Amwaluna: Jurnal Ekonomi dan Keuangan Syariah Vol. 4 No.2 Juli 2020 Page 276-287
Online ISSN : 2540-8402 | Print ISSN : 2540-8399

ANALYSIS OF MAQÂSHID AL-SYARÎ'AH ON THE APPLICATION OF THE COLLATERAL IN THE MUDHÂRABAH CONTRACT IN SHARIA FINANCIAL INSTITUTIONS

[1]Maman Surahman, [2]Nurrohman
[1]Universitas Islam Bandung, Tamansari No 1 Bandung Indonesia
[2]Universitas Islam Negeri Bandung, Gedebage Bandung Indonesia
[1]abuazkaalmadani@gmail.com, [2]nurrohman@uinsgd.ac.id

Abstract

In the study of classical Jurisprudence, the *mudhârabah* contract is the same contract which has no guarantee provisions in it. Therefore, in the *mudhârabah* contract *there is* no need for collateral, because the *mudhârabah* contract is a contract that is based on the element of trust (*trust*) so there is no need for guarantees given by customers to banks / Islamic financial institutions. The purpose of this study was to analyze *maqâshid al- sharia* on the application of collateral to the *mudhârabah* contract in Islamic Financial Institutions. The method of approach used in this study is normative juridical research with the nature of descriptive analysis. The type of data used in this study are primary and secondary data types. This research is classified as a type of qualitative research. The results show that collateral in the *mudhârabah* contract serves to avoid deviations from the fund management customer so that they do not play around in managing the mudhârabah financing fund, and guarantees are not necessary and mandatory conditions on every Mudhârabah financing. Therefore, LKS may set the guarantee to clients which serves to avoid the *moral hazard* of the *mudharib* negligent or not according to the contract, which is in line with the values of the benefit in Islamic transactions system.

Keywords: *mudhârabah, maqâshid al-Syariah*, *collateral*.

I. Introduction

The concept of *maqâshid al-Syariah* occupies a very important position in formulating Islamic law, including Islamic economic law. *Maqâshid al-sharia* is necessary to formulate macroeconomic policies (monetary, fiscal, public finance), products of Islamic banking and finance as well as micro economic theories of others. *Maqâshid al-syarî'ah is* also very necessary in making banking regulations and Islamic financial institutions. Without *maqâshid al-syarî'ah,* all regulations, fatwas, financial and banking products, fiscal and monetary policies, will lose sharia substance. Without *maqâshid al-syarî'ah*, fiqh muamalah is developed, banking and financial regulations will be rigid and static, consequently sharia banking and financial institutions will find it difficult to develop let alone defeat conventional banking.

Maqâshid al-syarî'ah is not only the most important factor in determining the birth of Islamic economic products that can realize human benefit, but also more than that, *maqâshid al-syarî'ah* can also give philosophical and rational dimensions to products Islamic economic law that was born in contemporary sharia economic ijtihad activities. *Maqâshid al-syarî'ah* will provide a substantial pattern of thinking in looking at Islamic banking agreements.

One of the contracts developed by Islamic financial institutions, especially Islamic banking, is the *mudhârabah*

Received: 2020-04-05 | Reviced: 2020-06-23 | Accepted: 2020-07-28
Indexed : Sinta, DOAJ, Garuda, Crossref, Google Scholar | DOI: https://doi.org/10.29313/amwaluna.v4i2.5588

contract, which is the construction and development of cooperation agreements or *musharaka.* In the context of jurisprudence muamalah, investors and Islamic banks as intermediary institutions *finance* cannot appeal to prospective debtor so that the debtor pledged, because it is not among the principal or the priority that should be considered in the provision of capital or financing funds in a partnership contract. There is something more important that must be considered and assessed by investors, namely the debtor's business prospects. (Maulana, Muhammad, 2014).

At the implementation level, Islamic financial institutions (LKS) implement a guarantee system for *mudhârabah* contract financing customers. In fiqh studies, *mudhârabah* contract is a trust contract so that no collateral is needed. However, there is a gap in practice in Islamic financial institutions, namely the application of collateral to the *mudhârabah* contract. Therefore, the application of collateral in the *mudhârabah* contract *needs to* be reviewed from the perspective of the *maqâshid al-syarî'ah.*

The purpose of this study was to determine the concept of material security and *mudhârabah* and *maqâshid al-syarî'ah contracts* in Islamic economics. Then the next goal is to analyze the application of collateral in the *mudhârabah* contract in the Islamic Financial Institution from the perspective of the *maqâshid al-syarî'ah.*

The research method is based on a normative juridical approach, namely by reviewing or analyzing secondary data in the form of secondary legal materials by understanding the law as a set of rules or positive norms in applicable legislation, so this study is understood as library research, namely research on secondary materials (Soekanto, Soerjono & Sri Mamudji, 1985)

The research specification used is analytical descriptive, which is research to describe current problems (actual problems), by collecting data, compiling, classifying, analyzing, and interpreting. Descriptive aims to describe observational data without testing hypotheses (Adi, Rianto, 2004).

