Dispute Resolution of Collateral Sale in *Murābahah* Contract

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Abstract: This study analyzes Case No. 5/Pdt.GS/2021/PA.Sbg, addressing a contentious issue concerning the sale of collateral by the debtor. The sale of collateral occurred without the acknowledgment of the plaintiff's claims regarding the seizure of the collateral and the establishment of auction rights. This research investigates the dispute surrounding a default under a *Murābahah* contract as discussed in the decision rendered by the Subang Religious Court (Case No. 5/Pdt.GS/2021/PA.Sbg). Furthermore, the study explores the application of Sharia economic law in the resolution of collateral ownership transfer, as outlined in the court's decision. A normative legal methodology is employed, incorporating case law, statutory provisions, and conceptual analysis. The findings are as follows: first, the plaintiff's lawsuit in Case No. 5/Pdt.GS/2021/PA.Sbg centered on the defendant's default in settling the financing agreement within the stipulated timeframe and the subsequent discovery of collateral sale. Second, the legal reasoning in Decision No. 5/Pdt.GS/2021/PA.Sbg is based on Islamic principles (Al-Qur'an), Fiqh rules, the Civil Code (KUH Perdata), the Civil Procedure Law (HIR), Law No. 4 of 1996 concerning Mortgage Rights, and Law No. 37 of 2004 regarding Bankruptcy and Suspension of Debt Payment Obligations. Finally, the settlement of the case demonstrates the court's adherence to the principle of justice by granting the defendant an extension to fulfill the contract, in alignment with Q.S. Al-Baqarah verse 280. However, the case resolution did not fully apply the principles of justice, utility, and legal certainty in a balanced manner.
Keywords: Collateral, *Murābahah*, Court Decision, Default Dispute

Abstrak: Penelitian ini menganalisis Perkara No. 5/Pdt.GS/2021/PA.Sbg, yang mengangkat isu kontroversial mengenai penjualan jaminan oleh debitur. Penjualan jaminan tersebut terjadi tanpa adanya pengakuan terhadap klaim penggugat terkait penyitaan jaminan dan pembentukan hak lelang atas jaminan tersebut. Penelitian ini bertujuan untuk mengkaji sengketa terkait wanprestasi dalam kontrak *Murābahah* seperti yang dibahas dalam putusan Pengadilan Agama Subang (Perkara No. 5/Pdt.GS/2021/PA.Sbg). Selain itu, penelitian ini juga mengkaji penerapan hukum ekonomi syariah dalam penyelesaian peralihan kepemilikan jaminan sebagaimana yang tercantum dalam putusan yang sama. Metode hukum normatif digunakan dalam penelitian ini, dengan pendekatan kasus, perundang-undangan, dan konseptual untuk memberikan pemahaman yang jelas mengenai permasalahan yang diteliti. Berdasarkan temuan penelitian, dapat disimpulkan sebagai berikut: pertama, gugatan penggugat dalam Perkara No. 5/Pdt.GS/2021/PA.Sbg difokuskan pada wanprestasi tergugat yang tidak menyelesaikan perjanjian pembiayaan dalam jangka waktu yang disepakati dan penemuan penjualan jaminan oleh tergugat. Kedua, pertimbangan hukum dalam Putusan No. 5/Pdt.GS/2021/PA.Sbg didasarkan pada Al-Qur'an, kaidah fiqh, Kitab Undang-Undang Hukum Perdata (KUH Perdata), Hukum Acara Perdata (HIR), Undang-Undang No. 4 Tahun 1996 tentang Hak Tanggungan, serta Undang-Undang No. 37 Tahun 2004 tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang. Ketiga, penyelesaian perkara ini mengedepankan prinsip keadilan dengan memberikan perpanjangan waktu untuk memenuhi perjanjian, yang sejalan dengan Q.S. Al-Baqarah ayat 280. Namun, penyelesaian perkara ini belum sepenuhnya menerapkan prinsip keadilan, kemanfaatan, dan kepastian hukum secara proporsional.
Kata Kunci: Jaminan, *Murābahah*, Putusan Pengadilan, Sengketa Wanprestasi

Introduction

Murābahah are the cornerstone of Islamic banking financing in Indonesia.[1] According to Sutan Remy Sjahdeini,[2] investment products and *Murābahah* financing are estimated to be the dominant products in Indonesia, covering more than 80% of the market. Research related to *Murābahah* financing shows an increase in the average amount of financing, despite the impact of the Covid-19 pandemic in 2020. According to Afkar & Purwanto,[3] *Murābahah* financing products are the most prevalent form of Islamic financing.

The growing popularity of *Murābahah* financing products, a cornerstone of Islamic banking,[4] has also introduced potential legal challenges for Islamic banks, particularly for BPRS (Bank Pembiayaan Rakyat Syariah/Sharia Microcredit Bank). These legal risks stem from the inherent nature of *Murābahah* transactions, where banks may face bad debts and defaults, either intentionally or due to customer bankruptcy. The installment payment structure of *Murābahah* financing further exposes Islamic banks to the risk of non-payment and disputes.[5]

Islamic banks often require collateral from customers to mitigate these risks, with specific requirements depending on the type of collateral provided.[6] However, even with collateral, Islamic banks can still face legal challenges related to imperfect collateral binding, the prosecution of guarantors, and the credibility of the collateral itself.[7] These legal issues can severely affect Islamic banks, potentially leading to license revocation and business closure. Therefore, effective risk management strategies are crucial for Islamic banks to navigate the legal landscape associated with *Murābahah* financing.[8]

Recent studies underline the need of strong dispute resolution systems for *Murābahah* contract collateral sale. Particularly with respect to collateral sold to settle defaults, several studies have investigated how Islamic law controls these disputes. Often starting with party deliberation and agreement, these systems seek to prevent official litigation. On the other hand, if such informal initiatives fail, conflicts could rise to arbitration or perhaps litigation via religious courts run under Islamic values and provide a forum for resolving disputes consistent with Shariah law.[9]

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[1] Hawa Gazani, Binti Nur Asiyah, and Nurul Hidayah, "Market Share Factors of Sharia Banks in Indonesia and Malaysia," *Al-Muamalat: Jurnal Ekonomi Syariah* 11, no. 1 (January 31, 2024): 16–32, https://doi.org/10.15575/am.v11i1.33550; Sakinah Maulidah Mastniah Amin and Tiara Juliana Jaya, "The Effect of Bank Performance and Macroeconomics on the Profitability of Indonesian Sharia Commercial Banks," *Al-Muamalat: Jurnal Ekonomi Syariah* 11, no. 1 (January 31, 2024): 95–114, https://doi.org/10.15575/am.v11i1.34141.

[2] Sutan Remy Sjahdeini, *Perbankan Syariah: Produk-produk dan aspek-aspek hukumnya* (Jakarta: Kencana, 2014), 191.

[3] Taudlikhul Afkar and Teguh Purwanto, "Penyaluran Dana Bank Syariah Melalui Pembiayaan Murabahah, Istishna, Dan Ijarah Sebelum Dan Selama Pandemi Covid 19," *Jurnal Ilmiah Ekonomi Islam* 7, no. 2 (July 1, 2021), https://doi.org/10.29040/jiei.v7i2.2423.

[4] Islamic banks face various operational risks, including financing risk, liquidity risk, market risk, and capital risk. See: Veithzal Rivai and Andria Permata Veithzal, *Islamic Financial Management: Teori, konsep dan aplikasi panduan praktis untuk lembaga keuangan, nasabah, praktisi, dan mahasiswa* (Jakarta: Rajawali Press, 2008), 623; Muhamad, *Manajemen Bank Syari'ah* (Yogyakarta: Unit Penerbit dan Percetakan AMP-YKPN, 2002), 357.

[5] Muhamad, *Manajemen Bank Syari'ah*, 357–59.

[6] The most commonly used collateral binding is Mortgage Rights for land and building collateral. Then for movable goods use Fiduciary Guarantee. There are others such as pawn, ship mortgage and warehouse receipt. See: Salim H. S, *Perkembangan Hukum Jaminan Di Indonesia* (Jakarta: Rajawali Pers, 2014).

[7] Muhamad, *Manajemen Bank Syari'ah*, 366.

[8] Nur Dinah Fauziah Syahrul Hanafi, "Profil Dan Penerapan Manajemen Risiko Di Bank Syariah," *Al-''Adalah : Jurnal Syariah Dan Hukum Islam* 2, no. 2 (July 10, 2017): 128–40, https://doi.org/10.31538/adlh.v2i2.421.

