



Economic and Legal Dimensions of Collateral Existence in Modern *Mudhārabah* Contracts: Understanding the Relationship between Risk Management, National Law, and Contemporary Fiqh

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Abstract: This paper examines the economic and legal dimensions of the existence and application of collateral in modern *mudhārabah* contracts. Through this multi-perspective study, this paper sought to see the relationship between risk management, national law, and contemporary fiqh in discussing the existence and application of the collateral. This paper was included in the library research design and specifically in legal research methodology, applying normative legal research types with a conceptual and statutory approach. Furthermore, this research found a relationship between risk management, national law, and contemporary fiqh in viewing the existence of collateral applied to modern *mudhārabah* contracts in Sharia banking through its financing products. Based on the perspective of risk management, its existence was a risk control for non-performing financing. Then, in the perspective of national law, it manifested the prudential principle mandated by the sharia banking law. Meanwhile, in the perspective of contemporary fiqh, it can be seen as an effort to avoid the harm that was in line with the *sadd adz-dzari'ah* principle. This relationship was realized by looking at the existence of collateral in modern *mudhārabah* contracts as a preventive instrument.

Keywords : Collateral; *Mudhārabah*; Risk Management; National Law; Contemporary Fiqh

Introduction

There are various patterns of sharia contracts in the study of *muamalah* fiqh. In the treasures of sharia contracts, there are contracts based on the principles of deposit, loan, buying and selling, lease, cooperation, and service. The pattern of contracts with the principle of cooperation is that income is achieved through *profit-sharing*. The contracts in this category include *mudhārabah*, *musyārakah*, *muzāra'ah*, *mukhābarah*, and *musāqah*. Among all the contracts with the principle of cooperation, *mudhārabah* is an essential part of modern Muslim finance. It becomes a form of contract that forms the basis for financial transactions in Sharia banking as one of the modern ummah's economic institutions with the scope of application in fund-raising and financing products.

The *mudhārabah* contract in the practice of financing carried out by Sharia banking does have different characteristics from the *mudhārabah* concept discussed in classical fiqh. The difference is

the application of collateral in the financing of the *mudhârabah* contract. In this case, the collateral intended is the customer's property handed over to the Sharia banking sector as collateral for the capital participation provided by the Sharia bank to the customer in the *mudhârabah* contract. In this practice, Sharia banks act as *shahibul mal* (fund owners), requesting collateral from *mudhârib* customers (fund managers). In the basic concept of *mudhârabah*, there is no collateral submission from *mudharib* to *shahibul mal*. The concept of collateral in muamalah fiqh is called a *rahn* contract. It is a contract whose existence follows the existence of a *qardh* contract (debts/loans of money). Thus, because *rahn* is a *thabi'iyah* contract, its existence rests on another contract. In this case, it relies on a *qardh* contract whose principle is a loan or debt, not a *mudhârabah* contract whose principle is *profit-sharing* cooperation. There are differences between the concept of *mudhârabah* in classical fiqh and modern *mudhârabah* in Sharia banking. Indeed, some factors make this conceptual shift occur, which means having considerations that form the basis for applying such a *mudhârabah* contract.

Finding out the discussion about *mudhârabah* in previous research, there is various research on *mudhârabah* contracts. Wibisono in his writing reviewed the implementation of the *mudhârabah* contract in one of the Islamic financial institutions, i.e., the Savings and Loans Cooperative and Sharia Financing.

Furthermore, the article from Pakpahan focused on the discussion of *mudhârabah* in terms of legal protection for customers who carried out the *mudhârabah* contracts with Sharia banks. Meanwhile, the writings of Surahman and Nurrohman discussed collateral in *mudhârabah* financing but were limited to the legal dimension that focused on the *maqâshid sharia* perspective only.

Therefore, this paper was in contrast to previous research. In this paper, the author attempted to examine the application of collateral in modern *mudhârabah* contracts based on multiple economic and legal perspectives. The economic dimension covered risk management studies, while the legal dimension covered national law and contemporary fiqh. Through this research, the author wanted to see the embodied relationship between risk management, national law, and contemporary fiqh in discussing collateral in modern *mudhârabah* contracts.

Economic Dimension

1. Application of *Mudhârabah* Contracts in Modern Financial Products

Mudhârabah contract is a business cooperation contract between two parties where the first party (*shâhib al-mâl*) provides all the capital. Meanwhile, the other party becomes the capital manager (*mudhârib*), and the business profits are divided according to the agreement outlined in the contract, whereas, if the loss is borne by the owner of the capital, as long as the loss is not the result of the manager's negligence. *Mudhârabah* can be applied to funding products and financing products. Regarding funding product, *mudhârabah* is applied to time savings products and deposits in Sharia banks. As for the financing side, *mudhârabah* applications are for (1) Working capital financing, such as trading and service working capital; (2) Special investment, also called *mudhârabah muqayyadah*, which is a special source of funds with specific distribution with the conditions set by the *Shâhib al-mâl*.

2. Existence of Collateral as a Manifestation of *Mudhârabah* Financing Risk Management

Business activities in financing products are carried out by Sharia banking. In its operations, there is a screening and monitoring process. In the screening phase, a customer feasibility analysis is

based on the 5C principle. The 5C principle aims to determine the ability and willingness of customers to pay installments on time. Thus, analysis with the 5C principle is a form of financing analysis that analyzes qualitative (willingness to pay) and quantitative (ability to pay) which is an operational screening.

Besides screening carried out at Sharia banks, in addition to analysis using the 5C principle, there is also an additional screening, namely sharia screening. There is an “S” as an added point in financing analysis, i.e., sharia. Some things that must be considered first in sharia screening are: “Is the object to be financed halal? Does the project cause harm to the community? Is the project related to immortality? Is the project related to gambling? Is the business related to the arms industry illegal? Does the project harm the Islamic *syi’ar* directly or indirectly?”

