ANALYSIS OF MAQÂSHID AL-SYARÔ’AH ON THE APPLICATION OF THE COLLATERAL IN THE MUDHÂRARAH CONTRACT IN SHARIA FINANCIAL INSTITUTIONS

1Maman Surahman, 2Nurrohman
1Universitas Islam Bandung, Tamansari No 1 Bandung Indonesia
2Universitas Islam Negeri Bandung, Gedebage Bandung Indonesia
1abuazkaalmandani@gmail.com, 2nurrohman@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-syari’ah is also very necessary in making banking regulations and Islamic financial institutions. Without maqâshid al-syari’ah, all regulations, fatwas, financial and banking products, fiscal and monetary policies, will lose sharia substance. Without maqâshid al-syari’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-syari’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-syari’ah can also give philosophical and rational dimensions to products Islamic economic law that was born in contemporary sharia economic ijtihad activities. Maqâshid al-syari’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
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 mudhârabah 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 are 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, are 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, Dimyauadin, 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 (Syafâ’î, 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 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-Mâl 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-Syaqiqi, 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 Khalil 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.

Ulma agreement regarding mudhârabah may be quoted from Dr. Wahbah al-Zuhaili 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-Syar'i’ah in Islamic Economics

Etymologically, مقاديس الشريعة (maqâshid al-syar'i’ah ) is a compound term of two words: مقادس (maqshid) and الشريعة (al-syar'i’ah ). Maqâshid is a plural form of مقصد (qasd) which is a derivation of the verb مقصد (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, syar'i’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 syari‘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 dîne 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-Syathbi 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-‘Ilah, ‘Ilal al-Shari‘ahu,‘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 the 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-Syathbi 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-Syathbi through one of his works entitled al-Muwâfaqât Fi Ushûl al-Syari‘a, a book written as an attempt to bridge several points of difference between Malikiyah scholars and Hanafiyyah 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-Talkhis and al-Waraqat (Mingka, Agustianto, 2013).

Then the thought of al-Juwaini 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-Amary (d. 631) in Al Ilhām al-Ushr al-Anām, Izzuddin Abd Salam (660) as stated in in his work Qawā'id al-Ahām al-Ushr al-Anām (Mufidi, Moh, 2018).

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 shar'i'ah (the rule of law) aimed at creating prosperity and avoiding kemudharatan (jalbul mashalih wa da'ru'l mafaṣsid), both in the world, and at the end. The rules in shar'i'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 dhururiyat (primary), hajiyyat (secondary), and tahsiniyat (tertiary).

Dhururiyat is maintaining the needs that are essential for human life. There are five basic needs, namely: religion (al-din), soul (al-nafs), descent (an-nas), 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).

Maslahat is the heart of the maqashid al-syar'i'ah. This is because the maqashid al-syar'i'ah is manifesting its own benefit. Thus, it is very appropriate and proportionate if maslahat 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 *maqāshid al-syarʿi`ah*, namely *ḥifḍ al-māl* (protecting assets). Thus, Islamic economic transactions have an epistemological basis which is based on the reasoning of *maqāshid al-syarʿi`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 *maqāshid al-syarʿi`ah*, then all understanding of Islamic economics will be narrow and rigid. Without *maqāshid al-syarʿi`ah*, an expert and practitioner of Islamic economics will always be mistaken in understanding Islamic economics. Thus, the position of *maqāshid al-syarʿi`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`a allows a cooperation agreement so that they can benefit from each other. *Shahbul māl* (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 magâshid 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 murâbaah, musyârakah 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, 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 mudhrâbs, 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 yadîru ma'a 'illatîhî manifestations 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 mudhârabah 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-'amil ), 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 mudharrrib 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:

"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 Mashalahat 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 Sohibal Mal and Mudharib with the avoidance of moral hazard in the form of irregularities by the fund manager (Taqshir al - 'amil).

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 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 Mashalah which is the goal of the Islamic Sharia, namely to avoid moral hazards in the form of deviations by the fund manager ( taqshir al-'amil).
Bibliography