The type of data used in this research, in secondary data, namely the literature that have relevance to the focus of discussion, books on the contract *of Mudharabah* and *maqâshid al-syarî'ah* or legal documents such as the National Sharia Board Indonesia ulema council fatwa. The data collection method used is the study of literature, namely by studying and analyzing the concept of collateral in the *mudhârbah* contract at the Islamic Financial Institution. The data analysis method used in this study is a qualitative method.

The analysis of secondary data which is qualitative in nature is carried out by means of legal theory or legal doctrine contained in the mindset, then applied deductively to the focus of the problem.

II. Discussion

a. Concept of Material Security

The term collateral is a translation of the Belanda language, which is "*zekerheid"* or " *cautie"* which generally means the way the creditor guarantees the fulfillment of his bills, in addition to the debtor's general accountability for debts. (HS, Salim, 2004). According to the term, a guarantee is something given to a creditor to create confidence that the debtor will fulfill obligations that can be valued with money arising from an engagement. Mariam Darus Badrulzaman

(2000) provides the definition of collateral as a dependency given by a debtor and / or third party to the creditor to guarantee his eligibility in an engagement. From this definition, the conclusions of the elements of collateral can be drawn, namely: made as fulfillment of obligations, guarantees can be valued in money, guarantees arise due to an agreement (principal agreement) between creditors and debtors.

As a matter of aiming to fulfill obligations, guarantees must be valued in money. Therefore, the guarantee law is closely related to the law of matter. Material guarantees whether the debtor's own wealth or third-party wealth, in addition to being intended as a guarantee of fulfilling debtor's payment obligations, is also intended to provide preferential rights or prioritized rights over other creditors in the collection of debt repayments, from objects that are objects of collateral. Priority rights remain attached to the creditor despite the debtor's bankruptcy, the creditor has been established as a creditor of a separator (Rosyadi, Imron, 2017).

Besides being known as collateral, the term "collateral" is also used for the same meaning. This can be found in Act Number 7 of 1992 concerning Banking which was amended by Act Number 10 of 1998. In interpreting the two terms, J. Satrio (1996) said that the notion: collateral "has a broader term than" collateral " Because collateral does not always refer to an item in a concrete sense, but also relates to the debtor's ability to carry out his achievements as in principle 5C (character, collateral, capacity, capital, and condition of economy). Collateral is not concrete, because it relates to the creditor's confidence in the ability of the debtor to carry out his achievements. The collateral is always concrete (real), that is, all assets owned by the debtor or third party to guarantee repayment when the debtor does not carry out achievements (default).

In Islamic law there are collateral institutions as institutions that guarantee debt repayment in the event of default. This is as narrated by Anas bin Malik that the Prophet Muhammad once guaranteed armor made of iron to one of the Jews in Medina and from these Jews the Prophet Muhammad took wheat. Another narration that is in line with the hadith Anas bin Malik is a hadith narrated by Aisha that the Prophet bought food from the Jews an armor made of iron.

Based on the two narrations above, then the practice of pawning existed in the time of the Prophet Muhammad was still alive, even he himself made a pawn contract with the Jews. Clothes market p groaned made of iron as collateral, because at that time regarded as goods that have economic value given the situation of tribal skirmishes that led to his days of war are still common. Even so, the guarantee agency at that time was manifested in the form of *rahn,* unlike now the material security is divided into several forms and is associated with the type and nature of the material guaranteed, such as guarantees of mortgage, fiduciary security, mortgage and mortgage.

b. Akad *Mudharabah* Islamic law

Mudhârabah comes from the word *dharb*, which means to hit or walk. The definition of hitting or walking is more precisely the process of someone moving his feet in running his business (Djuwaini, Dimyaudin, 2008). *Mudhârabah* is also called *qirâdh. Mudhârabah* is the language of the population of Iraq, while according to the language of the inhabitants of the Hijaz it is called the *qirâdh*.

According to Neneng Nurhasanah (2015), *al-qirâdh, al-muqâradhah,* and *al-mudhârabah* are one meaning, namely the surrender of assets (capital) to someone to be played (fostered), while the benefits are shared among them (financiers and those who are given capital). *Qirâdh,* with the surrendered *Qaf* letter taken from the word *al-qardhu* which means *al - qath'u* (pieces). Because the owner gives a discount from his wealth to be given to the entrepreneur to pool the assets, and the entrepreneur will give a discount from the

profits obtained. *Qirâdh* can be taken from the word *muqâradhah* which means *al-musâwah* (equality), because capital owners and entrepreneurs have the same rights to profits.