Furthermore, the analysis with 5C + S principles, namely: (1) character is the condition of the character/nature of the customer as the recipient of financing; (2) capacity is the customer’s ability to run his business to gain profit for smooth payments; (3) capital is the customer’s capital which is included in economic assets; (4) condition of the economy is a business condition related to economic stability; (5) collateral is property owned by the financing customer and is used as collateral to be submitted to the bank; (6) sharia is the feasibility of a financed business seen from its halal based on sharia principles.

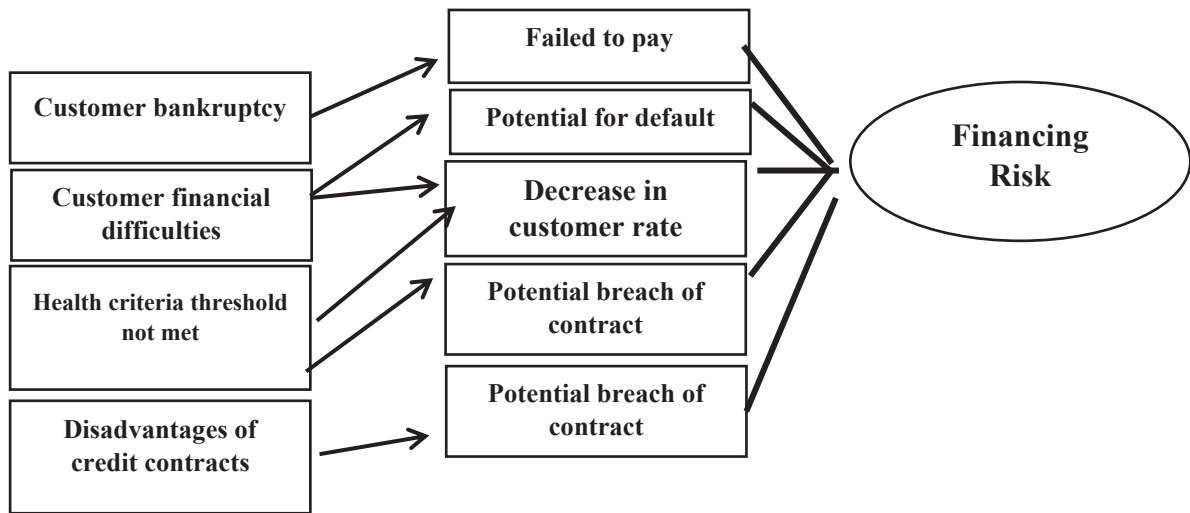
Collateral is one part of the analysis that is important to note. Collateral is a quantitative analysis of the ability to pay because it can measure the customer’s financial ability. Moreover, collateral will become a payment for financing repayments if the customer experiences financing problems and has been unable to pay. Besides, it can also be categorized as qualitative analysis or willingness to pay. The customer’s property being deposited or detained in a sharia bank can lead to seriousness and sincerity in managing the business and paying monthly installments.

The existence of collateral in financing is an effort to manage risk, where the collateral is a means of protection for the security of creditors, i.e., legal certainty in paying off debtors’ debts or carrying out an achievement by the debtor. The existence of collateral that determines particular objects bound in the collateral agreement gives the creditor a right to the object bound to get repayment in advance from other creditors by executing the collateral if the debtor is no longer able to pay his debts.

Adiwarman A. Karim mentioned the criteria for collateral, namely: (1) the object is the customer’s property; (2) the object is specified in size, character, and value (based on actual market value); (3) the object can be moved by the bank even though the bank does not utilize it. Another explanation regarding this matter explains that the considerations made by banks regarding the criteria for collateral are marketable and secured requirements. In this case, marketable means the collateral is easily sold or cashed to pay off all debtors’ debts when executed. Furthermore, the secured requirement means that the collateral can be legally bound under the provisions of the law and legislation. If there is a default in the future, the bank has the juridical power to carry out execution actions. In addition to legal assessments that banks usually carry out in the realization of financing followed by collateral engagement, banks conduct economic assessments such as the type and form of collateral, condition of the financing collateral object, ease of transfer of ownership of the financing collateral object, precise price levels, and marketing prospects.

Financing risk occurs due to defaults caused by financial difficulties or bankruptcy experienced by financing customers. In addition, if the fulfillment of the debtor's health criteria is not met, it will potentially lead to default and a decrease in customer ratings due to a decrease in customer performance. The potential financing risk can also arise due to weak financing contracts, causing breaches of financing contracts.

Figure 1
Correlation of Each Aspect in Financing Risk



Source: Indonesian Bankers Association, *Mengelola Bisnis Pembiayaan Bank Syariah* (Jakarta: Gramedia Pustaka Utama, 2015), 84.

The final part of a financing cycle is repayment of financing. Repayment of financing ideally occurs following the financing tenor agreed in the financing contract. However, it can also occur that it is not under the contract. Not under the tenor of the contract, early/expedited repayment can occur compares to the tenor specified at the beginning of the contract or even past the agreed tenor. Customers who have excess funds and want to complete their financing cycle immediately can apply for early or accelerated repayment at Sharia banks. When it happens in conventional banks, a *penalty* or fine will be imposed. Repayment is accelerated at conventional banks. It is the same as cutting the profits of conventional banks. It becomes a financial loss for conventional banks because the source and withdrawal of profits come from credit interest on money loan transactions. Moreover, this act is considered to have violated the contents of the contract (default) by conventional banks. Meanwhile, if it occurs in Sharia banks, there is no *penalty* or fine. When repayment is accelerated in Sharia banks, then the same is true of accelerating delayed profits for Sharia banks. The source and withdrawal of profits come from margins on buying and selling transactions of goods on credit, for which the selling price has been known from the beginning of the contract.

