

## **Islamic Law Review of the Principle of Freedom of Contract in Murabahah Contracts**

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### **Abstract**

In the banking world there is a tendency for standard contracts, in the form of contracts that have previously been determined and determined unilaterally in terms of the content and form of the contract with the intention of being addressed to the public with the same clauses, are continuous and are usually printed and detailed and cannot be negotiated. Likewise, what applies to Bank Aceh Syariah, the contents of the contract are deliberately left blank to give the customer the opportunity to negotiate and are filled in after an agreement is reached. This kind of contract limits the customer and does not provide a balanced position for either party, who basically has the same opportunity to determine what is desired in the contract. The application of the principles of al-hurriyah, fairness and balance between parties in contracts has been limited in banking. For this reason, this writing aims to find out how the process of making a murābahah contract/agreement is, the position of the customer and the Aceh Syariah bank in formulating the murābahah contract and the application of the principle of freedom of contract in the process of making the murābahah contract according to a review of Islamic law at PT. Bank Aceh Syariah Sub-Branch of UIN Ar-Raniry Banda Aceh. This research is categorized as qualitative research based on data collection methods through Library Research and field research. Based on the studies that have been carried out, the results show that the process of making a murabahah contract/agreement at PT. Bank Aceh Syariah does not fully involve the customer, the customer only has the opportunity to read the contract which has been fully prepared by the bank, so that the position of the customer and the bank is not equal. The bank is in a stronger position and can unilaterally determine the contents of the contractual clauses agreed upon, while the customer is in a weak position and must accept all the contents of the clauses that have been determined by the bank. A position like this shows that the principles of freedom, justice and balance in contracts cannot be fully applied in the process of making murabahah contracts/agreements at PT. Bank Aceh Syariah Capem. UIN Ar-Raniry Banda Aceh.

**Keywords:** Contract/Agreement, Murābahah, Bank Aceh Syariah

### **INTRODUCTION**

Islamic law as a legal system which is the standard source for drafting national law contains quite a lot of universal principles. One of them is the principle of freedom of contract which guarantees someone freedom in entering into a contract, where the parties are free to determine its form and content. If the form and content have been agreed

upon, the agreement is binding on the parties who agree to it and all their rights and obligations must be implemented. However, this freedom is not absolute, as long as it does not conflict with the Shari'ah then the agreement is permissible and no authority has the right to cancel it except with the agreement of both parties (Dewi et al., 2007)

Freedom of contract is stated in article 1338 of the Civil Code, paragraph (1), which states that all agreements made legally are valid as law for those who make them. In connection with the article above, article 1320 of the Civil Code explains one of the legal conditions for an agreement, namely the agreement of the parties. Even if there is an agreement between the parties that creates an agreement, there is a possibility that the agreement that has been reached is defective or what is usually called a defect of will or a defect in the agreement, making it possible for an annulment to be requested by the parties who feel disadvantaged by the agreement (Miru, 2007). Likewise, it is based on the source of Islamic law which gives the parties the freedom to carry out an agreement as they wish. If there is an element of coercion and restriction of freedom, it causes the legality of the resulting contract to be null and void or invalid (Dewi et al., 2007).

An agreement between one party and another party is private, only binding on both parties, the other party has no right to interfere in the agreement. A contract or agreement made by the parties must fulfill the legal requirements of the agreement, must not conflict with applicable regulations and the agreement must not arise as a result of coercion, mistake or fraud (Article 1322 of the Civil Code).

Apart from that, in making a contract there must be communication between the parties to the transaction, meaning that every content of the contract to be agreed must be discussed/explained transparently and in detail. There may be no contents of the contract/agreement that are not previously explained or unknown to either party, but appear in a contract. Islamic contract law in principle adheres to the principle of freedom of contract as outlined in the principle of 'an-tarādhin minkum'. An agreement or agreement will be valid and binding on both parties if there is an agreement that is realized in two pillars, namely *ijab* (offer) and *qabul* (acceptance). In this case, a clear statement of will is needed and there must be conformity between offer and acceptance. An agreement must apply the principle of consent both with intention and with deeds, even though consent is hidden in the heart, the indicators and signs can be seen through consent and *qabul*. Before the *ijab-qabul* occurs as the final result and gives rise to legal consequences for the parties, both parties to the agreement must be in an equal or balanced position, meaning that both parties have the same rights and opportunities to express their wishes (Dewi et al., 2007).