The Iraqis mention it in the term *mudhârabah,* because everyone who makes a contract has a share of the profit, or the entrepreneur must travel in the pursuit of these capital assets. The trip is called *dharban fî al-safar* (Syafe'i, Rachamat, 2001).

According to the Compilation of Sharia Economic Law (KHES) Mudhârabah is cooperation between fund owners or investors and capital managers to conduct certain businesses with profit sharing based on *ratio.* Therefore, what is meant by mudhârabah contract is a business cooperation agreement between two parties where the first party (*shâhib al-mâl*) provides all (100%) capital, while the other party becomes the manager. In *mudhârabah*, business *clusters are* divided according to the agreement set forth in the contract. If the business suffers a loss, then the loss is borne by the capital owner as long as the loss is not due to negligence of the manager. If the loss is caused by fraud or negligence of the pengelala, the manager must be responsible for the loss (M. Syafi'i Antonio, 2001). In the event of a loss in the *mudhârabah* contract, the capital owner bears the loss, the financial loss meant. Managers (*mudari*) bear losses in the form of loss of time and energy that has been spent but does not bring profit. From this understanding it can be concluded that the capital provided by *Shâhib al-Māl* is capital not benefits, such as wage rent.

Explicitly, the Qur'an does not mention *mudhârabah* as a form of *mu'âmalâh* that is permissible in Islam. In general, some verses imply his ability and the scholars make some of these verses as the basis of *mudhârabah* law.

Surah al-Jumu'ah (62) verse 10:

" *When the prayer is fulfilled, then you will be scattered on earth; and seek the gift of God and remember God a lot so that you are lucky. "*

According to al-Syanqithi, surah al-Jumu'ah (62) verse 10 provides legality regarding the validity of mudhârabah transactions.

Ibn Majah's Hadith

"Having told us Al Hasan bin Ali Al Khallal said, had told us Bisyr bin Thabit Al Bazzar said, had told us Nashr bin Al Qasim from 'Abdurrahman bin Dawud from Salih ibn Shuhaib from his Father he said," Rasulullah Shallallahu' alayhi wasallam said: "Three things in which there is barakah; buying and selling that gives tempo, lends, and mixes of wheat with barley for consumption by people not for sale.

Ulama agreement regarding *mudhârabah may be* quoted from Dr. Wahbah al-Zu h aili in his book *al-Fiqh al-Islami wa Adillatuh* as follows.

"It is reported that a number of friends did mudhârabah by using the assets of orphans as capital and none of them (friends) refuted or rejected them, and that automatically became a consensus."

c. The concept of *Maqâshid Al-Syarî'ah* in Islamic Economics

Etymologically, **مقاصد الشريعة**(*maqâshid al-syarî'ah*) is a compound term of two words:**مقاصد** (*maqâshid*) and**الشريعة**(*al-syarî'ah*). *Maqâshid* is a plural form of **مقصد** (*maqshad*),**قصد**(*qasd*),**مقصد**(*maqshid*) or**قصود**(*qushûd*) which is a derivation of the verb**قصد يقصد**(*qashada yaqshudu*) with various meanings, such as going in one direction, destination, middle, just and not transcending borders, straight road, midway between overdoing and lacking .

Meanwhile, *syarî'ah* which etymologically means the path to a spring, in fiqh terminology means the laws prescribed by Allah for His servants, both established through the Koran and the Prophet's sunnah in the form of words,

deeds, or the decree of the Prophet (Zaidan, Abd al-Karim, 1976). In a shorter and more general definition, al-Rasyuni stated as quoted by Ahmad Imam Mawardi that *syarî'ah* means a number of *'amaliyyah* laws brought by Islam, both related to the conception of the creed and its legal legislation.

Thermallyogically, the meaning of *maqâshid al-syarî'ah* develops from the simplest meaning to the holistic meaning. Among classical scholars before al-Syathibi, yet dite n tukan concrete and comprehensive definition of *the maqasid al-shari'ah* . Their definition tends to follow the meaning of language by mentioning its equivalent meanings. Al-Bannani interprets it with the wisdom of the law, al-Asnawi defines it with legal purposes, al-Samarqandi equates it with legal meanings, while al-Ghazali, al-Amidi, and Ibn al-Hajib define it by grasping benefits and rejecting mafsadat. The variations in these definitions indicate the close relationship of the *maqâshid al-syarî'ah* to *wisdom, 'illat,* purpose or intention, and benefit.