Repayment can also occur outside the schedule specified in the financing contract due to the emergence of problematic or problem financing/non-performing financing. If this case happens, then Sharia banks must strive to improve the quality of customer financing optimally with professional performance. The ultimate goal is to save financing from becoming healthy again.¹ Ways

¹ Ikatan Bankir Indonesia, p. 131.

that Sharia banks can take in saving financing for productive use with the use of large amounts can be in the form of financing restructuring, namely improvement efforts made by banks to finance customers who have difficulty fulfilling obligations. The criteria for customers in financing restructuring consist of financing customers who have the potential or have experienced difficulties in paying installments; financing customers who have good faith and are cooperative; and financing customers who have good business prospects and are projected to be able to fulfill their obligations after restructuring. Another method is liquidating collateral, i.e., the disbursement of collateral for financing customer financing facilities to reduce or pay off customer financing obligations to Sharia banks. The liquidation of collateral can be performed through the sale of collateral or redemption of collateral. In addition to the previous two methods, there can also be a financing settlement through a third party. It means that it is carried out through a judicial institution within the religious court environment. Collateral is a *second way out* to save financing provided to customers if the customer cannot pay off their obligations.

Dimensions of National Law: Collateral in *Mudhârabah* Financing as an Application of Business Activities based on Prudential Principles

At the actual level in Sharia banks, the provisions for binding collateral still use the same provisions as those applied to conventional banks. It is due to the absence of laws and regulations regulating collateral institutions that oversee financing transactions in Sharia banking. If referring to the meaning of Law No. 21 of 2008 concerning sharia banking by using *lex specialis derogat legi generalis*, other provisions that have not been regulated in the sharia banking law also apply to banking practices in Indonesia. Hence, the provisions for classifying collateral into binding collateral for Sharia banks use the juridical basis of the laws and regulations that apply to conventional banks.² Different types of collateral binding have been institutionalized in the national legal system. There are five forms of collateral institutions that are recognized and become an option in the national legal system, namely (1) Pawning with the legal basis of articles 1150-1160 of the Civil Code; (2) Mortgages with the legal basis of Article 1162 of the Civil Code, Article 314 of the Commercial Code and Law No. 21 of 1992 concerning Shipping; (3) Mortgage with the legal basis of Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land; (4) Fiduciary Guarantee based on Law No. 42 of 1999 concerning Fiduciary Guarantees; and (5) Guarantee Rights on Warehouse Receipts based on Law No. 9 of 2011 concerning Amendments to Law No. 9 of 2006 concerning the Warehouse Receipt System and provisions for warehouse receipt objects with the legal basis of Regulation of the Minister of Trade of the Republic of Indonesia Number 26/M-DAD/PER/6/2007 concerning Goods that can be Stored in Warehouses in Warehouse Receipt System Implementation.

Procurement of collateral in modern *mudhârabah* contracts on financing products in Sharia banking is an actualization of the prudential principle. The prudential principle requires banks to be careful within the framework of *business judgment rules* or business considerations for the best decisions taken by banks when channeling funds to customers.³ The legal basis is Article 2 of Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking and Article 2 of Law

² Ifa Latifa Fitriani, "Jaminan Dan Agunan Dalam Pembiayaan Bank Syariah Dan Kredit Bank Konvensional," *Jurnal Hukum & Pembangunan* 47, no. 1 (March 31, 2017): pp. 145-146, <https://doi.org/10.21143/jhp.vol.47.no.1.138>.

³ Noor Hafidah, *Hukum Jaminan Syariah & Implementasinya Dalam Perbankan Syariah Di Indonesia* (Yogyakarta: UII Press, 2017), 2.

No. 21 of 2008 concerning Sharia banking. The principle of “No Risk No Return” and “High-Risk High Return” in the business world is recognized in economics. It also applies to Sharia banks. Becoming something so significant in controlling financing risk is called the prudential principle in banking. This principle is an urgent basis to be considered and applied so that operations can run ideally and stably. The mandate of the prudential principle in banking in Indonesia is contained in banking laws such as Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking and Law No. 21 of 2008 concerning Sharia banking.

According to Veithzal Rivai and Andria Permata Veithzal, the prudential principle is the principle to protect financing from various problems by getting to know the *customer* either through the identity of the prospective customer or supporting documents for information from the prospective customer.⁴ The principle of prudence can also be interpreted as a concept that has elements of attitudes, principles, policy standards, and bank risk management techniques in such a way as to avoid the slightest consequences that can harm or disrupt stakeholders, especially depositors and the bank itself.⁵ Based on the definition above, the prudential principle is the foundation of risk management which aims to keep public funds or customer depositors safe and not suffer losses to create financial stability for banks.

Sharia banks should consider that they are intermediary institutions that collect public funds. Sharia banks must manage their business activities based on prudential principles with optimal implementation. In contrast to conventional banks in the distribution of funds using the term credit, the distribution of funds in Sharia banks tends to use the term financing. Financing is sometimes carried out by taking profit based on margin as in *murābahah*, *salam*, *istishnā'* of buying and selling contracts, and *ujrah* (wages/rental fees) in the *ijārah* contract. Then, financing that uses the principle of profit sharing is also known, namely financing through *musyārakah* and *mudhārabah* contracts. The two financing contracts based on profit sharing are seen from their very different characteristics from other contracts. Among the prominent differences is that Sharia banks cannot be guaranteed to obtain certain benefits (financing capital plus return) in channeling their funds to customers who receive financing. It is like a financing scheme that takes profits based on profit margins. However, the bank will likely suffer losses if the customer's business fails or goes bankrupt. It is the consequence of a financing scheme with profit and loss sharing principles. However, on the contrary, if the customer's business is successful, it will get a profit sharing that may be greater than the distribution of funds through a financing scheme based on a profit margin. It is because, between the two parties (the bank and the customer), there has been an agreement on the profit sharing ratio in the form of a percentage such as 50:50, 60:40, 70:30, and others. As a form of actual implementation of the bank's prudence in channeling its funds with *mudhārabah* contract products, before providing financing, Sharia banks must conduct a careful assessment of the character, ability, capital, collateral, and business prospects of debtor customers.

