispute (Trisadini Prasastinah Usanti 2013).

According to Hasanuddin Rahman, a *standard* contract is a contract that has been made in standard form, or also printed in large quantities with a blank for several parts that are the object of the transaction, such as the amount of transaction value, type, and amount of goods transacted and so on so as not to open opportunities for other parties to negotiate what will be agreed to be stated in the contract. (Hasanuddin Rahman 2003). Law No. 8 of 1999 on Consumer Protection (UUPK) did not formulate a standard agreement but formulates a standard clause as stipulated in Article 1 point 10 that a standard clause is any rule or provision and conditions that have been prepared and determined in advance unilaterally by business actors as stated in a document and/or agreement that is binding and must be fulfilled by consumers.

A standard contract becomes improper or unfair if it is formed in an unbalanced relationship or situation. If the propriety or unfairness occurs in a relationship of unbalanced parties, then this situation is called *undue influence.* Meanwhile, if unfairness occurs in an unbalanced situation, this is called *unconscionability*. *Undueinfluence* is seen from the effect of the imbalance on the opportunity of the influenced party, while *unconscionability is* seen from the behavior of the strong party in trying to impose or utilize the transaction on the weak person (Hasanuddin Rahman 2003). Based on the results of an inventory of *murâbahah* financing contracts from several Islamic banks, all of them are made in a standard form in addition to contracts made by notaries in authentic form. The contract has been prepared from the start by the Islamic bank and the customer is no longer free to determine the *terms* because the *terms* and *conditions* have been prepared in advance by the Islamic bank in a standardized formal.

In principle, the contract of an Islamic bank that is set forth in a standard form is not contrary to sharia as long as it fulfills several things: 1) the validity of the contract, namely fulfilling the pillars and conditions of the contract; 2) does not violate elements prohibited by sharia, namely gharar, maysir, usury, zalim and

haram objects; 3) does not violate the principles of sharia agreements, including the principles of freedom of contract, consensualism, honesty, good faith, equality, balance, justice, and trustworthiness.

A sale-purchase agreement is a legal action that has the consequence of the transfer of rights to an item from the seller to the buyer, so naturally in this legal action it must be able to fulfill the pillars and conditions for the validity of buying and selling. The pillars of buying and selling consist of: 1) the subject, the existence of the seller and the buyer; 2) the object, the existence of money and objects; and 3) the existence of a lafaz (abdul shomad 2010).

With regard to the existence of sellers and buyers of an engagement, indirectly the principles of honesty and equality need to be emphasized so that at any time if a dispute occurs the parties can again realize that each has been limited by the law and principles in the murabaha transaction. Therefore, the important point of the study of *al-musâwah* or equality really needs to be emphasized. Muamalah is a legal provision that regulates the relationship of fellow humans to later be able to fulfill a life need. In meeting the needs of life, Allah has exceeded some of you over others in terms of sustenance (Q.S. An-Nahl t.t.). However, the wisdom that can be taken from this difference is that among them will need mutual cooperation (Q.S. An-Nahl t.t.). With the behavior of mutual need, then every human being has the same rights to be able to enter into an agreement.

Based on the above explanation, it can be emphasized that this principle is the benchmark for the validity of an engagement in this case murabaha. Information disclosure for both the customer and the financial institution becomes the benchmark for validity in the life of muamalah. This is where we can see that the *al-musâwah* principle is a principle in muamalah that emphasizes being fair and honest in all worldly activities. If there is a contract that seems burdensome to one of the parties, then it is given the flexibility for the parties to negotiate as a form of khiyar rights for both parties to the contract so that the contract made does not reflect the exploitation of one of the parties.

In the concept of Islamic banking, what must be understood beforehand is that banks whose operations use sharia principles are subject to two rules in which provide limitations related to the bank's operations. Islamic banks are subject to Positive Law regulations in force in Indonesia and Islamic Law in accordance with the Qur'an and alHadis. Therefore, the principles based on these two sources

should be implemented properly and correctly as a reference in conducting business transactions.

Another thing that is also closely related to Islamic banking is the importance of the responsibilities of various parties by upholding a fair law for all parties. To achieve a form of justice and balance in terms of Islamic banking traffic, especially in the form of sale and purchase financing (*murâbahah*), it is very important in an agreement or in the term used by Islamic banking as a contract that balanced elements are fulfilled in the process of making and the contents of the clauses in the contract.

2. Application of the *al-Musâwah* Principle in Standard Contracts in *Murâbahah* Agreements in Islamic Banks

In simple terms, *murâbahah* means the sale of an item for its cost plus an agreed profit. In its definition of an agreed profit, the characteristic of *murâbahah* is that the seller must inform the buyer of the purchase price of the goods and state the amount of profit to be added to that cost (Adiwarman. A Karim 2007). In Islamic bank practice, this murabaha product is a financing product where the bank can mediate between interested parties, namely customers and developers or suppliers, in this case, if the customer wants to have or buy an item from the developer while the customer does not have sufficient funds to be able to buy it, then the bank in this case provides assistance in the form of financing by purchasing the goods desired by the customer first from the developer, then the bank resells the goods to the customer at a price according to the bank's purchase from the developer with an installment method and added profit for the bank which has been agreed between the bank and the customer before the sale-purchase transaction is carried out (Bagya Agung Prabowo 2009).