In the history of classical Islamic jurisprudence, the terms and concepts of *maqâshid al-syarî'ah* have been the subject of many scholars for centuries. According to Ahmad Raisuni, the most important figure in the *maqâshid al-syarî'ah* was Imam al-Syathbi (d. 790 H), but al-Syathibi was not the first ulama to introduce the terms and concepts of the *maqâshid.* Ahmad Raisuni said the term *maqâshid al-syarî'ah* was first used by al-Turmdzi al-Hakim, a scholar who lived in the early 4th century in the book he wrote, namely: *al-Salah wa Maqashidu, al-Haj wa Asraruhu, al-'Illah, 'Ilal al-Shari'ah,' Ilal al-'Ubudiyah* and also his book *al-Furuq* which was later adopted by Imam al-Qurafi became his book. This is in accordance with t u oral Mohammed Hashim Kamali in his work entitled *al-maqasid al-Shari'ah, The Objectives of Islamic Law.* According to the professor of ushul fiqh, the term *maqâshid al-syarî'ah* was first introduced by al-Turmidzi al-Hakim (Mingka, Agustiano, 2013).

After al-Hakim, appeared Abu Manzur al-Maturudi (d. 333 H) with his work *Ma'had al-Syara '* , then was followed by Abu Bakr al-Qaffal al-Syasyi (d. 365) with his books *Usul Fiqh and Mahasin al Sharia* , after al-Qaffal then appeared Abi Bakr al-Abhari (d. 375) with his work entitled *Mas'alah al-Ans wa al-dalail wa al'illah* , then al-Baqillany (d. 403) with his work *al- Taqrib wa al-Ershad fi Tartib Thuruq al-Ijtihad* .

In general, the history of *maqâshid* can be divided into 3 (three) phases. *First,* the prophetic phase of Muhammad. This phase is the introduction phase of sharia *maqâshid* contained in the newspaper and Sunnah in the form of frozen signals that have not yet been diluted, or only in the form of implied views which have not been theorized. *Second;* the best friend and tabiin phase. At this time the first stone began to be laid the rapid development of the history of the *maqâshid.* The *third* or final phase is the *maqâshid theorization* phase which is mostly elaborated by Muslim scholars (Mufidi, Moh, 2018).

Apart from the above differences, regarding the periodization of the development of the *maqâshid it* can be concluded that the theory of the *maqâshid* had indeed emerged long before al-Syathibi introduced it. However, al-Syathbi managed to systematize the theory in a *design* that was more organized, *communicated* and acceptable to many Muslims. The theory of *maqâshid was* polarized by al-Syathibi through one of his works entitled *al-Muwâfaqât Fî Ushûl al-Syarî'a*, a book written as an attempt to bridge several points of difference between Malikiyah scholars and Hanafiyah scholars.

After the death of al-Baqillany, then came the Imam al-Juwainy (419-478), known as Imam Haramain. In some of his *writings* he was the first to classify *maqâshid al-syarî'ah* into 3 (three) broad categories, namely: *Daruriyat, Hajiyah and Tahsiniyah*. His work in the field of

usul fiqh is *al-Burhan, al-Talkhîs* and *al-Waraqat* (Mingka, Agustianto, 2013).

Then the thought of al-Juwainiy was developed by his student named Abu Hamid al-Ghazaly / Imam al-Ghazali (d. 505 H / 1111 AD). Next came al-Razy (d. 606), al-Amidy (d. 631) in *al-I h kâm fî Ush all al-A h kâm* , Ibn Hajib (d. 646), Izzudin Abd Salam (660) as stated in in his work *Qawâ'id al-A h kâm fî Mashâlih al-Anâm* , Baidhowi (d. 685), al-Asnawi (d. 772), Ibn Subki (d. 771), al-Qurafi, Ibn Taimiyah, Ibn Qayyim al -Jauziyah and no less important is the ushul fiqh figure Najmuddin al-Thufi (d. 710) in *Ris'lah fî Ri'âyah al-Mashlahah* and several other major figures.

That is a series of figures who give concern to the urgency of *maqâshid al-syarî'ah*. However, they have not formulated a logical, systematic and comprehensive concept as formulated by al-Syathibi. Therefore, it is natural that al-Syathibi is considered to be the father of *maqâshid al-syarî'ah*, as Imam Shafi'i is claimed to be the founder of the science of ushul fiqh.

The emergence of al-Syathibi with his book *al-Muwâfaqât* opens a new page for the evolution of the theory of *maqâshid*. Since then, *maqâshid is* discussed separately from the propositions in the method of legal discovery, despite being an independent scientific discipline. The effort of al-Syathibi continued to be elaborated by Muhammad Thahir ibn Asyur with his book *Maqâshid al-Syarî'ah al-Islamiyah*. In this context, the science of *maqâshid is* said to have received a new injection and become an independent scientific discipline that was previously part of the study of Jurisprudence (Mufidi, Moh, 2018).

Qashdu ash-Shari 'fi Wadhi' ash-Shari'ah is the purpose of Allah in establishing the Shari'a. In the view of Syathibi, Allah revealed shari'ah (the rule of law) aimed at creating prosperity and avoiding and *kemudharatan* (*jalbul mashalih wa da'rul mafasid*), both in the world, and at the end. The rules in shari'ah are not made for sharia itself but are made for the purpose of prosperity. With easier language, the rules of law that God has determined are only for the benefit of man himself. Syatibi then divided the *maqashid* into three gradations, namely *dharuriyat* (primary), *hajiyyat* (secondary), and *tahsiniyat* (tertiary).