The laws and regulations in Indonesia regulate the issue of guarantees in the context of implementing the prudential principle that banking institutions, including Sharia banks, must apply. These regulations are the rules in Law No. 7 of 1992 concerning Banking as amended by Law No. 10 of

⁴ Veithzal Rivai dan Andria Permata Veithzal, *Islamic Financial Management: Teori, Konsep dan Aplikasi Panduan Praktis untuk Lembaga Keuangan, Nasabah, Praktisi, dan Mahasiswa* (Jakarta: RajaGrafindo Persada, 2008), 149-50.

⁵ Tangguh Prima Ndaru, “Penerapan Prinsip Kehati-Hatian Dalam Perjanjian Kredit Bank,” *Binamulia Hukum* 6, no. 2 (2017): p. 162, <https://doi.org/10.37893/jbh.v6i2.80>.

1998, Law No. 21 of 2008 concerning Sharia banking, Regulations from Bank Indonesia, and the Civil Code. Furthermore, the Regulation of the Financial Services Authority (POJK) No. 16/POJK.03/2014 concerning asset quality of Islamic Commercial Banks and Sharia Business Units also shows the obligation to apply the prudential principle. Specifically, it explains the existence of the 5C principle in financing analysis as part of the prudential principle. Collateral policy in financing in Sharia banks also embodies the prudential principle, which represents POJK No. 65 \POJK.03/2016 concerning the Implementation of Risk Management for Islamic Commercial Banks and Sharia Business Units.

Dimensions of Contemporary Fiqh: Renewal of Law and Reason for Legal Findings on Collateral in Modern *Mudhârabah* Contracts

The existence of collateral called the *rahn* contract in sharia economic law is found in the Al-Qur'an and hadith. In the study of fiqh for the distribution of contracts, *rahn* is viewed based on the name or not of a contract. Furthermore, *rahn* is a *musamah* contract whose name has been determined by *syara'*. Judging by the purpose of the contract, *rahn* is an *at-tausiqat* contract, which aims to bear or give trust to debts. Reviewing the existence of the contract, *rahn* is a *tabi'iyah* contract, i.e., a contract that requires another contract. *Rahn* is not carried out if there is no debt contract. Judging by the nature of the contract on the presence or absence of compensation, *rahn* is a *tabarru'* contract. It is a contract involving non-profit transactions not seeking commercial gain.

In sharia banks, the *rahn* contract aims to repay the bank by providing financing. Goods to be pledged as collateral must meet criteria, namely belonging to the customer himself. Clearly, the size, nature, and value are determined based on the accurate market value and can be controlled.⁶ Provisions related to the sale of collateral (*marhun*) in the *rahn* contract are stipulated in the DSN-MUI Fatwa No. 25/DSN-MUI/III/2002 concerning *Rahn*, which is in line with the provisions in Article 402-403 of the Compilation of Sharia Economic Law (KHES).

Financing at Sharia banks is different from credit at conventional banks. The sharia-based financing rejects bank interests categorized as usury and unlawful in Islam. It is a fundamental difference that makes the character of Sharia bank financing different from conventional banks. Credit in conventional banks is in the form of interest-bearing loans. Meanwhile, financing in Sharia banks has a variety of sharia contracts with various mechanisms. Financing at Sharia banks, as previously mentioned, that is commercial or is allowed to make a profit is based on buying and selling (*murâbahah*, *salam*, and *istishnâ'*), profit-sharing-based financing (*mudhârabah* and *musyâarakah*), and leasing-based financing (*ijârah muntahiyyah bi at-tamlîk*). The results that become income can be in the form of margin (sales and purchase contracts), profit sharing contracts, and *ujrah/fees/rental fees* (lease contracts). The three forms of financing and the benefits obtained are recognized for their existence in sharia economic law as legalized operations. Furthermore, there is another non-profit or social financing, namely lending and borrowing (*qardh*) based financing, i.e., pure money loans without attracting profits. It is forbidden to withdraw profits in this transaction whose application is not in the main product of Sharia banks. This kind of funding based on money loans at Sharia banks can take the form of bailouts and social loans. In essence, this *qardh* contract is applied in conventional

⁶ Monzer Kahf, *Tanya Jawab Keuangan dan Bisnis Kontemporer dalam Tinjauan Syariah*, trans. oleh Nur Cholis (Solo: Aqwam, 2010), 53-4.

banks. Nevertheless, conventional banks make it a commercial finance product. Besides, this error in muamalah makes it a usury transaction which is forbidden.

Such conventional banks, Sharia banks, also apply collateral in financing. This collateral is one part that is analyzed to test the feasibility of financing customers. The existence of collateral in the form of property is known in muamalah fiqh as a *rahn* contract. A *rahn* contract is basically a contract that arises because it is in the form of *dain* (debts), whether it is money debt/loans of money called *qardh* or debts of goods/buying and selling not cash or on an authoritarian basis called *bai' muajjal*. What is practiced by Sharia banks in financing products regarding collateral is comprehensive. It is applied in financing with the principle of buying and selling, profit sharing, and loans. The *rahn* contract, which in the transaction guarantees legal proof of ownership of the goods, is not directly the physical goods handed over. Its existence is recognized in the National Sharia Council (DSN) Fatwa with the mention of *rahn tasjily*.

Collateral is not allowed for trust contracts. These contracts do not encourage an obligation to be responsible for the property of another party when the property is damaged, lost, or reduced (quality and quantity). One of the trust contracts is a *mudhârabah* contract.⁷ This contract is based on trust, with each party in the partnership being an *amen* (trusted) for the other partners. This contract is related to business cooperation. In the classical fiqh perspective on this contract, the legal relationship created is based on mutual trust between the two parties who have a contract and are committed to working together. It is associated with debt guarantees. Moreover, the basic concept is not to ask for collateral. They must trust each other as a foothold and share risks as well. In addition, the form of the transaction is business cooperation with profit sharing, not a day transaction as referred to in the classical fiqh view of the *Rahn* case.