[9] Selvi Aprilia and Anajeng Esri Edhi Mahanani, "Analisis Perjanjian Kredit Syariah Dikaitkan Dengan Mekanisme Penyelesaian Sengketa Di PNM Mekaar Syariah," *Jurnal Hukum Bisnis Bonum Commune* 6, no. 2 (2023): 94–108, https://doi.org/10.30996/jhbbc.v6i2.9238; Riska Fauziah Hayati and Abdul Mujib, "Dispute Resolution on Muḍārabah Musytarakah Contract on Sharia Insurance in Indonesia: Between Regulation and Practice," *El-Mashlahah* 12, no. 1 (June 30, 2022): 14–36, https://doi.org/10.23971/elma.v12i1.3795.

Studies indicate that collateral in *Murābahah* contracts is a vital security tool for the bank in case of debtor default. National laws like the Sharia Banking Law and fiduciary laws control the legal framework around collateral, therefore guaranteeing the enforceability of these agreements.[10] Still, especially as defaults are not always connected to bad purpose but might arise from unanticipated events like bankruptcy, the danger of default stays notable even with these systems in place.[11]

Many studies have also looked at how Sharia Arbitration Boards settle such conflicts outside of official court systems. These entities offer a more Sharia-compliant and flexible option to traditional litigation.[12] In cases of default, the use of collateral—including properties like gold or other assets—is frequently questioned as its sale or seizure may create ethical and legal questions, especially about the fairness and openness of these transactions under Sharia law.[13]

One of the developing problems is the difficulty Islamic banks have when collateral is sold without prior consent or when the collateral itself is not adequately recorded, therefore generating legal ambiguity. Recent cases have highlighted this problem especially, as they call into question the validity of the collateral sale and cause legal conflicts in religious courts.[14]

BPRS Gotong Royong's situation is a clear reminder of the mounting difficulties in *Murābahah* financing. Though it dominates the market, BPRS suffered significant financial trouble from wrongly applied risk management policies. The resulting legal dispute over collateral sale in *Murābahah* contracts, especially during the liquidation process, underline the urgent need for more rigorous rules and unambiguous enforcement tools.

As explained later, the dispute over the debtor's sale of collateral in the Subang Religious Court has more complicated the handling of defaults. This case highlights the changing character of *Murābahah* financing disputes, particularly as they relate to the sale of collateral and the role of religious courts in deciding these matters.

BPRS Gotong Royong is a prime example of an Islamic bank facing these risks. The OJK determined in 2019 that BPRS Gotong Royong should be included in the BPRS under special oversight because its minimum equity ratio fell below 4%. The OJK also assessed that the financial health level of BPRS had reached an unhealthy level. Consequently, the OJK issued a deadline for the Management/Shareholders to recover.[15]

BPRS Gotong Royong was unable to exit the special oversight status by the beginning of 2020. The bank's financial condition continued to deteriorate due to poorly implemented prudential principles in distributing funds, and internal problems within

[10] Muhammad Yadi Harahap, "Pembebanan Jaminan Atas Benda Benda Tidak Bergerak Dalam Kontrak Pembiayaan Mudharabah Perspektif Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan," *JURISDICTIE* 11, no. 1 (June 3, 2020): 139, https://doi.org/10.18860/j.v11i1.6692; Nur Hidayah, Moch. Bukhori Muslim, and Abdul Aa Azis, "Jaminan Fidusia Dalam Pembiayaan Murabahah: Antara Jual Beli Dan Hutang Piutang," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (December 1, 2021): 187–200, https://doi.org/10.24090/mnh.v15i2.5243.

[11] Munawar Khalil and Ismaulina Ismaulina, "Considering Murabahah Gold Financing Practice in Aceh with Reference to Islamic Banking and Sharia Pawnshop," *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 46, no. 2 (December 31, 2022), https://doi.org/10.30821/miqot.v46i2.915.

[12] Diding Jalaludin, "Exequatur of Sharia Economic Sector Arbitration Awards in The National Legal System," *Al-Muamalat: Jurnal Ekonomi Syariah* 10, no. 2 (July 31, 2023): 113–20, https://doi.org/10.15575/am.v10i2.24469.

[13] Evi Eka Elvia et al., "BASYARNAS as a Place for Dispute Resolution of Musyarakah Financing in Sharia Banking in the Disruption Era," *El-Mashlahah* 13, no. 1 (June 30, 2023): 39–56, https://doi.org/10.23971/el-mashlahah.v13i1.5345.

[14] Khalil and Ismaulina, "Considering Murabahah Gold Financing Practice in Aceh with Reference to Islamic Banking and Sharia Pawnshop."

[15] Otoritas Jasa Keuangan, "Siaran Pers: OJK Cabut Izin Usaha BPRS Gotong Royong Kabupaten Subang," ojk.go.id, May 6, 2020, https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Pages/Siaran-Pers-OJK-Cabut-Izin-Usaha-BPRS-Gotong-Royong-Kabupaten-Subang.aspx.

BPRS proved difficult for the controlling shareholders to resolve. As a result, in 2020, OJK revoked BPRS's registration.[16]

The Deposit Insurance Corporation (Lembaga Penjamin Simpanan, abbreviated as LPS), an independent legal entity authorized by law to handle failed banks,[17] is conducting liquidation proceedings after the OJK officially revoked its business license. During the liquidation process, the LPS Liquidation Team encountered several legal problems and disputes, including defaults on *Murābahah* contracts. At least five disputes arose, which were settled at the Subang Religious Court. The case files are registered with the following numbers: 1/Pdt.GS/PA.Sbg, 2/Pdt.GS/PA.Sbg, 3/Pdt.GS/PA.Sbg, 4/Pdt.GS/PA.Sbg, and 5/Pdt.GS/PA.Sbg.

One of the successful cases decided by the Subang Religious Court was case number 5/Pdt.GS/PA.Sbg, filed on June 4, 2021. The case involved the Liquidation Team of PT BPRS Gotong Royong Subang Regency (Plaintiff), represented by a Support Personnel, suing a housewife from Subang (Defendant). The lawsuit stemmed from the Defendant's default on a *Murābahah* contract financing facility. As per the agreed-upon contract, the Defendant's debt matured on October 9, 2020, with outstanding arrears of Rp. 38,839,961. The Plaintiff sought immediate and unconditional payment from the Defendant through the Subang Religious Court.

Decision No. 5/Pdt.GS/2021/PA.Sbg sheds light on an intriguing issue regarding the collateral associated with the *Murābahah* contract. The plaintiff, seeking to recover the outstanding debt, requested the seizure (*conservatoir beslag*) of the land and building offered by the defendant as collateral. Additionally, they sought the right to auction the property publicly. However, the court initially denied the seizure request in an interlocutory decision. This denial stemmed from the fact that the collateral, according to the defendant, had already been sold to a nephew to settle the very financing agreement. While this sale aimed to resolve the debt, it led to further payment issues.

The defendant's sale of the collateral formed the basis for the court's decision to deny the defendant's request for the seizure. The primary purpose of the seizure of collateral is to safeguard the enforceability of a final judgment by preventing the dissipation of assets. As Sutantio & Oeripkartawinata[18] explain, that seized assets can be readily subjected to execution to fulfill the court's verdict and protect the plaintiff's interests.

This unauthorized sale by the defendant creates new complexities. The LPS Liquidation Team, representing BPRS Gotong Royong, now faces challenges in directly seizing the collateral. Furthermore, the legal status of the nephew, the third-party buyer, is unclear, potentially exposing them to legal uncertainties and financial losses. The sale also raises questions regarding the ownership rights to the property.

The complexities of this case around a *Murābahah* contract default warrant further investigation. Key questions remain unanswered, including the final court decision and the judge's reasoning. Additionally, uncertainties exist regarding the enforceability of collateral seizure and the regulations governing the sale of collateral in *Murābahah* contracts. The legality of the defendant's sale and the court's perspective on using this sale for debt settlement requires a further analysis based on Sharia principles and Indonesian law. Finally, a critical evaluation is needed to determine if the final settlement aligns with Sharia economic principles.

Research Methodology

[16] Otoritas Jasa Keuangan.

[17] The Deposit Insurance Corporation is an independent legal entity authorized by law to conduct settlement and handling related to failed banks. See: Article 6 of Law Number 24 Year 2004 on Deposit Insurance Corporation.

[18] Retnowulan Sutantio and Iskandar Oeripkartawinata, *Hukum Acara Perdata Dalam Teori Dan Praktek* (Bandung: Mandar Maju, 1989), 91.