Dharuriyat is maintaining the needs that are essential for human life. There are five basic needs, namely: religion (*al-din*), soul *(al-nafs),* descent *(an-nasl),* wealth *(al-mal),* and reason *(al-aql). Hajiyyat* is a need that is not essential, but a need that can avoid people from the difficulties of their lives. The non-maintenance of these needs does not threaten the five basic human needs but will create difficulties for the mukalaf. This group is closely related to *rukhsah*. *Tahsiniyat* is the need to support the enhancement of human dignity in society and before his Lord in accordance with obedience (Adam, Panji, 2019).

In essence, the five main objectives of both the *dhururiyat*, *hajiyat* and *tahsiniyat groups are* intended to maintain or realize the five points as mentioned above. It's just that the ranking of the interests of each other is different (Djamil, Faturrahman, 1995).

Mashlahat is the heart of the *maqâshid al-syarî'ah.* This is because the *maqâshid al-syarî'ah* is manifesting its own benefit. Thus, it is very appropriate and proportionate if *mashlahat is* placed as the second principle in Islamic economics.

The application of *benefits* in Islamic economics has a broader scope of the concept of worship. Islamic teachings about muamalah are generally global in nature, because that is the space of ijtihad to move wider. Islamic economics which is one of the fields of muamalah is different from *mahdhah* worship. Worship is dogmatic (*ta'abudi*), so there is very little room for jihad. The ijtihad room in worship is very semitic. The benefit in the field of muamalah can be found by the human mind / mind through ijtihad.

Talking about sharia economics and financial transactions, it is very closely

related to the principle of *maqâshid al-syarî'ah,* namely *hifdz al-mâl* (protecting assets). Thus, Islamic economic transactions have an epistemological basis which is based on the reasoning of *maqâshid al-syarî'ah.* The purpose of the Shari'a in Islamic economics is to create the welfare of humankind between the rich and the poor in a fair and balanced manner.

Without *maqâshid al-syarî'ah,* then all understanding of Islamic economics will be narrow and rigid. Without *maqâshid al-syarî'ah,* an expert and practitioner of Islamic economics will always be mistaken in understanding Islamic economics. Thus, the position of *maqâshid al-syarî'ah is* very urgent in the development of Islamic economics.

d. Analysis *maqasid al-shari'ah* against Application Security at Akad *Mudharabah* in Islamic Financial Institutions

Philosophically, the practice of investment savings for *mudharabah* profit sharing to declare *capital* with *labor (skill and entrepreneurship)* which has always been separate in the conventional system because the system was created to support those who have *capital* (capital). In addition, *mudaraba* investment will be evident and the spirit of togetherness and justice. This is done through togetherness in bearing the losses suffered by the project and sharing profits that swell when the economy is *booming* (Perwaatmadja, Karnaen and Muhammad Syafi'i Antonio, 1992).

Islam requires the *mudharabah* cooperation agreement *to facilitate people (taisir al-nas),* because some of them have assets but are unable to manage them. Conversely, sometimes there are people who do not have property, but have the ability to control and develop wealth. from here, the Shari'ah allows a cooperation agreement so that they can benefit from each other. *Shahbul mal* (investor) utilizes the expertise of *mudharib* (manager) and *mudharib* (manager) utilizing assets and thus the realization of cooperation in property and charity. Allah does not prescribe a single contract except to realize prosperity and reject damage (Abdullah, 1414 H).

The wisdom that is desired by the Shari'a from the *mudharabah* agreement is to elevate the degree of the needy who need venture capital and awaken mutual love between people. For capital owners, there are at least two advantages. *First,* get the reward for the act of giving funds for businesses for small communities. Or, if the capital is given to non-poor, he also gets the reward for having done good to give benefits to others. Second, can develop capital without struggling to manage it. For small communities, the funds or capital can be managed properly so as to produce a lot of profits to meet the needs of daily life (al-Jurjawi, Ali Ahmad, t.th).

In addition, this *mudharabah* agreement can also stimulate economic growth. Because with this investment or financing, businesses can expand their businesses by applying for financing in Islamic banks. This is because in an economic perspective, assets that are not invested in Islam are useless. Islam does not recommend accumulating wealth without distribution. Therefore, on the one hand, Islam provides a disincentive to *savings* that are not invested, but on the other hand Islam also provides incentives to invest. Meanwhile, the logical consequence of investment is the emergence of opportunities for profit and loss. It is here, the purpose of this cooperation agreement in order to improve human welfare evenly (Sahroni, Oni and Adiwarman A Karim, 2015).