Based on the above principles, the owner of the capital (*shâhib al-mal*) cannot demand any collateral from the capital manager (*mudhârib*) to return the capital or capital with a profit. Suppose the *shâhib al-mal* requires the provision of collateral from the *mudharib* and states this in the contract terms. In that case, the *mudhârabah* contract by the scholars in classical fiqh studies is invalid. It contradicts the basic principles of the *aqd al-amânah* (trust contract) in *mudhârabah*.⁸

Discourse occurs in the practice of *mudhârabah* in Islamic financial institutions and Sharia banking, where the collateral is charged to customers in their operations. *Mudharib* is asked to provide collateral to *shâhib al-mâl* in a *mudhârabah* contract. The provisions in classical fiqh explain that a *mudhârabah* contract is a form of trust contract. It is a contract that occurs with mutual trust or is based on mutual trust. Thus, there is no collateral position in it. This capital participation agreement can be understood as the *mudhârabah* contract was born because of common interest to establish a productive partnership in a productive business accompanied by mutual need and trust. It can be called the trust of the fund owner to the fund manager in managing his funds for a business operation.

Meanwhile, in terms of capital protection, the classical scholars collectively agreed on the prohibition of collateral schemes in *mudhârabah* because it is not relevant to the *mudhârabah* business.

⁷ Lastuti Abubakar, "Implementasi Prinsip Kehati-Hatian Melalui Kewajiban Penyusunan Dan Pelaksanaan Kebijakan Perkreditasi Atau Pembiayaan Bank," *Rechtidee* 13, no. 1 (29 Juni 2018): p. 66, <https://doi.org/10.21107/ri.v13i1.4032>.

⁸ Sahban Sahban, "Esensi Akad Mudharabah Dan Musyarakah Pada Perbankan Syariah Dalam Mewujudkan Keadilan Ekonomi," *Al-Ishlah: Jurnal Ilmiah Hukum* 20, no. 2 (1 November 2017): 45.

Since the *mudhârabah* operates under a profit-sharing scheme, not a loan, collateral is not required.⁹ In the normative study of muamalah fiqh, the *mudhârabah* contract is classified as one of the trust contracts, where the *mudhârib* (capital manager) is categorized as an ‘amin’ or a trustworthy person. Hence, according to fiqh, *mudhârib* is not responsible for potential losses if they occur not due to negligence. Thus, in the study of classical fiqh literature, previous scholars stated that the *mudhârabah* contract should not involve a collateral. The involvement of a collateral can damage the *mudhârabah* contract, which is no longer valid as a *mudhârabah* contract, because the collateral is only known in debt transactions such as the implementation of *qardh* contracts, not in cooperation transactions with profit-sharing patterns such as *mudhârabah* contracts.

Observing the *mudhârabah* contract which is part of the *aqd al-Amânah* which is legally bound by mutual trust, it is natural that in classical studies there are no collateral because relationship building is a relationship of trust. Nevertheless, if assessed, the form of *mudhârabah* contracts contained in classical fiqh studies is in the form of *mudhârabah* contracts that occur between individuals, where a *shâhib al-mâl* (owner of capital) will provide capital to someone he already trusts. The owner of the capital will conjoin with someone whom he already knows and has conviction in that person and, according to his evaluation, can work thriving and reliably. Henceforth, the relationship of trust that causes the *mudhârabah* contract is built.

Therefore, there is a fundamental difference between the classical *mudhârabah* contract and the modern *mudhârabah* contract. The classical *mudhârabah* contract is implemented in the form of transactions between individuals, while the modern *mudhârabah* contract has experienced developments whose implementation is no longer limited to between individuals, but what happens especially in the application of Islamic banking is transactions between institutions and individuals or between institutions. Due to their nature as financial institutions and intermediary institutions, Islamic banks are inclusive. Sharia banks can conjoin and distribute financing with *mudhârabah* contracts to anyone, not only those who have been known for a long time but also those who have only been known after becoming customers on condition that they are declared eligible after going through the feasibility analysis process. Sharia banks will offer *mudhârabah* financing to those who apply for financing and are declared eligible and qualified in the screening process for the feasibility of the financing. With these facts, the imposition of collateral in modern *mudhârabah* contracts in sharia banks has a different implementation context from classical *mudhârabah*, which is widely studied in classical fiqh literature. In this case, there is also a legal reform in the implementation of the *mudhârabah* contract, one of which considers a shift in the form of the transaction.

As part of muamalah activities, the implementation of the *mudhârabah* contract also refers to the rules that have become the basic principles in muamalah, which recite “Basically, all forms of muamalah are permissible unless there are arguments that forbid it.” Through this rule, it shows that there is flexibility and elasticity in muamalah cases or financial transactions that are different from rigid worship cases. As well as the factors that can affect a law or can change a law in the formulation of Ibn Qayyim’s rules, i.e., the factor of changing times, places, circumstances, intentions, and customs.

⁹ Sapuan, Noraina Mazuin, “An Evolution Of Mudarabah Contract: A Viewpoint From Classical And Contemporary Islamic Scholars,” *Procedia Economics and Finance* 35 (2016): 352.

In principle, indeed, Rahn contracts are allowed only on debts (*dain*) which, among other things, arise due to money loan contracts (*qardh*), non-cash sales and purchases (*bai' at taqsith*), or lease contracts (*ijârah*) payment of *ujrah* is not cash. In principle, also in an *aqd al-amânah* (trust contract), one of which is a *mudhârabah* contract, it is not allowed to have a collateral, but nowadays with the implementation of the *mudhârabah* contract, it is no longer only in the form of transactions between individuals but has developed into between institutions and individuals such as Islamic banks. with financing customers so that the trust holders (financing customers) do not deviate from behavior (moral hazard), Sharia banks may request a collateral (*marhûn*) from financing customers as trust holders with the position as capital managers (*mudhârib*). Collateral in a modern *mudhârabah* contract is also different from the position of deposit in a *qardh* contract, where when the borrower is unable to pay the debt, the collateral will be sold to pay off the remaining debt, but the position of the collateral in a modern *mudhârabah* contract aims to avoid the moral hazard of capital managers (*mudhârib*), not to secure investment value in case of loss due to business risk factors. So, if the loss that arises is due to business risk factors, the *mudharib* collateral cannot be confiscated by a sharia bank that is domiciled in *shâhib al-mâl*.