In implementing a contract, no party should feel forced to avoid elements that could be detrimental to the parties in making the contract they agreed to (Syahmin, 2006). In the context of an agreement, it is clear that any party to the agreement is not permitted to impose his or her will on another party. If there is coercion by one party against another party, then there has been a violation of freedom of will which results in the agreement not being justified and the contract can be canceled because from the start it is considered that there was never an agreement (Wijdjaya, 2004).

The fact is that the implementation of the murabahah contract/agreement at the Bank Aceh Syari'ah sub-branch of UIN Ar-Raniry Banda Aceh has not fully complied with the provisions of the principle of freedom of contract. This means that this contract/agreement is only made unilaterally by the Bank without giving the customer the opportunity to express his wishes. In general, the murabahah contract has been made and drafted by Bank Aceh Syari'ah into a standard contract and all the contents of the agreement or the consequences of the agreement are not explained to the customer, so that the agreement made by Bank Aceh Syari'ah with all its consequences must be approved by the customer because of his needs. for financing that will be provided by Bank Aceh Syari'ah. For example, the Bank determines all costs relating to third parties even though they are required by Bank Aceh Syari'ah, but these costs are borne unilaterally by the customer, such as notary services used to certify the legality of collateral, legal advisory services, billing services and other services. (Standard Contract for Bank Aceh Syariah Murābahah Agreement, 2011).

In its operations, Bank Aceh Syariah also establishes a margin system that is determined unilaterally by the Bank, without prior negotiation with the customer. Customers are only given several choices in determining the margin set by the Bank in accordance with the financing period. The longer the financing period taken by the customer, the greater the margin determined by Bank Aceh Syariah (Personal Interview, 2013).

In other provisions regarding the time period, method of payment, the bank's release from third parties and several other provisions, the bank stipulates that the customer must bear all costs required in connection with making this agreement, and requires the customer to bind himself to release the bank from all claims and a lawsuit that comes from any party and requires the customer to pay a penalty. If there is a delay in payment by the customer to the bank, if the customer does not carry out his obligations, then the bank can request execution from the District Court (Bank Aceh Syariah Murābahah Standard Contract, 2011).

The implementation of this standard contract, which is made unilaterally, has a positive effect on the bank, where the contract can be used for all customers who wish to apply for financing, without having to create a new contract for each customer who applies for financing. However, this has a negative effect on customers, resulting in the customer's goals and desires not being fulfilled. Therefore, the principle of freedom of contract is a very important principle in making contracts or agreements. The most basic thing is that an agreement made should not be intended to harm the interests of the parties, or other parties outside the agreement. Here it can be seen that the problem for most customers is not in terms of the function of the financial institution, but from the business concept, operational techniques, and the content of the agreement which is burdensome for one of the parties as well as the potential customer's contribution to the limited contract clauses (Wijdjaya, 2004).

## **RESEARCH METHODS**

This research investigates the murābahah contract process at PT. Bank Aceh Syariah Sub-Branch of UIN Ar-Raniry Banda Aceh, focusing on the roles of the customer and the bank in crafting these agreements and how the principle of contract freedom is applied in accordance with Islamic law. Utilizing a descriptive analytical approach, the study employs both primary data, collected through documentation, interviews, and questionnaires at the research site, and secondary data from various sources. The research method involves a qualitative case study with a cross-sectional time horizon, capturing data at a single point in time. The analysis includes several stages: data reduction by identifying key themes and excluding irrelevant information, data display to provide a comprehensive view, and drawing conclusions by comparing the findings with theoretical frameworks and practical applications in Sharia banking. This method aims to offer a detailed, systematic, and accurate depiction of the murābahah contract implementation.