Furthermore, the purpose of the Sharia in *mudharabah* transactions can be seen in 2 (two) things. *First,* if someone has excess property and has the ability to manage it, then he must work and manage his own property. If he succeeds, all the benefits are his right. This is the goal (*maqashid*) contained in QS Fushilat paragraph 4, that the profit of property

becomes his property as long as there are no roles and rights of others and QS al-Baqarah verse 286, which implies that if the property is managed and suffered a loss then it becomes the responsibility of the owner, except if the loss is caused by another party. *Second,* if someone who has property but is unable to manage it himself, then he must hand it over to other parties to manage it. This is one of the objectives in the *maqâshid al-syarî'ah* to allow the distribution of assets.

With this *mudharabah* agreement, it is hoped that the Muslim community will give birth to successful business people from small communities who have a tenacious and persistent entrepreneurial spirit. Because the *mudharabah* agreement provides an opportunity for capital owners to invest their capital in the budding budding. Conversely, for novice entrepreneurs to manage the funds (capital) properly, so as to produce maximum profits. This is the highest goal of the Shari'ah to allow *mudaraba* contracts in Islamic economic activity.

Financial transactions that develop in the modern economy at Islamic banks, *mudhârabah-based* financing and *musyârakah* in their operations require Islamic banks to guarantee these financing customers. (Hidayatullah, Muhammad Syarif, 2020).

Basically, in the *mudhârabah* agreement there is no guarantee, but to avoid the possibility of irregularities and to provide a sense of calm for both parties, the Islamic financial institutions (LKS) can ask for guarantees from customers.

Guarantees on *mudhârabah* financing have the same position as guarantees on financing at other Islamic banks such as *murābaah* , musyārakah and other financing. Its position is as a tool to prevent deviations or violations of matters agreed upon by both parties in the contract. (Yudha, Candra, 2015).

The function of collateral in *mudharabah* contracts in Islamic banking is to guarantee the implementation of *mudharabah* contracts in accordance with the agreements made by the parties at the beginning of the agreement, namely between the capital owner (*shahib al-maal*) and the manager (*mudharib*). Whereas the collateral function of banks conducting conventional business activities is as a guarantor for debts incurred between creditors and debtors. (Irawan, Vendra, 2019).

Opinion stating that in the *mudhârabah* contract *there is* no need for collateral, because the *mudhârabah* contract is a contract based on trust. The opinion was stated by Asyraf Muhammad Dawabah (2016) as follows:

" *Jurists (Islamic jurists) agree that there is no need for collateral that is burdened to the mudhrib in the mudhârabah contract unless the mudhrib is negligent or does an act of default, because the mudhârabah contract is a contract based on the trust of the two parties, in principle the transaction is based on neglect trust values are not required for collateral unless there is a default, then if the business does not generate profits / even loss of capital that is not caused by the default, then there is no guarantee in it* ".

But in the view of the scholars in collateral, considering the relationship between investors and fund managers is a pawn relationship and *mudhrib* is a trusted person, then there is no guarantee by *mudhrib* to investors. Investors cannot demand any guarantees from *mudhrib* to return capital with profits. If investors require guarantees from *mudhrib* and state this in terms of the contract, then their *mudhârabah* contract is invalid, according to Malik and Shafi'i.

Although in Jurisprudence investors are not allowed to demand guarantees from *mudhrib,* but in practice Islamic financial institutions (LKS) ask for guarantees from *mudhrib.* They do this to ensure that the capital channeled and the expected profit from this capital is given to

the LKS at the time specified in the contract. Guarantees can be given from *mudhrib* itself or from third parties. The collateral requested by the LKS is not made to ensure the return of capital, but to ensure that *mudhrib* performance is *in* accordance with the terms of the contract.

Contemporary Islamic jurists, including Muhammad Abdul Mun'im Abu Zaid in his book *Nahwa Tathwiri Nidhami al-Mudharabah fi Masharif al-Islamiyah,* as quoted by Hindayanti (2011) stated that guarantees for *mudhârabah* financing in sharia banking practices are permissible and highly important for its existence on the basis of 2 (two) reasons as follows:

1. In the current context of Islamic banking *Mudharabah* are done differently with *Mudharabah* traditional involve only two parties, namely *SHA h ib al-Mal* with *mudharib,* where the two met each other in person.
   While *mudhârabah* practices in sharia banking today, banks function as intermediary institutions managing large amounts of investor funds to other *mudhribs*, large amounts of investor funds do not meet directly with *mudhrib* so they cannot know with certainty the credibility and capabilities of *mudhrib.* Therefore, to ensure *trust* from investors, Islamic banks must apply the prudential principle, including by charging guarantees to customers who receive financing;
2. The current situation and condition of society has changed in terms of commitment to noble moral values (ethics), such as trust (trust*)* and honesty (*honest*). In this regard, Abdul Mun'im Abu Zaid in his other work, " *al-Dhaman fi Fiqh al-Islam* " also states that the biggest factor that *impedes* the development of Islamic banking, particularly in the investment sector is the low morality of the customers receiving funds financing in terms of honesty (*al-shidq*) and holding the mandate (*amanah*). Therefore, the prohibition of collateral in the *mudhârabah* contract because it is contrary to the basic principle that is trustworthy may change due to changes in the objective conditions of society in terms of morality. In accordance with the rule that: *al- h ukmu yadûru ma'a 'illatihi manifestation wa' Adaman* , which means the existence of the law determined by the presence or absence of *'illat* reasons. If *'illat* changes then the legal consequences change.