The prohibition of collateral in *mudhârabah* by previous scholars, written in various classical fiqh books, can be understood as a standard form that reflects justice in the legal relationship of *mudhârabah* in the context of place and time. Therefore, collateral in *mudhârabah* financing in Sharia banking is an exception to the general norm caused by various variables that position the parties involved in it as a legal relationship, a particular form of *mudhârabah* that must be understood in the context of place and time. Because as an exception to the general principle, the position of collateral in *mudhârabah* in Sharia banking differs from that of collateral in conventional banking. *Mudhârabah* financing is not debt or borrowing as in conventional banks. Thus, placing collateral in *mudhârabah* financing is not the same as collateral in conventional banking. The collateral position in *mudhârabah* is a guarantee of certainty for business actors not to deviate from the provisions of the mutually agreed agreement.¹⁰ Collateral places business actors responsible by mutual agreement.

In the financial transactions that develop in the modern economy in Sharia banks, such as in the financing with *mudhârabah* contracts in their operations, Sharia banks require collateral from the financing customers. The permissibility of collateral in *mudhârabah* contracts in Sharia banks results from *ijtihad* in contemporary fiqh. *Ijtihad* is the entire effort expended by a *mujtahid* to conclude the rules of sharia to a certain degree of probability from the evidence detailed in the sources.¹¹

Sutan Remi Sjahdeini wrote several reasons for the permitting of collateral from *mudhârib*, namely: (1) there were many users of sharia bank services, so the owners of bank capital cannot know with certainty the credibility and capabilities of *mudhârib*, unlike the practice at the time of the prophet; (2) commitment to the values of *trust* as the reason (*'illat*) does not need collateral, following the situation and conditions of society, in general, has changed, so that the reason (*'illat*) can change; (3) collateral is related to the risk of infringement (*ta'addi'*), negligence (*taqsir*), and violating a predetermined agreement (*mukhalafatuhu al-syuruth*).¹²

¹⁰ Rafidah Rafidah, "Alternatif Solusi Atas Problematika Pembiayaan Mudharabah," *JURNAL SYARIKAH: JURNAL EKONOMI ISLAM* 3, no. 1 (21 Juni 2017): p. 401, <https://doi.org/10.30997/jsei.v3i1.724>.

¹¹ Mohammad Hashim Kamali, *Membumikan Syariah: Pergulatan Mengaktualkan Islam*, trans. oleh Miki Salman (Jakarta: Mizan Publika, 2008), 214.

¹² Sutan Remi Sjahdeini, *Perbankan Syariah: Produk-produk dan Aspek-aspek Hukumnya* (Jakarta: Kencana Prenada Media, 2014),

Adiwarman A. Karim also conveyed the same thing regarding *mudharib* (financing customers) collateral requested by *shâhib al-mâl* (Sharia banks) with the following description: (1) the working system of the bank was a group investment, where they did not know each other. Hence, there was very little chance of a direct and personal relationship. (2) Many investments currently require large amounts of funds, so it took tens or even hundreds of thousands of *shâhib al-mâl* to become funders for a particular project jointly. Furthermore, (3) weak discipline towards Islamic teachings made it difficult for banks to obtain security guarantees for the disbursed capital.¹³ He also stated that the purpose of applying collateral in *mudhârabah* financing was to avoid the moral hazard of *mudhârib*, not to “secure” the investment value in the event of a loss due to business risk factors. Hence, if the losses that arise are due to business risk factors, the *mudhârib* collateral cannot be confiscated by the *shâhib al-mâl*.¹⁴

Fiqh studies that are sensitive to ongoing realities not only enrich the treasures of Islam but can also present legal solutions that are under the demands of the times. The real fiqh or fiqh law is realistic because it departs from reality and does not ignore it. It is built based on reality and does not depart from a vacuum. On the other hand, ijihad functions to justify a social reality so that it must be in line with the journey of the reality of life.¹⁵ The existence of collateral applied to modern *mudhârabah* contracts in Sharia banks is based on the perspective of contemporary fiqh. Argumentatively, various legal opinions about the rationale for legal discovery related to its permissibility and legality. Thus, with the same opinion, namely legal reform in the form of collateral permissibility in *mudhârabah* contracts, the method of legal discovery used as the basis is different.

The first is the reasoning for the discovery of law based on *istihsân*. *Istihsân* means looking good. *Istihsân* in Islamic legal theory is a legal policy or legal exception. The policy is the policy not to apply general rules regarding a case. However, for that case, special provisions are applied as policies and exceptions to general provisions because legal reasons (*dalil*) require adopting such legal policies.¹⁶ Nasroen Harun put forward the *istihsân* thread that became the substance of the various opinions of scholars, namely strengthen *qiyâs khâfi* rather than *qiyâs jâli* because some arguments support it. Furthermore, what is meant by *istihsân* is supporting *juz'iyah* law compared to *kulli* law or general rules based on specific arguments that support it.¹⁷

According to Taufikul Hulam, classical scholars believe that collateral in *mudhârabah* transactions is not necessary because these transactions are based on mutual need and trust. However, to avoid fraudulent practices, Hulam argues that nowadays, the *istihsân* law discovery method is used so that the *mudhârib* is burdened with collateral under applicable regulations.¹⁸ The stipulation of collateral in *mudhârabah* transactions is based on the application of the legal discovery method, which is not intended to override the original law but is based on the principle of using the *istihsân* method.¹⁹

 317-8.

¹³ Adiwarman A. Karim, *Bank Islam: Analisis Fiqih dan Keuangan* (Jakarta: RajaGrafindo Persada, 2008), 198-9.