## **RESULTS AND DISCUSSION**

### **Murābahah Contract Making Process at PT. Aceh Sharia Bank**

Business success is largely determined by the contract structure designed by the parties. However, it is unfortunate that the bank formulated the contract without the customer's knowledge and without the presence of the customer, so that the resulting contract did not pay attention to the processes, procedures and norms of correct contract design (drafting contract process) (Personal Interview, 2013). As a process, the contract should ideally be able to accommodate the exchange of interests of the customer and the bank in a fair and equitable (proportional) manner at each phase or stage of the contract, namely through negotiation. The negotiation phase is a 'crucial point' for formulating the exchange of rights and obligations of the parties which will later be binding and must be fulfilled. In the negotiation process, the target or objective of the parties is actually only one, namely reaching an agreement (Hernoko, 2010).

Inmaking a murabahah agreement contract, the bank stated that it had carried out negotiations with the customer, where the bank did not dominate the customer in the agreement, but gave the customer the opportunity to read and understand the contents of the agreement and the consequences that arise as a result of the agreement, namely when the customer signs the contract, despite the time provided is very limited. The bank only explains in general what the customer's responsibilities are in the agreement and of course when the contract is ready (standard contract), as stated in the following murābahah agreement contract (Standard Akad Murābahah Contract PT. Bank Aceh Syariah, 2011):

Article 18

CLOSING

First point: "Before this agreement letter is signed by the customer, the customer acknowledges in truth that the customer has read carefully or read to him the entire contents of this agreement along with all letters and/or documents that are attached

to this agreement letter, so that the customer understands fully everything that will become a legal consequence after signing this agreement."

However, even though the bank has given the customer the opportunity, it is still 'one-sided', meaning that the agreement only states the rights of one party without including the bank's obligations, and instead states the customer's obligations while the customer's rights are not stated. (Sjahdeini, 2009). In making a murabahah agreement contract, the customer is not included, meaning that the contract is not made jointly, only made unilaterally by the bank. In conditions like this it can be said that the customer has no contribution to the contract agreement made unilaterally by the bank (Personal Interview, 2013).

Even though there is genuineness on the part of the customer regarding the murabahah agreement, if a party is in a disadvantaged position and is forced to accept it, then by law the customer who feels disadvantaged by the agreement can request cancellation from the court (Miru, 2010). This kind of standard contract is a form of agreement which theoretically contains debate, especially with regard to the principle of freedom of contract which is related to the terms of the validity of the agreement. In a standard contract, freedom in entering into a contract and giving an agreement to the contract is not carried out as freely as in an agreement made directly by involving the parties in negotiating the terms of the agreement. The application of certain clauses by a party in a stronger position result in a party in a weaker position being greatly disadvantaged or what is commonly known as abuse of circumstances.

Any contract or agreement must be made as well as possible to avoid gharar and injustice on the part of any party. A clause in a contract or agreement that allows changes in obligations that are beyond the control of the parties involved is unfair. The validity of a contract or agreement requires that the motivating and underlying cause must be in accordance with sharia provisions. All contracts or agreements that lower morals or are contrary to public welfare, endanger the person or property of a third party or are prohibited by law, are considered invalid (Anwar, 2007).

### **The Position of the Customer and the Bank in the Formulation of the Murābahah Agreement**

ContractMurābahah agreements that have been formulated and standardized by the bank must be known to the Sharia Supervisory Board (DPS). The matters contained in the agreement or contract must be in accordance with sharia provisions, not because of the bank's interests as a stronger party, although this cannot be compared (Naja, 2011). The reality shows that in murabahah agreement transactions the bank is in a dominant and determining position. With a more dominant position, it is common for the bank to provide a standard agreement, an agreement whose clauses have been determined unilaterally so that they cannot be negotiated by the customer. This situation creates an unequal position and only benefits one party (Ciptawati, 2019).