The foregoing, as well as the provisions of the murabaha contract based on the normative law applicable in Indonesia as stated by the National Sharia Council of the Indonesian Ulema Council (DSN MUI) (Fatwa DSN No: 04/DSN-MUITV/2000 t.t.). However, in the concept of the three strands of the contract, it is not uncommon to find erroneous practices when faced with the problem of determining margins that tend not to give customers the right to negotiate, in addition to the form that has been filled in is not understood by the customer. Thus, it is necessary to make each party aware again, especially Islamic banks to re-actualize the concept of *al-musâwah* in the financing.

In general, the purpose of the murabaha financing agreement is to

provide financing on the basis of sale and purchase of an item at a price of the principal price plus a mutually agreed profit with payment deferred within an agreed period. In the form of the amount of financing, it is also clearly stated and detailed on both sides of the bank which states how much the principal price, profit margin and time period are clear. It's just that the problem is seen in the procedure before the contract is made related to the right of the bank to determine the profit margin and is obliged to provide an opportunity for customers to negotiate a profit margin agreement, for the customer has the right to determine the length or period of financing and is obliged to make payments in accordance with the agreement made with the bank.

In general conditions, the Bank still uses the form of a standard contract that is made unilaterally, this is not a problem when it is in accordance with the provisions contained in Article 18 of Law Number 8 of 1999 concerning Consumer Protection which regulates that business actors in this case Sharia Banks are allowed to make standard clauses, as long as they do not conflict with this article. In addition, in the form of Islamic business ethics, it is permissible to use standard contracts as long as it does not harm one of the parties and is beneficial for the benefit of the people.

In the principle of agreement according to Islamic law itself regulates several principles, including *al-musâwah* (equality) or balance, which means that both parties who bind themselves in the financing contract have the same rights and obligations in determining the bargaining position and terms and conditions in the clauses made. This clearly shows that as a country based on law we must uphold the values of balance in the eyes of the law. As a form of supervision in exercising its authority for Islamic banks, the Indonesian Ulema Council through the National Sharia Council must supervise the implementation of equality or balance *al-musâwah* principle) in Islamic banking practices. This *al-musâwah* principle is actually the basis for other principles that can run properly according to the provisions such as the principle of *al-'adâlah* (justice) in accordance with the proportionality of each party.

Fair here does not mean equality in getting a share (50:50), but it could be that the form of fairness here is (60:40) depending on the rights and obligations according to their proportions. Then the principle of *ar-riḍâ,* which means willingness, means that in making an agreement, no party should feel forced to undergo the contents of these clauses. In accordance with the applicable provisions

and regulating the profit margin that will determine the amount of financing is based on the customer's ability to make payments in accordance with the agreed period. However, this becomes invalid when the Islamic Bank still calculates based on the Bank Indonesia interest rate, which clearly contradicts the prohibition in Islamic law, namely the charging of interest is Riba and the law is Haram (Adiwarman. A Karim 2007).

In determining the amount of numbers used as an excuse to do *Mark Up* which is not in accordance with the principles of Islamic law, because this will clearly burden the customer especially if it is not given the opportunity by the bank to bargain in determining this profit margin figure.

Thus, it is clear that the form of imbalance or equality (principle of *al-musâwah*) is not realized. Then another thing that is not appropriate is that there is a difference between financing with a period of 2 (two) and more, this is because the bank does use the basis of the period or the length of the customer's ability to make installments, it should be how long the customer's ability to make installments will not affect the amount of financing in which there is a profit margin for the bank.

The clause should also mention the minimum and maximum limits for the financing period that can be used to measure that the value of this financing does not depend on the customer's ability to make installment payments. In terms of managing the risk of goods, it is clear that there is an imbalance or equality (principle of *Al-musâwah*) in terms of managing the risk of goods if a problem occurs. In banking practice, Islamic banks as *profit-oriented* financial institutions certainly will not just let go of customer obligations, so in DSN Fatwa Number. 48/DSNMUI/II/2005 concerning Rescheduling *Murâbahah* Bills regulates the things that banks can do in order to rescue *murâbahah* financing.

The next obligation is the obligation for the customer to be responsible for the risk of the goods and to release the bank from all claims and or compensation in any form for the risk since the signing of the contract. There is no DSN Fatwa related to risk, so the basis for analyzing the clause is the view of the jumhur ulama. From the above basis, the obligations related to risk are not contrary to Islamic Law, especially in the principle of equality (*al-musâwah*), as for what is not appropriate is related to the penalty determined unilaterally and the obligation to pay at once if the customer is in a tight situation.

C. CONCLUSION

Based on the explanation above, there are several important points that the author can conclude from the explanation is that the essence of the principle of *Al-musâwah* is a benchmark for the validity of an agreement. Information disclosure for both customers and financial institutions is a benchmark for validity in the life of business. Islamic banks are subject to the rules of Positive Law and Islamic Law in accordance with the Qur'an and al-Hadith. Therefore, the principles based on these two sources should be implemented properly and correctly as a reference in conducting business transactions.

When viewed in terms of determining the price and period of payment, and risk management in *murâbahah* financing, it is clear that the principle of *Al-musâwah* has not been realized because the contract is more burdensome for the customer.[]

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