¹⁴ Karim, 97.

¹⁵ Salim, Moh. Nur, *Fikih Realistis: Kajian Tentang Hubungan antara Fikih dengan Realitas Sosial pada Masa Lalu dan Masa Kini* (Jakarta: HatinuranikuPRESS, 2009), 6.

¹⁶ M. Ma'ruf Abdullah, *Hukum Keuangan Syariah pada Lembaga Keuangan Bank dan Non Bank* (Yogyakarta: Aswaja Pressindo, 2016), 40.

¹⁷ Nasron Harun, *Ushul Fiqh 1* (Jakarta: Logos, 1996), 105.

¹⁸ Taufiqul Hulam, “Jaminan dalam transaksi akad Mudharabah pada perbankan syariah,” *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 22, no. 3 (2010): 520.

¹⁹ Nufi Mu'tamar Almahmudi, “Analisis Implementasi Pembiayaan Mudharabah dalam Perkembangan Hukum Ekonomi Syariah

This method, in principle, prioritizes the goal of realizing the benefits or rejecting the dangers in particular because the general argument requires that the danger be prevented.²⁰

Second is the reasoning of legal discovery based on *mashlahah mursalah*. *Mashlahah mursalah* is divided into two words, namely *maslahah* and *mursalah*. *Maslahah* means benefit or regardless of damage. Meanwhile, *mursalah* means detached or free. Combined with *maslahah mursalah*, it is a benefit whose existence is not supported by *syara'* and also not rejected by *syara'* through detailed arguments.²¹ It is referred to as a *maslahah*. The law established based on this *maslahah* can prevent the *mukallaf* from something that is harmful and will also bring benefits and goodness to the *mukallaf*.²² The permission for *shâhib al-mâl* to ask for collateral from *mudhârib* can be based on the rules of *ushul fiqh*, namely *maslahah mursalah*, which refers to the needs, interests, goodness, and public benefit as long as it does not conflict with the principles and strict arguments of the Shari'a and leads to the common good that does not have a problematic impact and harm other people or parties in general.²³

Third, legal discovery reasoning is based on *sadd adz-dzari'ah*. The existence of collateral in *mudhârabah* financing can be justified in terms of blocking the way customers act undisciplined (*moral hazard*) in the payment process (*default actions*). This method in the study of *fiqh* is known as *sadd adz-dzari'ah*.²⁴ The word *sad* literally means to cover the reproach, cover the damage, and prevent or prohibit. Meanwhile, the word *dzari'ah* means a path that leads to something. Wahbah az-Zuhaili defines *sadd adz-dzari'ah* namely prohibiting and rejecting everything that can be a means to haram, to prevent damage and harm.²⁵ Moreover, the essence of the *dzari'ah* rule is that it connects something beneficial to *mafsadat*. It is meant that someone does a permissible job because it contains a benefit, but the goal he will achieve ends in harm. Consequently, it is correlated with the existence of collateral in the financing of a *mudhârabah* contract which has no collateral because it is included in the *aqd al-amânah* or contract that should be based on the trust of both parties. Furthermore, its existence is a preventive measure against something that will harm, for instance, a customer who defaults with a moral hazard which ultimately causes *non-performing financing* for Sharia banks. Due to the absence of collateral, customers with lousy behavior eventually commit crimes by fraud and run away from the obligation to pay installments.

Fourth is legal discovery reasoning based on *urf*. In addition to the *istihsan*, *mashlahah mursalah*, and *sadd adz-dzari'ah* methods, there is also a study that bases the permissibility of loading this collateral on the *urf* rules with the correlation of the basic *fiqh* rules, which states that "*al-'adah muhakkamah*", i.e. custom can be used (consideration and determination) of law. Latifa's article described that in the meaning of this rule, the collateral, and binding laws that Islam did not explicitly regulate applied to the provisions of these rules and was considered part of *al-'adah*. As long as this *al-'adah* does

di Indonesia," *Al-Huquq: Journal of Indonesian Islamic Economic Law* 2, no. 2 (2020): 224.

²⁰ Iskandar Usman, *Istihsan dan Pembaharuan Hukum Islam* (Jakarta: RajaGrafindo Persada, 1994), p. 20.

²¹ *Mashlahah* seen based on its existence can be classified into three types. One of them is *mashlahah mursalah*. In addition to *mashlahah mursalah*, there are other divisions, namely *mashlahah mu'tabarah* and *mashlahah mulghah*. *Mashlahah mu'tabarah* is a benefit that is supported by *syara'* either directly or indirectly. It means that there is a special argument that forms the basis for the form and type of benefit. Furthermore, there is *mashlahah mulghah* which means a benefit that is rejected by *syara'*, because it is contrary to the provisions of *syara'* or is only considered good by human reason.

²² Mohammad Mufid, *Ushul Fiqh Ekonomi dan Keuangan Kontemporer: Dari Teori Ke Aplikasi* (Jakarta: Kencana, 2016), 117-8.

²³ Sa'adah, "Jaminan Pembiayaan Mudharabah Dalam Perspektif Maslahat," *At-Taradhi: Jurnal Studi Ekonomi* 4, no. 1 (28 Oktober 2013): p. 49, <https://doi.org/10.18592/taradhi.v4i1.90>.

²⁴ Abdul Aziz Munawar Albadri, "Risk Analysis Of Financing Musyarakah Sharia Financial Institutions," *Munic Personal Repec Archive (MPRA) Paper*, no. 88036 (2018): 10.