This study adopts a normative legal methodology, employing case, statutory, and conceptual approaches.[19] These methodologies are utilized to uncover and clarify the norms related to the research problem, as well as to generate a thorough, comprehensive, and precise analysis and argumentation. Data collection involves a range of legal sources, including decisions from religious courts, relevant legislation, scholarly works (such as books, journals, theses, and dissertations), and document reviews. The primary data collection techniques are document studies and literature reviews.

The core focus of this research is judicial decisions. However, legal concepts or doctrines that serve as the basis for the decision-making process (*ratio decidendi*) are also explored.[20] The judicial decision examined in this study is Subang Religious Court Decision No. 5/Pdt.GS/2021/PA.Sbg, which pertains to a simple Sharia economic lawsuit involving the default of a *Murābahah* contract.

An analysis is conducted on this decision to critique the judge's reasoning. The judge's considerations are examined through a coherence model between the elements and a critical model to evaluate the adequacy or inadequacy of the legal reasoning applied. Additionally, all research findings are further scrutinized to reveal aspects of justice, utility, and legal certainty within the decision.

The study also focuses on the issue of collateralization addressed in the decision. It aims to identify a concrete law (*hukum in concreto*) concerning the sale of collateral, as discussed in the decision, which is grounded in an abstract legal norm (*norma hukum abstracto*). Consequently, the abstract legal norm functions as the major premise, with the relevant legal facts from the case serving as the minor premise.[21]

Results and Discussion

Legal Considerations of The Panel of Judges in Decision No. 5/Pdt.GS/2021/PA. As for the Default of the *Murābahah* Contract

Fuadah[22] explains that the considerations of law section in a civil court judgment analyze several key aspects. First, the court identifies which arguments presented by both parties are accepted and which are rejected. Second, it defines the core issue of the case. Third, the court performs a legal analysis of the facts presented during the trial. Fourth, the legal reasoning must be presented logically, systematically, and in a way that demonstrates clear connections between each point. Fifth, every legal consideration applied needs to be thoroughly justified. Sixth, the court must meticulously examine each claim made by the plaintiff to ensure a conclusion that reflects all aspects of those claims. Finally, the judge's decision must be strictly based on the claims presented and cannot go beyond their scope.

Fuadah[23] further clarifies that both the considerations of law and the operative part of the judgment constitute its binding legal force (*bidende kracht*). The considerations of law section details the judge's reasoning on the plaintiff's claims, the defendant's defenses and/or exceptions, and how these arguments connect to all the evidence presented. Based on this analysis, the judge determines whether the plaintiff's claims have been proven. Following this, the legal basis for the decision is presented. This includes the legal arguments, Islamic law principles (if applicable), statutes, and doctrines that support the judge's reasoning[24].

1. Evidence

19 I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Prenada Media, 2016), 156–68.

20 Diantha, 95.

21 Faisal Ananda Arfa and Watni Marpaung, *Metodologi Penelitian Hukum Islam* (Jakarta: Kencana, 2016), 43.

22 Aah Tsamrotul Fuadah, *Hukum Acara Peradilan Agama Plus Hukum Acara Islam Dalam Risalah Qadha Umar Bin Khattab* (Depok: Rajawali Pers, 2019), 74.

23 Fuadah, 160.

24 Fuadah, 161.

The plaintiff in filing the lawsuit submitted 11 letters as evidence to strengthen the arguments of his lawsuit. Against all the letter evidence, the judge analyzed and considered it. The following are the results of the judge's analysis and consideration of the evidence:

Firstly, Exhibits P.1 through P.4 establish the plaintiff's legal standing (*persona standi in judicio*) by demonstrating their official appointment as the government-recognized liquidation team. Additionally, these letters confirm the existence of a Sharia agreement regarding the defendant's proposed financing, allowing the case to proceed formally.

Second, Exhibit P.5 verifies the defendant's identity (acknowledged by the defendant), ensuring the lawsuit is not misdirected. It also proves the defendant applied for, signed a contract for, and received funding, solidifying their jurisdiction under the Subang Religious Court (as per Article 66 of the Religious Courts Act) for formal case consideration.

Thirdly, Exhibit P.6 details the goods pledged by the defendant, which were previously subject to a seizure application (*conservatoir beslag*) and described in an interlocutory decision with amendments. However, the validity of P.6 hinges on the court's decision regarding the seizure application.

Fourthly, Exhibit P.7 represents the plaintiff's attempt to formally enforce their claim through a notification letter.

Fifthy, Exhibits P.8 through P.10 document the plaintiff's debt enforcement steps taken in response to the defendant's default.

Sixthy, Exhibit P.11 is a record of the plaintiff attempting to visit the defendant as a reminder of their outstanding obligations.

2. Categorization of Legal Considerations based on the Lawsuit

As stipulated in Article 178 of the *Herziene Inlandsch Reglement* (HIR) and Article 189 of the *Rechts Reglement Voor de Buitengewesten* (RBg), a valid judgment must adhere to the following fundamental principles:

Article 178 HIR

Judges because of their position when deliberating are obliged to suffice all legal reasons; which are not stated by both parties.
The judge is obliged to adjudicate on all parts of the claim.
He is not allowed to decide on a matter that is not sued, or give more than what is sued.

Article 189 RBg

In the deliberation meeting, the judge must, by his office, add legal grounds not raised by the parties.
He must rule on all parts of the claim.
He is prohibited from ruling on matters not pleaded or granting more than is pleaded.

According to Article 178 of the HIR and Article 189 of the RBg, a court decision must contain a clear, detailed, and adequate statement of reasons (*onvoldoende gemotiveerd*). The term "legal reasoning" here refers to the articles or sections of a regulation that form the basis of the plaintiff's claim. This requires judges to explain the legal grounds for granting or rejecting a claimant's request.

In addition, these articles require that a court decision, or in this context, the legal reasoning part of a decision, must address each part of the plaintiff's claim. If a lawsuit contains multiple claims by the plaintiff, the judge must decide and rule on each of those claims.

The final criterion is that a judge may not rule on a claim that is not part of the plaintiff's claim. An example to illustrate this point could be if the plaintiff seeks repayment of money from a loan agreement and the court grants that request, but

the plaintiff does not request a penalty for late payment. In this situation, the judge is prohibited from adding a requirement for the defendant to pay a penalty because it was not explicitly requested by the plaintiff.

In assessing the principle that a court decision must address each part of the claim, reframing the legal considerations by categorizing them based on the lawsuit is useful. This provides a clearer understanding of the reasoning behind each part of the judgment.

The first claim is the demand that the court accept and grant the plaintiff's claim in its entirety; The judge considers the principles of justice, expediency, and public interest as the objectives of law, in line with the Qur'an, Surah An-Nisaa, verse 58:

..وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِ..

English Sahih Internasional
"...when you judge between people to judge with justice..."

In his considerations, the judge opined that the plaintiff's claim must be weighed against the defendant's capacity as stated in its response, in accordance with a sense of justice and balance between the two. The judge reasoned that since the lawsuit filed was a Sharia economic lawsuit based on Islamic values derived from the Qur'an, Hadith, Ijma, and Qiyas, the judge had the authority to exercise *Ijtihad* (independent reasoning) in deciding the case. Based on these considerations, the judge declared that the plaintiff's claim was granted in part and denied in part.

The second claim is a request that the court declare the defendant's actions (promise/default of contract) toward the plaintiff to be legally valid; In his reasoning, the judge stated that the defendant's admission of the plaintiff's claim, together with the exhibits P.1 to P.11, constituted incriminating and irrefutable evidence.

The defendant, as the debtor, is obliged to perform the obligation, if it is still performable, or to cancel it with compensation in accordance with Article 1267 of the Civil Code. The confession of the defendant constitutes perfect evidence in accordance with Article 174 of the HIR, so that no further evidence is required.

The third claim is a demand that the court declares the *Murābahah* financing agreement No. 052/AP-MRBH/XI/2018 dated October 9, 2018, to be valid and binding, with all its legal consequences; The legal considerations for this claim are implicitly contained in the considerations of the other claims.

The fourth claim is a demand that the court order the defendant to pay in full, immediately and without condition, the entire remaining financing debt to the plaintiff in the amount of Rp. 38,839,961,- (Thirty-eight million eight hundred thirty-nine thousand nine hundred sixty-one rupiah).

The judge opined that based on the principles of Islamic law, the *Murābahahh bil wakalah* contract between the plaintiff and the defendant is a "*Pacta Sunt Servanda*" (agreement must be fulfilled). Furthermore, if the resulting obligation is reciprocal, the creditor may demand termination or cancellation through the court (Article 1266 of the Civil Code) in accordance with the fiqh principle that states:

اَلْمُسْلِمُوْنَ عِنْدَ شُرُوْطِهِمْ

"A Muslim is bound by the covenant he made."