However, although guarantees in the *muhdârabah* contract in current banking practice are permissible, it is required that these guarantees must be based on the purpose of safeguarding *moral hazards* in the form of deviations by fund managers (*taqshir al-'amîl*), not aimed at returning bank capital or as compensation *(dhamân*) for any losses *due* to the absolute failure of the *mudhrib* business . Therefore, guarantees can only be disbursed if the fund manager is proven to have violated (*ta'adî*), negligence (*taqshir*) or violated the agreement that has been determined (*mukhâlafa t al-syurûth*). In addition, the obligation to guarantee collateral in *mudharabah* does not have to be borne by *mudharrib* but the bank can ask for guarantees from third parties who will guarantee *mudharrib* if it makes a mistake.

In the daily practice of sharia banking in Indonesia, the "formal law" that regulates the legal relationship between sharia units and customers (financing and depositing funds) is regulated based on the Civil Code. This includes guarantees, applicable forms of guarantee. This is because the operations of Islamic banks must be adjusted to the provisions in force in the territory of Indonesia which are based on the Pancasila and the 1945 Constitution. Legal provisions specifically related to the Sharia Body, which before the ratification of this Act on July 16, 2008 yesterday, the umbrella of sharia banking law was Act Number 10 of 1998

concerning Banking amendment from Act Number 7 of 1992 concerning Banking.

In Act Number 21 of 2008 concerning Sharia Banking, rules regarding collateral applied to Islamic banking in financing transactions between banks and their customers are regulated. Article 1 number 26 defines collateral (collateral), namely: "Collateral is additional collateral, both in the form of movable objects and immovable objects submitted by the collateral owner to Sharia Banks and / or UUS, in order to guarantee the settlement of obligations of the Facility Receiving Customer". The provisions of collateral in Islamic banking are not different from guarantees (collateral) applied in conventional banks, where in conventional banks collateral used is both movable and immovable objects.

It's just that, even though the form of collateral applied is the same as that applied to conventional banks, (individual collateral and material collateral), the collateral position differs between conventional banks and Islamic banks. In Islamic banks the position of collateral is not central in the provision of financing funds. Based on DSN-MUI Fatwa No: 7 / DSN-MUI / 2000 concerning Mudharabah Financing, the existence of guarantees in Islamic banking, especially in Mudharabah financing is only to provide certainty to the bank that the financing customers will use the funds from the bank in accordance with the agreement agreed in advance.

The guarantee provisions in the *mudhârabah* contract are in accordance with the *maqâhid of the* mandate of the contract. This is as the rule states that:

الغرم بالغنم

" *Benefits are always accompanied by risks"* (Zuhaili, Muhammad, 2006).

Based on the above rules, the benefits that arise along with risk (*al-ghunmu bil gurnmi*). If profits are guaranteed, then the main characteristics of the contract will be lost and is no different from an interest-bearing loan.

In the end, the guarantee that is in the Mudharrabah contract is as a form of realization of the Maqashid Sharia, which is to protect Harta (Hidzul Mal) and as a realization for the realization of Mashlahat which the goal of the Shari'a itself is. This is with a guarantee aimed at avoiding the possibility of irregularities and to provide a sense of calm for both parties namely Sohibul Mal and Mudharib with the avoidance of *moral hazrd* in the form of irregularities by the fund manager (*Taqshir al - ' amîl*),

III. Conclusion

Based on the description and explanation in the previous sub-chapter, in this paper some conclusions can be drawn as follows:

Akad Mudharabah is a contract of business cooperation between the two parties in which the first party (*sahib al-mal*) provides a whole (100%) of capital, while the other party to become a manager. Allah revealed the Shari'ah (the rule of law) aimed at creating prosperity and avoiding and *kemudharatan* (*jalbul mashalih wa da'rul mafasid*), both in the world and at the end. The rules in shari'ah are not made for sharia itself but are made for the purpose of prosperity. With easier language, the rules of law that God has determined are only for the benefit of man himself. Syatibi then divided the *maqashid* into three gradations, namely *dharuriyat* (primary), *hajiyyat* (secondary), and *tahsiniyat* (tertiary).