²⁵ Wahbah az Zuhaili, *al-Wajiz fi Ushûl al-Fiqh* (Damaskus: Dâr al-Fikr, 1999), 108.

not conflict with sharia with the act of “forbidding what is lawful and justifying what is unlawful”, the application of this collateral can be justified in the context of Islamic law. The emphasis is on the formation of law must also see changes in society in changing customs.²⁶

Fifth, through the analysis of *maqāshid sharia*. Muhammad Abu Zahrah stated that the essential purpose of Islamic law is a benefit. Furthermore, in line with this statement, Fathi ad-Darayni said that the laws were not made for the law itself but for the benefit.²⁷ Allah Swt.’s purpose in stipulating the law is to maintain human benefit and avoid *mafsadat* in this world and hereafter. This goal is to be achieved through *taklif*, whose implementation depends on the reasoning of the primary legal sources, i.e., the Qur’an and Hadith.²⁸ Based on the *maqāshid sharia* perspective, Toha Andiko et al. in the book “*Maqashid Syariah dalam Ekonomi Islam*”, said that the legal provisions governing the permissibility of collateral in *mudhārabah* contracts in Islamic Financial Institutions are in line with *maqashid* mandated contracts, i.e., the existence of benefits that arise with risks (*al għunmu bi al-għurmi*).²⁹ The benefits as the goals of this shari’ah include five things: religion, soul, mind, lineage, and property. Everything that contains the protection of these five things is called *maslahah*, and anything that makes the five things disappear is called *mafsadah*. Hence, the existence of collateral in the *mudhārabah* contract on sharia financing in sharia banking will benefit because it is a manifestation of *hifzh al-māl* (guarding property).

Some of the rules of Islamic law (Islamic legal maxim) can also be used as a basis or reinforcement for legal arguments related to collateral issues in modern *mudhārabah* contracts, such as the original legal rule, “Basically all forms of *muamalah* are permissible unless there is an argument that forbids it”³⁰. Furthermore, everything that is useful is lawful and what is harmful is unlawful with the guidance of the Shari’a³¹. Then, the rule of legal progressivity is “Changes in law are based on changes in times, places, and circumstances.”³², “Changes and differences in fatwas according to changes in time, place, circumstances, intentions, and customs”³³, and “changes and differences in fatwas according to changes in time, place, circumstances, intentions, and wisdom thereof”³⁴. Additionally, the rule of benefit “that harm must be eliminated”³⁵. Furthermore, “The law follows the most powerful benefit”³⁶, “Rejecting *mafsadat* (badness) is more important than attracting *maslahat* (good deeds)”³⁷, “Adversity must be prevented as much as possible”³⁸.

²⁶ Fitriani, Ifa Latifa, “Jaminan dan Agunan dalam Pembiayaan Bank Syariah dan Kredit Bank Konvensional”, *Hukum dan Pembangunan* 47, no.1 (2017); 145.

²⁷ Fathi ad-Darayni, *al-Minhāj al-Ushūliyyah fi Ijtihād bi ar-Ra’yi fi at-Tasyri’* (Damaskus: Dār al-Kutub al-Hadīts, 1975), 28.

²⁸ Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos Wacana Ilmu, 1997), 125.

²⁹ Toha Andiko, Suansar Khatib, dan Romi Adetio Setiawan, *Maqashid Syariah dalam Ekonomi Islam* (Yogyakarta: Samudera Biro, 2018), 103.

³⁰ Oni Sahroni, *Fikih Muamalah Kontemporer: Membahas Permasalahan Sosial dan Ekonomi Kekinian*, vol. 3 (Jakarta: Republika Penerbit, 2020), 285.

³¹ Fathurrahman Azhari, *Qawaid Fiqhiyyah Muamalah* (Banjarmasin: Lembaga Pengembangan Kualitas Umat, 2014), 184.

³² Muhlisch Usman, *Kaidah-kaidah Ushuliyah dan Fiqhiyyah* (Jakarta: RajaGrafindo Persada, 1997), 145.

³³ Muhammad bin Abū Bakr bin Qayyim al-Jauziyyah, *I’lām al-Muwaqqi’în ‘an Rabb al-‘ālamīn*, vol. 3 (Kairo: Maktabah al-Kulliyāt al-Azhariyah, 1968), 2.

³⁴ Muhammad bin Husain bin Hasan al-Jaizānī, *Ma’ālim Ushūl al-Fiqh ‘Ind Ahl as-Sunnah wa al-Jamā’ah* (Mesir: Dār Ibn al-Jauzī, 1427), 547.

³⁵ Jalaluddin Abdurrahman, *Lima Kaidah Pokok dalam Fikih Mazhab Syafi’i*, trans. oleh Asywadie Syukur (Surabaya: Bina Ilmu, 1986), 2.

³⁶ Wahbah az Zuhailī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 1 (Damaskus: Dār al-Fikr, 1985), 124.

³⁷ Muhammad Musthafā az Zuhailī, *al-Qawā’id al-Fiqhiyyah wa Tathbīqātihā fi al-Madzāhib al-Arba’ah*, vol. 1 (Damaskus: Dār al-Fikr, 2006), p. 280; Abū al-Hārīts Muhammad Shidqī bin Ahmad al-Burnū al-Ghuzzī, *Al-Wajīz fi Idhāh Qawā’id al-Fiqh al-Kulliyah* (Beirut: Muassasah ar-Risālah, 1996), 265.

³⁸ Ahmad bin asy Syaikh Muhammad az Zarqā, *Syarh al-Qawā’id Fiqhiyyah* (Damaskus: Dār al-Qalam, 1989), 207.

Besides, “Any conditions for the benefit of the contract or required by the contract, then these conditions are allowed.”³⁹

Conclusion

Looking at the economic and legal dimensions of the existence of collateral in modern *mudhârabah* contracts, there is a relationship between risk management, national law, and contemporary fiqh in the imposition of collateral. They are preventive measures for any harm that may occur. Collateral in modern *mudhârabah* contracts in Sharia banking in risk management is a preventive instrument for moral hazard and default actions as part of NPF risk management. In the perspective national law is a preventive instrument representing the implementation of the prudential principle as the principle of sharia banking business activities under the mandate the law and in the perspective contemporary fiqh are preventive instruments for harm whose existence is in line with the *sadd adz-dzarî'ah* principle.

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³⁹ A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Masalah-Masalah yang Praktis* (Jakarta: Kencana, 2006), 137.

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