Based on all the considerations, the judge concludes that the plaintiff's claim is a simple Sharia economic claim for breach of promise/default of the contract, which is established and has sufficient grounds if the deadline for performance specified in the agreement has fallen due and is accompanied by a summons or warning letter

from the creditor. The defendant, as the debtor, is obliged to pay compensation for the losses suffered by the creditor (Article 1243 of the Civil Code).

The fifth claim is a demand for the guarantee of full payment of the defendant's obligations as a financing customer. The debt collateral is in the form of land and buildings located thereon based on Certificate of Ownership (*Sertifikat Hak Milik*, abbreviated as SHM) No. 660 Tambakmekar Village located in Sukamaju, Tambakmekar Village, Jalancagak District, Subang Regency, West Java Province; Land Measurement Letter No. 351/Tambakmekar/2019 dated January 23, 2019, registered in the name of the attached Defendant is subject to seizure of collateral.

Regarding the application for seizure of collateral that has been submitted, the judge conducted a preliminary examination before the examination of the main case. The results of the examination of the seizure of collateral that has been carried out in a question-and-answer session have been decided in an interlocutory decision No. 5/Pdt.GS/2021/PA.Sbg dated June 30, 2021, with the following orders:

1. To reject the plaintiff's application for seizure of collateral (*conservatoir beslag*/CB);
2. To order the parties to continue the proceedings of this case;
3. To postpone the costs of the case until the final decision.

In the legal considerations, it was stated that the application for seizure of collateral was determined after a preliminary hearing. Because the defendant in the interlocutory decision hearing No. 5/Pdt.GS/2021/PA.Sbg has been proven during the visit to be aware of the pledged goods to the plaintiff in the sales process so that it has been related to a third party, the judge must declare the application for seizure of collateral for the pledged goods to be rejected.

The sixth claim demands that the court declare the plaintiff's right to sell at public auction the collateral in the form of land and buildings thereon based on Certificate of Ownership No. 660 Tambakmekar Village located in Sukamaju, Tambakmekar Village, Jalancagak District, Subang Regency, West Java Province; Land Measurement Letter No. 351/Tambakmekar/2019 dated January 23, 2019, registered in the name of the defendant;

The Panel of Judges considers that with the proven breach of promise/default by the defendant for approximately one year, the plaintiff, in accordance with the defendant's willingness and consent, may conduct an open auction in public of the collateral goods/assets in the deed in question, even though the goods are in the process of being sold, which is known to the plaintiff.

The Judge based his decision on the special position of the creditor holding the Mortgage Right in accordance with the principle of "*droit de preference*". The Judge also stated that the creditor holding the Mortgage Right is still entitled to auction the said object even though it has been transferred to another party in accordance with the principle of "*droit de suite*". In essence, the Mortgage Right regulated in Law No. 4 of 1996 on Mortgage Rights (UUHT) grants a special privilege to the creditor as a preferred creditor. Meanwhile, the holder of a mortgage right who is also a separatist creditor has a position that is separated from other creditors in the event of bankruptcy experienced by an individual or legal entity debtor as stipulated in Law No. 37 of 2004 concerning Bankruptcy and Suspension of Payment of Obligations.

The seventh claim demands that the court declare that the decision of this case can be executed immediately even though there is an appeal, cassation, and verzet; The *a quo* case is included in a simple Islamic economic lawsuit that has a very short legal remedy. Therefore, the request for immediate execution is not significant in the execution of the *a quo* case. With that, the request for immediate execution is rejected.

The eighth claim demands that the court order the defendant to pay the costs of the proceedings; The plaintiff argues that the defendant has been proven to be the guilty party. Therefore, based on Article 181 of the HIR (Herziene Inlands Reglement), all costs of the proceedings incurred shall be borne by the defendant, the amount of which shall be determined in the judgment.

In addition to the legal considerations categorized above, the panel of judges also used the following legal bases as formal requirements for examining the case, namely:

First, Article 49 paragraph (i) of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Courts, vide explanation of Article 49 on point (h), in conjunction with Law No. 21 of 2009 Concerning Islamic Banking. This legal basis is used to state that the religious court has the authority to handle Islamic economic cases, in this case, the Subang Religious Court.

Second, Article 130 HIR, in conjunction with Articles 65 and 82 of Law No. 7 of 1989 concerning Religious Courts which has been amended by Law No. 50 of 2009 in conjunction with Article 39 paragraph (1) of Law No. 1 of 1974 in conjunction with Article 31 paragraphs (1) and (2) of Government Regulation No. 9 of 1975 in conjunction with Article 143 of the Compilation of Islamic Law. This legal basis relates to the judge's obligation to mediate between the parties in each hearing. With that, the judge tried to mediate but was unsuccessful. Efforts to mediate simple claims, outside the provisions of Supreme Court Regulation of the Republic of Indonesia Number 01 of 2016 concerning Mediation Procedures in Court.

Third, Supreme Court Regulation of the Republic of Indonesia No. 14/2016 in conjunction with Supreme Court Regulation of the Republic of Indonesia No. 4/2019. This legal basis relates to simple Islamic economic claims. The claim can be declared as a simple Islamic economic claim and in accordance with the applicable Supreme Court regulations.

A Critical Review of The Legal Considerations in The Decision No. 5/Pdt.GS/2021/PA. Sbg

In Case No. 5/Pdt.GS/2021/PA.Sbg, the main claims filed by the plaintiff are to convict the defendant of the default of the contract and to demand payment for the financing facility that has been provided. In addition, to ensure that the aforementioned payment claims are properly executed, the plaintiff demands the placement of a seizure of collateral and the establishment of the right to sell the collateral. The panel of judges in their verdict granted part of the plaintiff's claims as follows:

Adjudicate

a. Grants the Plaintiff's claim in part;
b. Declares that Defendant has legally breached the contract/committed default to Plaintiff by failing to fulfill the obligation to pay installments based on *Murābahah* Deed No.: 054/AP-MRBH/IX/2018 dated October 9, 2018;
c. Orders the Defendant to pay the total obligation to the Plaintiff in the amount of Rp. 38,839,961,- (thirty million eight hundred thirty-nine thousand nine hundred sixty-one rupiah) within 3 (three) months from the date this decision is read;
d. Rejects the rest of the claims;

Orders the Defendant to pay the costs of the proceedings incurred in this case in the amount of Rp. 405,000,- (four hundred five thousand rupiah).

In the aforementioned verdict, it can be understood that the claim regarding collateral was not granted. This claim refers to the demand for the seizure of collateral and the right

to sell the collateral in public. However, the plaintiff's claims were intended to reinforce the certainty of payment for the *Murābahah* contract that binds the defendant.

The judge's ruling in this matter is based on several legal systems, particularly state law and Islamic legal principles. From a state law standpoint, the ruling shows clauses from the Indonesian Civil Code (KUHPer) and other applicable laws including HIR, RBg, and the Mortgage Law. The plaintiff's claim for collateral seizure was denied, which was supported by the fact that a third party owned the collateral under control.

Examined in light of Islamic law, especially with regard to the *Murābahah* contract at the heart of this matter, the plaintiff's demand for collateral enforcement has to reflect the principles of fairness, justice, and the prevention of exploitation. The enforcement of collateral in Islamic finance has to be done in a way that honours both the rights of the debtor and the entitlement of the creditor, therefore guaranteeing that the transaction stays free of *riba* (interest) or any kind of unjust enrichment. When viewed through this prism, the judge's denial of the claim for collateral seizure shows an effort to balance these ideas.

The judge rejected the request for the seizure of collateral through an interlocutory decision. In the legal considerations, it was explained that the reason for the rejection was that the collateral was in the process of being sold, so there were third parties involved with the collateral. Based on the questions and answers during the examination, the defendant had sold the collateral to another party.

According to Article 227 of the HIR, seizure of collateral is intended for debt-claim cases caused by breach of contract. The seizure is intended to protect certain goods so that they cannot be transferred to third parties, so that the value of the goods remains intact. The seized goods will later be used as a last resort to pay off debts through auction sales if the defendant is unable to pay the debt.[25] The object of seizure for debt-claim contracts that include collateral can be directly placed on the collateral itself, even though the form of the goods is immovable.[26]

The existence of a third party as the main reason for the judge's rejection of the placement of seizure of collateral is not sufficiently motivated (*onvoldoende gemotiveerd*). In this case, the judge needs to explain comprehensive reasons that can be accepted by the plaintiff as the party who wants their claim not to be illusory (*illusoir*) or empty when the verdict is carried out.