In this standard contract, two unequal forces are faced between the party who has a strong bargaining position and the party who has a weak bargaining position, so that the party whose position is weak simply accepts all the contents of the standard contract by force. If he tries to bargain with other alternatives, he will most likely suffer the consequences of losing what is needed (Personal Interview, 2013). In formulating the murabahah agreement contract, the bank stated that it had provided a balanced position and equal standing, meaning that the bank gave the customer the opportunity to understand all the contents of the contract before signing. However, this trend shows that agreements in business transactions, especially in banking, do not occur through balanced negotiations between the parties, but rather the bank has prepared a standard contract for the other party (Sjahdeini, 2009).

Theoretically, agreements made unilaterally include disproportionate customer rights and obligations in the contents of the agreement. The disproportionateness of rights and obligations has been the cause of accumulation of rights on the part of banks and accumulation of obligations to customers. This causes the agreement to be unbalanced and deviate from the principles of justice and imbalance in contracts, which should in the agreement uphold the principle of proportionality so that a balanced distribution of exchange of rights and obligations is realized between the parties to the transaction (Sjaiful, 2015).

Even though the principle of freedom of contract has been recognized by the Civil Code, its working capacity is still very loose. This leniency has created inequality and injustice if the parties making the contract are not equally strong or do not have the same bargaining position. As we know, Pancasila emphasizes equality of rights and degrees as stated in the second principle, this also applies to business transactions where parties must not behave arbitrarily towards other parties. If explained further, Pancasila democracy does not want a one-sided or unbalanced agreement whose contents suppress the rights of one another (Atiyah, 1979). From what has been explained above, there is no absolute freedom of contract. This means that the freedom in question is freedom from arbitrariness or unreasonable restrictions and not from immunity from regulatory action to protect the interests of society (Solekhah, 2019).

Because equality is emphasized in Islam, the parties must have the same position in transactions, without discriminating between the parties, even though they have power and position. Any transaction that contains elements of oppression is not justified, even though in fact there is rarely a balance between what is given and received or a balance in bearing risks. If there are conditions that give rise to imbalance or inequality, then the law can regulate the limitations of rights and obligations and straighten out the position of the parties through the regulation of clauses in the murabahah agreement contract with the PT. Aceh Sharia Bank (Dewi, 2005).

### **Implementation of the Principle of Freedom of Contract in the Murābahah Contract Making Process at PT. Aceh Syariah Bank According to Islamic Law Review**

The principles of Islamic law concern agreements that emphasize justice and balance in the positions of the parties. A contract in Islamic law must be based on freedom of contract and the voluntariness of each party entering into the transaction. The principle of freedom of contract is a principle that occupies a central position in contract law, which is the embodiment of a state of freedom (Hernoko, 2010). Djamil stated that Islamic law gives freedom to everyone who enters into a contract according to their wishes, but what determines the legal consequences is religion (Djamil, 2001).

In making contractual agreements *murabahah* at PT. Bank Aceh Syariah, often the principle of freedom of contract is not fully understood, giving rise to the impression of an unbalanced and one-sided pattern of contractual relations (*masyaqqah*), a situation that burdens one of the parties in implementing the contents of the agreement and is beyond the parties' ability and occurs randomly. unexpected and cause fatal losses. The principle of contracts in Islam is that there should be no coercion or threat of conditions that cause a party to feel forced to accept, but when carrying out the contract the parties do so with an open, equal agreement and are involved in drafting the agreement intended by the parties. However, in practice the standard contract has been prepared by the Aceh Syariah bank unilaterally, so that customers do not have the same opportunity to determine what they want in the contract (Nurdin, 2010). Regarding standard contract models and conditions like this, even though they are carried out openly and initialed in front of a notary, these conditions cannot be negotiated. Situations like this show that the application of the principles of freedom, justice and balance in contracts which are known in Islamic Fiqh have been limited and are not fully implemented in the sharia banking system, especially in PT. Aceh Syariah Bank (Personal Interview, 2013).