The collateral in the *mudhârabah* contract is as a form of realization of the *Maqashid Sharia,* which is to maintain the assets (*Hidzul Mal*) and as a realization for the realization of *Mashlahat* which is the goal of the Islamic Sharia, namely to avoid *moral hazards* in the form of deviations by the fund manager (*taqshir al-'amîl*),

Bibliography

Abdullah. (1414 H). *al-Bunûk al-Islamiyah Baina al-Nadzhariyat wa Tathbîq*, *Muasasah* al-Juaish, Beirut.

Abdul Karim Zaidan (1967). *Al-Madkhal ilâ al-Syarî'ah al-Islamiyyah, Muasasah* al-Risalah.

Agustianto Mingka. (2013). *Maqashid Syariah in Islamic Economics and Finance* Iqtishad Publishing, Ciputat.

Ali Ahmad al-Jurjawi. (t.th). *Hikma t al-Tasyrî 'wa Falsafatuhu*, Dar al-Fikr, Beirut.

Ana Toni Roby Candra Yudha. (2015). *Guarantees In aqad Financing mudarabah Banking Sharia In Surabaya region*, Al tijarah: Vol.1, No.1, June, 2015.

Ashraf Muhammad Dawwabah. (2016). *Shanâdiq al-Ististmâr fî al-Bunûk al-Islamiyyah Baina al-Nadzariyyah wa al-Tathbîq*, Dar al-Salam, Cairo.

Dimyauddin Djuwaini. (2008). *Fiqh Muamalah*, Student Library, Yogyakarta.

Fathurrahman Djamil. (1995). *Philosophy of Islamic Law: Part One,* Logos, Jakarta.

Hindayanti. (2011) *Comparison of Concepts and Implementation of Collateral in Mudharabah and Musyarakah Financing Agreements in Bank Syariah Mandiri Warung Buncit Branch*, Thesis, Syarif Hidayatullah State Islamic University, Faculty of Sharia and Law, Muamalat Study Program in Sharia Banking Concentration.

Imron Rosyadi. (2017). *Material Security Based on Sharia Contracts (Engagement Aspects, Charging and Execution Procedures),* Kencana, Jakarta.

J. Satrio. (1996). *Personal Assurance Law, Regarding Underwriting and Engagement Bearings Agreement,* Citra Aditya Bakti, Bandung.

Karnaen Perwaatmadja and Muhammad Syafi'i Antonio. (1992). *What and How to Ban Islam* Dana Bakti Wakaf, Yogyakarta.

M. Syafi'i Antonio. (2001). *Bank Syari'ah from Theory to Practice,* Gema Insani Press, Jakarta.

Mariam Darus Badrulzaman. (2000). *Some Legal Issues for Guarantee Rights ",* Journal of Business Law, Vol. II, 2000.

Moh. Mufidi (2018). *Maqashid Syariah Economics: Purpose and Application,* Four Media, Malang.

Muhammad Maulana. (2014). *Guarantees In Financing On Banking Sharia in Indonesia (Analysis guarantee financing Musharaka and mudaraba) ,* Journal of Scientific Islam Futura , Vol. 14. No. 1, August 2014.

Muhammad Syarif Hidayatullah. (2020). *Existence of Material Security in Sharia Bank Financing Contracts: Formal Legal National Law and Ijtihad in Jurisprudence*, Al-Mashlahah: Journal of Islamic Law and Islamic Social Institutions, Vol: 08, No: 1, May 2020.

Muhammad Zuhaili. (2006). *Al-Qawâ'id al-Fiqhiyyah wa Tahtbîqâtuha fî al-Madzâhib al-Arba'ah,* Dar a-Fikr, Damascus.

Neneng Nurhasanah, (2015). *Mudharabah*, Refika Aditama, Bandung.

Oni Sahroni and Adiwarman A Karim. (2015). *Maqashid Islamic Business and Finance: Synthesis of Jurisprudence and Economy*, Rajawali Press, Jakarta.

Adam's banner. (2019). *Islamic Law: Concepts, Philosophy and Methodology,* Sinar Grafika, Jakarta.

Rianto Adi. (2004). *Social and Legal Research Methods,* Jakarta: Granite.

Salim HS. (2004). *Development of Guarantee Law in Indonesia,* RajaGrafindo, Jakarta.

Soerjono Soekanto & Sri Mamudji. (1986). *Normative Legal Research (A Short Review)*, Jakarta: Rajawali Press.

Rachamat Syafe'i. (2001). *Fiqh Muamalah*, Student Library, Bandung.

Vendra Irawan. (2019). *Position of Collateral in Mudharabah Financing Agreement at Islamic Banks, Alhurriyah : Journal of Islamic Law , Vol. 04., No. 02.July December 2019.*

Wahbah Zuhaili. (2010). *Fiqh al-Islami wa Adilatuh,* Dar al-Fikr, Beirut.