Yahya Harahap[27] argues that when evaluating the grounds for seizure, the judge needs to consider concrete facts that support the suspicion that the defendant intends to embezzle their assets. At the very least, there should be some objective and reasonable indications that point towards such a suspicion. Furthermore, the judge is not allowed to demand excessively extreme facts during the examination, as this could create the impression of judicial arbitrariness. If the request for seizure is indeed not urgently needed and lacks a relevant basis, then there is sufficient reason to reject the request for seizure.[28]

Several factors strengthen the plaintiff's position in the claim for seizure of collateral. Both parties have acknowledged that the land and building with Certificate of Ownership No. 660 serve as collateral for the agreed-upon *Murābahah*h contract. The Certificate of Ownership for the collateral is currently in the possession of the plaintiff. The plaintiff's request for seizure of collateral is not without reason. The collateral has been sold by the defendant, making it vulnerable to conflict and damage that could potentially reduce its value. The defendant's response regarding the unemployed status of the defendant's spouse further underscores the urgency of placing a seizure on the collateral.

[25] M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2017), 397.
[26] Harahap, 400.
[27] Harahap, 345.
[28] Harahap, 346.

The reasons that strengthen the plaintiff's position in the above claim for seizure of collateral should be sufficient to grant the placement of seizure of collateral. These reasons are also in accordance with the provisions on the seizure of collateral in Article 227 HIR. In essence, in submitting a request for seizure of collateral, there must be a reasonable suspicion that the disputed goods will be lost or decrease in value.[29]

Based on the defendant's explanation, the collateral is in the control of a third party due to the sale made by the defendant to a third party. Therefore, the panel of judges in rejecting the seizure of collateral must include the legal basis for seizure in the hands of a third party or *conservatoir beslag onder derden*, abbreviated as *derden beslag*.[30]

Seizure from a third party is regulated in Article 197 paragraph (8) HIR and Article 211 RBg as follows:

Article 197 (8) HIR

> The seizure of non-fixed assets belonging to the debtor, including cash and valuable securities, can also be carried out on tangible goods in the hands of others. However, it cannot be carried out on animals and tools that are truly used to earn a living for the convicted person.

Article 211 RBg

> The seizure of movable assets belonging to the losing party, including money and securities, can also consist of tangible movable assets that are in the possession of others and may not extend to livestock and tools that are truly needed to run the personal business of the convicted person.

In more detail, a third-party seizure is also explained in Article 728 Rv, which reads as follows:

Article 728 Rv

> Except for what is mentioned in Section 2 of Chapter 11 of the Second Book, any creditor may, on the strength of authentic or underhand documents, place a seizure on money and property in the possession of third parties which are debts to the debtor or belong to him, or the debtor may resist the delivery of such property to the creditor.
>
> In the absence of papers, the chairman of the *raad van justitie*, in whose district the debtor resides, and also of the raad van justitie, in whose district the third parties reside, where the money and property are situated, may, upon application, grant permission for a seizure,
>
> The provisions of Article 722 shall also apply in this case.
>
> But the seizure may be lifted by the giving of security for the sum of money for which the seizure is made.

Across the three articles discussed, it is evident that the objects subject to third-party seizure are limited to cash, valuable securities, and bills or debts owed by the third party to the defendant. Furthermore, based on Article 728 Rv, these objects must belong to the defendant and be supported by ownership documents in the form of authentic deeds or private deeds.

In Case No. 5/Pdt.GS/2021/PA.Sbg, the plaintiff was able to prove that the objects sought to be seized as collateral were owned by the defendant. The evidence supporting this claim included a Certificate of Ownership No. 660 Tambakmekar Village located in Sukamaju, Tambakmekar Village, Jalancagak District, Subang Regency, West Java

[29] Bambang Sugeng A. S. and Sujayadi, *Pengantar Hukum Acara Perdata & Contoh Dokumen Litigasi Perkara Perdata* (Jakarta: Kencana, 2012), 76.

[30] Harahap, *Hukum Acara Perdata*, 407.

Province; and Land Measurement Letter No. 351/Tambakmekar/2019 dated January 23, 2019, registered in the name of the defendant. However, despite the Certificate of Land Ownership evidence, the seizure could not be granted because land and buildings are immovable property and are not included in the objects that can be subject to third-party seizure. On the other hand, land and buildings are indeed not included in the objects that are prohibited from being subject to *derden beslag*, such as livestock and tools used for the livelihood of the seized party.

In light of the foregoing, in rejecting the seizure of collateral over land and buildings in Case No. 5/Pdt.GS/2021/PA.Sbg, the panel of judges may add a reason for rejection by citing Article 197(8) HIR/Article 211 RBg jo. Article 728 Rv, which states that the seizure of goods in the possession of a third party is limited to objects such as cash, securities, and third-party claims against the defendant and cannot be applied to immovable property or other movable property.[31]

Another claim that the panel of judges did not grant was the plaintiff's claim to declare that the plaintiff has the right to sell at public auction the collateral pledged to the plaintiff. In response to this claim, there is an incoherence in the legal considerations, namely the inconsistency or lack of harmony between the evidence and the legal basis used to respond to the claim of the right to sell the collateral, which resulted in the claim not being granted in the judgment.

During the evidentiary stage, the Certificate of Ownership No. 660 was rejected by the judge on the grounds that the seizure of collateral was rejected, therefore evidence P.6 was also rejected. It should be noted that evidence P.6 should not have been rejected, but rather considered legally valid, that the *a quo* contract was indeed accompanied by the delivery of collateral as evidenced by evidence P.6.

In the lawsuit and maintained during the reading of the lawsuit, the plaintiff stated that the agreed-upon *Murābahah* financing deed was accompanied by the delivery of collateral in the form of land and buildings based on Certificate of Ownership No. 660 owned by the defendant. The Certificate of Ownership was kept by the plaintiff until the financing was paid off. However, it is known that the collateral was sold by the defendant but was not used to pay the financing debt.

Following that, the defendant in his answer stated that he acknowledged all the plaintiff's claims with the addition that the collateral in question had been sold to the defendant's nephew but there was a payment problem. From the statements of the plaintiff and the defendant, it has been historically proven that there was a delivery of collateral in the form of land and buildings that accompanied the *a quo* contract. The corresponding statements have fulfilled the legal burden of proof, namely historical proof that tries to establish what happened concretely.[32]

In addition, the evidence in the form of Certificate of Ownership No. 660 is an authentic deed of the defendant's ownership of the land and buildings. In the Civil Code, an authentic deed is a deed that is made in accordance with the law before an authorized official.[33] An authentic deed is perfect evidence of what is stated therein.[34] The evidence of Certificate of Ownership No. 660 is evidence related to a claim other than the seizure of collateral, namely a claim for a declaration of the right to sell the collateral at public auction. Therefore, the rejection of evidence P.6 is not justified because an authentic deed can only be rejected if the contents contain errors or fraud.

In ruling on the claim regarding the collateral, the judge based his decision on the Law on Mortgages. According to the Mortgage Law, goods that have been specifically designated as collateral for a particular agreement have their own specialization, namely

[31] Harahap, 409.
[32] Neng Yani Nurhayani, *Hukum Acara Perdata* (Bandung: CV Pustaka Setia, 2015), 143.
[33] Article 1868 of Civil Code
[34] Article 1870 of Civil Code

referring to the principles of *droit de preference* and *droit de suite*. Based on the principle of *droit de preference*, a creditor holding a mortgage has the right to take precedence over other creditors in making payment of the debt on the collateral subject to the mortgage on it.[35] Then, the principle of *droit de suite* gives the creditor a privilege, where the mortgage remains attached to a mortgage object regardless of who the object is.[36]

In his considerations, the judge concluded that based on these principles, the plaintiff has the right to auction the collateral even though its ownership has been transferred to another party. In this case, the judge categorized the holder of the mortgage as a separatist creditor. The judge added that in the event of the debtor's bankruptcy in accordance with the bankruptcy and debt rescheduling law, separatist creditors have a separate position from preferential creditors, namely the plaintiff.

The judge's application of the law in responding to the claim for the right to sell the collateral was correct. The judge's application of the law using the principles of *droit de preference* and *droit de suite* is in line with Article 1 paragraph (1) and Article 7 of the Mortgage Law.[37] However, it is not coherent with the rejection of evidence Certificate of Ownership No. 660 as authentic evidence that *Murābahah* contract No. 052/AP-MRBH/XI/2018 was accompanied by the delivery of collateral in the form of land and buildings based on Certificate of Ownership No. 660.

The judge's ruling is also not in line with the legal considerations regarding the collateral. In his considerations, the judge clearly stated that according to the defendant's willingness and consent, a public auction of the collateral could be held. However, in the ruling, the claim for the right to sell the collateral at public auction was not granted.