The sharia basis for aggravating circumstances as a reason for changing the contents of an agreement according to Islamic law is the principles or commonly known as Islamic legal rules, namely the principle that losses must be eliminated (*adh-dhararu yuzal*) and the principle of hardship brings relief (*al-masyaqqah tajlibut at- taisir*) on this basis, then if in carrying out the contract one of the parties experiences difficulties (*masyaqqah*) he is given leeway by giving him the right to request cancellation (*fasakh*) or reduce his obligations (Anwar, 2007). There must be no injustice committed in the agreement and that all transactions are carried out on the basis of likes and consent between each party, there is no pressure, coercion, fraud and misstatement (Dewi, 2005). One sign that Islam really pays attention to issues of justice and provides balanced freedom in carrying out agreements or contracts as a prevention of injustice, certainty of the prohibition of acts of violence against unjust people and the painful threats in this world and the hereafter as stated in the QS. Luqman verse (13): "Indeed He (Allah) does not like people who do wrong" (Zuhaili, 2011).

Freedom of contract must be accompanied with other principles in implementing contracts to consider fairness, it is not permissible to take advantage when the other party is at a disadvantage. This principle also means that the results obtained must be balanced with the efforts made (Ali, 2007). Therefore, the pillar of Islamic economics stands on respect for human nature and nobility which must be perfected with another pillar, namely

justice. Justice in Islamic law is not a secondary principle, but rather the root principle in accordance with the QS. An-Nahl verse 90, which orders to do justice and do good deeds and give to relatives (Qardhawi, 2010).

Basically all humans In Islamic judgment it is free (al-hurriyah) there is no submission except only to Allah SWT, likewise in contracting the customer must not submit to the bank except on the basis of truth, justice and goodness because there is no obedience to creatures in disobedience to the Khaliq, it is on the basis of this principle that freedom and honor for humans are rooted. This freedom is something that arises from humans, not because it is given to someone by the community (Luluk, 2008).

## CONCLUSIONS

The process of making a murabahah contract/agreement at PT. Bank Aceh Syariah does not involve the customer, meaning the contract is made unilaterally by the bank. The contract has been printed in the form of certain forms. The customer only has the opportunity to read and fill in certain informative data with little or no change to the clauses. The customer has the opportunity to negotiate in terms of selecting the financing term, margin provisions, selling price and payment method.

Furthermore, regarding the position of PT. Aceh Syariah Bank and customers in formulating contracts *murabahah* not balanced. The bank is in a strong position, while the customer is in an uncertain position. With a decisive position, it is usually the bank that provides the standard agreement. An agreement that contains the rights of only one party without stating the obligations of the bank parties and instead only states the obligations of the customer while what the customer's rights are is not stated.

In other cases, it is related to the implementation of the principle of freedom of contract in the contract making process *murabahah* PT. Bank Aceh Syariah viewed from the perspective of an Islamic law agreement, the bank does not fully implement the principles of justice, legal equality and balance of position of the parties, meaning that in the process of making a contract, the customer is not given the same opportunity to participate in the formulation of the murabahah contract/agreement. Customers are only given a few opportunities to bargain and negotiate the contents of contracts/agreements on certain matters only.

### Suggestion

Based on the research that has been carried out, researchers suggest to PT. Bank Aceh Syariah has made a revision in formulating the murabahah agreement contract by first negotiating openly with the customer, so that the resulting contract places more emphasis on the proportion of equal distribution of rights and obligations and takes place in a proper and appropriate manner.

Apart from that, in formulating the contract the customer agreement must be presented and each party studies the provisions contained in the contract. In this way, the customer can know all the consequences that arise as a result of the agreement, so that the customer agrees to the contract not because of compulsion or pressure from their needs. A contract with all its contents that has been made is binding to be fulfilled and it

is the obligation of the parties to carry it out. So, in implementing the murabahah agreement that has been made, it is best not to impose absolute burdens on the customer or burden the customer with all the clauses, but the bank must also pay attention to the customer's rights in the contract/agreement where the contents of the contract are not entirely dominated by the bank. In this way, the realization of fairness in contracts is created, a relationship that is equal, impartial and fair, and that the contractual relationship that occurs between the bank and the customer can take place in a proportional (balanced) and fair manner.

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