There is a specific urgency regarding the claim for the right to sell the collateral that should have been granted by the judge, namely in case No. 5/Pdt.GS/2021/PA.Sbg, it is known that there is a process of selling the collateral carried out by the defendant, the inability to impose attachment of the collateral, the existence of a payment default on the sale, and an indirect statement of bankruptcy by the defendant. In addition, based on evidence of P.7 to P.10 in the form of warning letters and P.11 in the form of evidence of six visits by the plaintiff, this urgency is added.

Therefore, the judge should add to the ruling by stating that the plaintiff has the right to sell the collateral either voluntarily or at public auction if the defendant cannot pay in full within three months from the date the verdict is read.

When evaluating the ruling, one must first understand how state law and Islamic law interact to form the result of the case. In this regard, state law seeks to guarantee legal certainty for creditors by enforcing unambiguous rules for public auctions and collateral seizure, as reflected in the ideals enshrined in the Mortgage Law (UU Hak Tanggungan). In particular, the execution of mortgage contracts under state law is fundamentally based on ideas like droit de suite (the right of a creditor to keep a claim on the collateral, regardless of its transfer to third parties) and droit de préférence (the priority of the creditor in claims against the collateral). Conversely, Islamic law guarantees that any contract, including *Murābahah* contracts, is free from exploitation and *riba* (interest) by stressing fairness, openness, and justice in financial transactions.

Islamic law demands that the debtor's rights and interests are equally protected even as state law gives procedural efficiency and certainty in enforcing creditor claims top priority. Although the judge's ruling tries to balance these systems, it begs whether it adequately includes Islamic ideas, especially in situations where a third party has already sold the collateral. A more complex strategy would thus be required, one that fully takes into account the Islamic legal viewpoint on collateral and its sale.

[35] Titik Triwulan Tutik, *Hukum Perdata Dalam Sistem Hukum Nasional* (Jakarta: Kencana, 2015), 183.
[36] Tutik, 184.
[37] Salim H. S, *Perkembangan Hukum Jaminan Di Indonesia*, 102–3.

Examining the case in light of Islamic contract theory—especially with regard to *Murābahah* agreements—will help to deepen the study even more. Islamic law forbids the concept of *gharar* (uncertainty) completely; deals have to be open, fair, and free of exploitation. The application of collateral, therefore, has to fit the concept of adl (justice) to guarantee that no one suffers unjustly.

The denial of the claim for collateral seizure and the right to sell the collateral in this instance has to be examined in light of Islamic financial ethics. Islamic law says that creditors have to be fair and not exploit the circumstances of the debtor. This concept of justice fits the Islamic ban on excessive claims or penalties that could unduly burden the debtor.

Therefore, although the judge's ruling conforms with state law, which sometimes gives creditor protection top priority, it could miss significant Islamic legal values that support a more fair and kind attitude to debt collection. The case offers a chance to think back on whether Islamic values, especially with regard to the treatment of collateral, were sufficiently considered in the court's rationale.

Finally, it should be noted that the crown of a judge lies in his decision, the heart of the decision in the considerations, the spirit of the decision in the evidence, and the goddess of justice in the ruling.[38] The consumers of a decision are not only judges at the first, appeal, and cassation levels. But the parties themselves who are bound, seekers of justice and the community. With that, legal considerations become an important part that can be a benchmark for whether a decision is good or not.[39]

Sharia Economic Law Analysis of the Settlement of Collateral Ownership Transfer in Decision No. 5/Pdt.GS/2021/PA.Sbg

1. Legal Review of the Sale of Collateral by a *Murābahah* Contract

   A *Murābahah* contract is a type of Sharia-compliant sale and purchase transaction where the seller discloses the cost price of the goods being traded and determines the profit margin in agreement with the buyer. In modern practice, *Murābahah* agreements are widely used in Islamic banking as one of the contracts in the sale and purchase domain for bank financing products.[40] *Murābahah* financing products are intended for customers who need to fulfill ownership of specific goods such as vehicles, houses, goods for investment purposes, or other consumer goods.[41]

   In *Murābahah* financing, the goods that serve as the object of financing must be clearly and specifically stated in the contract, as these goods act as the underlying assets of the transaction.[42] Ownership of the goods is transferred upon the approval and signing of the contract. Typically, payments in *Murābahah* financing are made in installments, often accompanied by an *urbun* or down payment.[43]

   Collateral plays a crucial role in financing transactions across the banking sector, including *Murābahah* financing. In adherence to the principle of prudence, banks often require collateral as a precondition for granting *Murābahah* financing. This serves as a risk mitigation strategy in case of non-payment or failure to fulfill contractual obligations by the customer.[44]

[38] Fuadah, *Hukum Acara Peradilan Agama Plus Hukum Acara Islam Dalam Risalah Qadha Umar Bin Khattab*, 167.

[39] Fuadah, 168.

[40] Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah Penemuan dan Kaidah Hukum*, Pertama (Jakarta: Kencana, 2018), 193.

[41] Lukmanul Hakim and Amelia Anwar, "Pembiayaan Murabahah Pada Perbankan Syariah Dalam Perspektif Hukum Di Indonesia," *Al-Urban: Jurnal Ekonomi Syariah Dan Filantropi Islam* 1, no. 2 (2017): 215, https://journal.uhamka.ac.id/index.php/al-urban/article/view/1026.

[42] Hakim and Anwar, 217.

[43] Hakim and Anwar, 218–19.

[44] Dhody Ananta Rivandi Widjaatmadja and Cucu Solihah, *Akad Pembiayaan Murabahah di Bank Syariah dalam Bentuk Akta Otentik: Implementasi Rukun, Syarat, dan Prinsip Syariah* (Malang: Inteligensia Media, 2019), 260.

The collateral referred to can take the form of property rights, which require a secured binding contract. This collateral bond is an additional contract based on the basic conditions of the obligation, in this case, the *Murābahah* financing contract.[45]

The requirement for collateral applies to all types of *Murābahah* financing with installment payment plans. This includes *Murābahah* financing for home ownership, *Murābahah* line facility financing, and *Murābahah* working capital financing.

Murābahah financing collateral for home ownership may take the form of a house that has been constructed. The house serves as the object of the financing contract, which is negotiated between the customer and the bank. The house is encumbered with a mortgage in favor of the bank, acting as the lender. In contrast, the collateral for a line facility financing contract is any document that proves ownership or other rights that can be used as collateral to guarantee the fulfillment of the customer's contractual obligations to the bank.[46]

In *Murābahah* financing, it can be concluded that the proposed collateral can be in the form of a financing object or other goods provided by the customer. In the event that the object of financing does not meet the prerequisites to be used as collateral because it is constrained by ownership certificates or cannot be bound notarially, the bank may request that customers provide temporary collateral. When the object of financing can be bound as collateral, the customer may apply for collateral exchange.[47]

Another opinion posits that financing collateral can be classified into two categories. The first category encompasses the primary collateral, which is represented by specific goods that are financed by the financing in question. The second category encompasses additional collateral, which takes the form of goods, securities, or guarantees that are not directly related to the financing. However, this additional collateral is deliberately included to persuade the bank that the customer can fulfill their contractual obligations.[48]

In *Murābahah* financing, the existence of collateral is permitted. Collateral in *Murābahah* is allowed to encourage customers to be serious about their orders. The permissibility of collateral is stated in the Fatwa of the National Sharia Council-Indonesian Ulema Council (Dewan Syariah Nasional-Majelis Ulama Indonesia, abbreviated as DSN-MUI) and the Compilation of Sharia Economic Law (abbreviated as KHES). In the third provision of Fatwa of DSN-MUI No. 04/DSN-MUI/IV/2000 concerning *Murābahah*, it is stated that:

> Collateral in *Murābahah* is allowed to encourage customers to be serious about their orders. The bank may ask the customer to provide tangible collateral. In line with that, Article 127 of Compilation of Sharia Economic Law states:
>
> The seller can request the buyer to provide collateral for the item being sold in a Murābahah contract.

This indicates that, in principle, the collateral provided by the customer to the bank is not mandatory or absolute. It merely serves to provide certainty for the capital provider (bank) regarding the customer's transactions with the bank. The bank may request reliable collateral from the customer.

The doctrine of Islamic economic law stipulates that the binding of an item as collateral is included within the scope of the *rahn* contract. This contract pertains to

[45] Rivai and Veithzal, *Islamic financial management*, 90.

[46] Widjaatmadja and Solihah, *Akad Pembiayaan Murabahah di Bank Syariah dalam Bentuk Akta Otentik*, 261.

[47] Divisi Pengembangan Produk dan Edukasi Departemen Perbankan Syariah, "Buku Standar Produk Perbankan Syariah Murabahah" (Otoritas Jasa Keuangan, June 29, 2016), 46, https://www.ojk.go.id/id/kanal/syariah/berita-dan-kegiatan/publikasi/Pages/Buku-Standar-Produk-Perbankan-Syariah-Murabahah.aspx.

[48] Rivai and Veithzal, *Islamic financial management*, 665–66.

the possession of specified goods belonging to the borrower by the lender, who acts as collateral provider.[49] The *rahn* contract is permitted only for debts (*al-dain*) resulting from *qardh* contracts, non-cash sales, and lease contracts (*ijarah*) in which the payment of *ujrah* is not in cash.[50]

The occurrence of a *rahn* contract may occur concurrently with the contract that creates the obligation, or it may occur subsequent to a debt contract that requires collateral, or it may occur prior to the contract that creates the obligation. The scholars concur on the first two forms, such as the application of the collateral system utilized in Islamic banks, where the bank determines the existence of collateral and requires the submission of *rahn* (collateral) for the purchase of goods with delayed payment (*muajjal*), which is the case in *Murābahah* financing. This collateral is carried out on *Murābahah* contracts for home ownership facilities, line facilities, or working capital, and others.[51]

In the case of these collateral goods, the applicable law determines whether a binding agreement is necessary or whether the collateral goods can be controlled. The process of establishing collateral binding is conducted before a notary. The implementation of the security binding is carried out subsequent to the signing of the financing contract, as the security binding is an accessory agreement (*accessoir*) of the main agreement, in this case, the financing contract. A variety of forms of collateral binding exist, including mortgages, fiduciary guarantees, and ship mortgages, among others, which are subject to the relevant laws and regulations.[52]

With regard to the control of collateral, it is only accomplished by the bank's control of the documentation and proof of legal ownership of the collateral. This is analogous to the concept of *rahn tasjily* as outlined in Fatwa of DSN-MUI No. 68/DSN-MUI/III/2008. In *rahn tasjily*, proof of legal ownership is submitted to the recipient of the collateral (*murtahin*) while the physical collateral (*marhun*) remains under the control and utilization of the guarantor.

The fundamental tenet of *Murābahah* is the act of buying and selling. Consequently, the object of *Murābahah* transfers ownership from the seller to the buyer, thereby conferring upon the buyer the right to utilize the object. In this context, the buyer is permitted to sell the *Murābahah* object to other parties. Nevertheless, in the event that the sale of the object is related to *Murābahah* financing with an Islamic bank, which is carried out in installments, the customer/buyer is still responsible for the debt tied to the bank. This stipulation is outlined in Fatwa of DSN-MUI No. 04/DSN-MUI/IV/2000 concerning *Murābahah* in the fourth dictum.

Subsequently, the *Murābahah* financing object is utilized as collateral for ongoing financing. Thus, the *Murābahah* object is considered both *mabi'* and *marhun*. In this sense, the *Murābahah* object is not merely an item traded but also a means of repaying debt in the event of a breach of promise. Consequently, the position of the *Murābahah* object is upheld. Consequently, customers are prohibited from renting, transferring, or moving these goods without prior permission from the bank. In Islamic law, the *Murābahah* object is afforded a privilege or priority (*al-imtiyaz/al-afdhaliyah*) that entitles the *murtahin* to be repaid by the *rahin* through the use of the *marhun* in the event of the *rahin's* failure to pay.[53]

[49] Article 20 of Supreme Court Regulation No. 2/2008 on Compilation of Sharia Economic Law
[50] Jaih Mubarok and Hasanudin, *Fikih Mu'amalah Maliyyah Akad Tabarru'*, Cetakan ketiga (Bandung: Simbiosa Rekatam Media, 2018), 221.
[51] Widjaatmadja and Solihah, *Akad Pembiayaan Murabahah di Bank Syariah dalam Bentuk Akta Otentik*, 262.
[52] Rivai and Veithzal, *Islamic financial management*, 677.
[53] Mubarok and Hasanudin, *Fikih Mu'amalah Maliyyah Akad Tabarru'*, 219.

In accordance with the Fatwa of DSN-MUI No. 47/DSN-MUI/II/2005 concerning the Settlement of *Murābahah* Receivables for Customers Unable to Pay, Islamic banks may sell *Murābahah* objects and/or collateral when customers are unable to complete financing by the amount and time promised. The sale is made to or through an Islamic bank at an agreed price.

In accordance with the aforementioned, Fatwa of DSN-MUI No. 92/DSN-MUI/IV/2014 concerning Financing Accompanied by *Rahn* (*At-Tamwil Al-Mautsuq Bi Al-Rahn*) stipulates that in the event that a warning/notice has been issued to the *rahin*, the *murtahin* is permitted to proceed with a forced sale of the collateral. The *murtahin* is permitted to request that the *rahin* sell the *marhun* to repay the *rahin's* debt.

In Indonesian positive law, the legal certainty of the existence of collateral for certain debts is ensured by requiring the binding of collateral in accordance with the type of collateral. In the discussion, the collateral is in the form of land and buildings, and thus the collateral binding is in the form of mortgage rights.

Mortgage rights are security rights that are imposed on land rights based on the Basic Agrarian Law, with or without objects on it that have a priority position.[54] In *Murābahah* financing, the mortgage rights are positioned as an *accessoir* agreement that follows the main agreement. The agreement cannot stand alone, as its existence or absence depends on the main contract.[55]

Concerning the sale of collateral, the Mortgage Law requires two methods of sale, namely:[56]

a. The sale of the collateral can be conducted by hand if there is an agreement between the customer and the bank, particularly regarding the selling price. In such an instance, the selling price can be regarded as the maximum price that is beneficial to both parties.
b. The collateral is sold at public auction in accordance with the stipulations set forth in the applicable laws and regulations for the settlement or payment of the financing facility.

The sale of mortgage rights can be carried out under the hand provided that there is an agreement between the grantor and the holder of the mortgage rights. In other words, both the customer and the bank in the sale of collateral are required to give notice and permission.[57] This aims to protect interested parties.[58] In the event that the sale of the collateral object does not adhere to the stipulations set forth in Article 20 of the Mortgage Rights Law, the sale may be declared null and void.

In light of this explanation, the validity of the sale of *Murābahah* objects and/or collateral, as defined by the doctrine of Sharia economic law and Indonesian positive law, is contingent upon the consent of both parties. In order for the sale of the collateral to be valid, the giver and receiver of the collateral must agree to the sale being carried out by the other party.

2. Aspects of Justice, Expediency, and Legal Certainty in Decision No. 5/Pdt.GS/2021/PA. Sbg

Case Number 5/Pdt.GS/2021/PA.Sbg is a ruling on a dispute over the default of a contract in a *Murābahah*, using a simplified lawsuit settlement scheme. The disputed contract is *Murābahah* financing contract No. 052/AP-MRBH/XI/2018. The financing provider is PT. BPRS Gotong Royong Subang and the financing recipient is a woman from Subang. The financing amount is Rp. 58,800,000,- (fifty-eight million eight

[54] Salim H. S, *Perkembangan Hukum Jaminan Di Indonesia*, 95–96.
[55] Article 10, Paragraph 1; General Elucidation, No 8 of Law No. 4/1996 on Mortgage Rights
[56] Article 20 of Law No. 4/1996 on Mortgage Rights
[57] Article 20, Paragraphs 2-3 of Law No. 4/1996 on Mortgage Rights
[58] Explanation of article 20, paragraphs 2-3 of Law No. 4/1996 on Mortgage Rights

hundred thousand rupiah) with the submission of collateral in the form of land and buildings based on Certificate of Ownership No. 660 to guarantee the settlement of the financing.

In brief, in 2020 PT. BPRS Gotong Royong experienced financial problems and its business license was revoked by the OJK. In this regard, all matters of the company PT BPRS Gotong Royong were taken over by LPS for liquidation. The Liquidation Team of PT BPRS Gotong Royong filed a default of contract lawsuit against contract No. 052/AP-MRBH/XI/2018.

The basis of the lawsuit filed is the defendant's default of contract for not paying the remaining financing until the due date. The remaining financing obligation that has not been paid is Rp. 38,839,961,- (thirty-eight million eight hundred thirty-nine thousand nine hundred sixty-one rupiah). The claims filed, include declaring the financing contract valid and valuable, ordering the defendant to pay the remaining outstanding obligations in full immediately, attaching a lien on the collateral to the collateral object of the contract, and declaring the plaintiff entitled to sell the collateral object in public.

The transfer of ownership of collateral, also known as collateral realization, is the process of selling collateral to recover the outstanding debt owed to a creditor. In the context of the court case, the plaintiff's oral statement indicates that the transfer of ownership of collateral is intended to sell the collateral object, as revealed during the trial.

The transfer of ownership of the collateral that the authors refer to is the sale of collateral that was revealed at trial. In his oral statement, the plaintiff stated that:

> Based on the contract, it is intended to guarantee the repayment of the financing on time until October 09, 2020, which has been mutually agreed upon. The defendant pledged his goods in the form of land and buildings standing on it based on Certificate of Ownership No.660 registered in the name of the defendant. The Certificate of Ownership was kept with the plaintiff until the financing was paid off. However, the collateral was known to have been sold by the defendant but was not used as debt repayment for the financing.

In accordance with the plaintiff's assertions, the defendant's response indicated that:

> Regarding the collateral the defendant sold it to the defendant's nephew for Rp. 33,000,000 (thirty-three million rupiah) to pay off the debt owed to the plaintiff, but the purchaser paid in installments of Rp. 2,000,000 (two million rupiah); for two years this amounted to Rp. 20,000,000 (twenty million rupiah) and until now the purchaser has never paid any more installments. The house is now occupied by the purchaser and has even become a problem in the family of the respondent.

It can be observed that the contract in question is a *Murābahah* contract. The primary dispute concerns default and the sale of collateral by the defendant, which has the effect of preventing the plaintiff from selling it.

The judge's verdict indicated that the payment claim was granted while the claim regarding collateral was rejected. The evidence presented, clearly demonstrated that the defendant had sold the collateral in question. Judges are required to consider the value of the law and a sense of justice in society when adjudicating cases.[59]

The discussion of judges' decisions always refers to three important aspects of legal objectives: justice, expediency, and legal certainty. According to Gustav Radbruch, these three legal objectives have a priority scale in their realization.

[59] Article 5, Paragraph 1 of Law No. 48/2009 on Judicial Power

Justice is the first scale that must be sought, then expediency, and finally legal certainty. However, a law and its application must still be attempted to create the realization of justice, expediency, and legal certainty. In the event of a conflict between the principles of justice, benefit, and legal certainty in the context of the rule of law or its application, the law itself must be consulted to determine the appropriate priority scale.[60]

One of the most fundamental values in the field of law is justice. In contrast to legal certainty, which is a general and generalizing concept, justice is an individualistic value.[61] Consequently, it is challenging to apply justice even in cases that appear to have similarities.

The judge's decision should align with the parties' perception of justice. In essence, the justice in question is substantive justice, not formal justice. Substantive justice is defined as fundamental justice that is recognized and felt by the parties. Formal justice, on the other hand, is justice based solely on the law. While formal justice is a legal concept, it is not always acceptable or fair to the parties.[62]

In Decision No. 5/Pdt.GS/2021/PA.Sbg, the judge applied the principle of justice by considering Al-Qur'an Surat An-Nisaa verse 58, which states:

۞ اِنَّ اللّٰهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰٓى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللّٰهَ كَانَ سَمِيْعًاۢ بَصِيْرًا

English Sahih Internasional
"Indeed, Allah commands you to render trust to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing."

The aforementioned verse was revealed during Fathul Makkah. During the conquest of Mecca, Prophet Muhammad (SAW) summoned Uthman bin Talhah to bestow upon him the key to the Kaaba. Prophet Muhammad (SAW) proceeded to unlock the Kaaba and engage in the tawaf. Thereafter, Jibril arrived to bestow upon Uthman a revelation, instructing him to return the key to the Kaaba. Upon exiting the Kaaba and reciting the verse, Prophet Muhammad (SAW) proceeded to bestow the key of the Kaaba upon Uthman bin Talhah.[63]

This verse, as interpreted by Quraish Shihab, provides guidance for judges on how to treat the parties to a dispute. It suggests that judges should treat the parties equally, including in matters such as seating, mentioning names (with or without titles), facial expressions, attentiveness, and consideration of the litigants' words. This approach ensures that all parties are treated equally before the law and that their perspectives are equally considered.[64]

Accordingly, the justice implied in the verse, as elucidated by Quraish Shihab, is related to equal justice in the process and how the judge treats the litigants. It is not the equality of what a party receives regarding the matter in dispute.

The judge in this case considered both the plaintiff's claims and the defendant's willingness to settle. The plaintiff's claims included the demand for immediate and unconditional payment of the remaining financing balance in full. The defendant's willingness to settle was expressed in their response, which is summarized as follows:

[60] Margono, *Asas Keadilan, Kemanfaatan & Kepastian Hukum Dalam Putusan Hakim*, Cetakan pertama (Jakarta: Sinar Grafika, 2019), 28–29.
[61] Margono, 105.
[62] Margono, 110.
[63] Jalaluddin As-Suyuthi, *Asbabun Nuzul: Sebab Turunnya Ayat Al-Quran*, ed. Ivan Satria, trans. Tim Abdul Hayyie (Jakarta: Gema Insani, 2008), 172–73.
[64] Rizal Renaldi and Achmad Saeful, "Fikih Keadilan: Antara Doktrin Dan Praktik Di Indonesia," *Syar'ie : Jurnal Pemikiran Ekonomi Islam* 5, no. 1 (2022): 32, https://doi.org/10.51476/syarie.v5i1.305.

> That the respondent should be given time to try to pay the respondent's debt of Rp. 38,839,961, - (Thirty-eight million eight hundred thirty-nine thousand nine hundred sixty-one rupiah) for 5 months.

The court acknowledged the plaintiff's leniency in granting the defendant ample time to settle the outstanding debt. The evidence presented, particularly the third warning letter dated September 7, 2020, and the lawsuit filed on June 4, 2021, clearly demonstrated this. Additionally, Exhibit P.11 further substantiated the plaintiff's goodwill efforts, as it documented six visits made to remind the defendant about their obligation to fulfill the financing agreement.

The defendant's request for an extension stemmed from their husband's unemployment due to layoffs caused by the pandemic. Considering these circumstances, the judge granted the defendant a three-month grace period from the date of the verdict to settle their outstanding debt.

The judge applied the principle of proportional justice on a case-by-case basis, granting the respondent only three additional months, rather than the five months requested. Proportional justice is defined as the equitable distribution of resources by an individual's eligibility. The focus of proportionality is not on equality of outcome but on the direction of distribution.[65]

The decision provides an opportunity for the defendant, who is experiencing financial difficulties, to fulfill their obligations in debt payments. Nevertheless, the plaintiff's sense of justice was not violated by the court's decision not to grant the defendant an excessive amount of time. In its ruling, the judge still imposed a penalty on the defendant to fulfill all of its obligations, but with additional time to attempt to comply with Sharia provisions.

The judge's allowance of time is in conformity with Surah Al-Baqarah verse 280 of the Qur'an, which states:

> وَاِنْ كَانَ ذُوْ عُسْرَةٍ فَنَظِرَةٌ اِلٰى مَيْسَرَةٍۗ وَاَنْ تَصَدَّقُوْا خَيْرٌ لَّكُمْ اِنْ كُنْتُمْ تَعْلَمُوْنَ
>
> English Sahih Internasional
>
> “And if someone is in hardship, then [let there be] postponement until [a time of] ease. But if you give [from your right as] charity, then it is better for you, if you only knew.”

In the event that the borrower is experiencing financial difficulties and lacks the means to repay the debt, Allah commands patience. This is evident in the following verse (وَاِنْ كَانَ ذُوْ عُسْرَةٍ فَنَظِرَةٌ اِلٰى مَيْسَرَةٍ.). In contrast to the *jahiliyah* masses, when the borrower was unable to fulfill their financial obligation at the designated time, the debt was to be repaid in full or the interest was to be added.[66]

In addition, court decisions are closely related to legal certainty. Judges must be able to uphold the idea of legal certainty in their decisions. However, court decisions cannot be read only from the ruling; they must also be considered in the context. Legal considerations are of great importance in understanding the background of court decisions. The extent to which the judge can articulate his views and concepts to develop legal arguments for the decision to be handed down can be assessed using these legal factors.[67]

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[65] Renaldi and Saeful, 32.

[66] Abdullah bin Muhammad bin Abdurahman bin Ishaq Al-Sheikh, *Tafsir Ibnu Katsir Jilid 1*, ed. M Yusuf Harun, trans. M Abdul Ghoffar (Bogor: Pustaka Imam As-Syafi’i, 2005), 557.

[67] Alaska Ahmad Syaiful Dodi, “Analisis Hukum Ekonomi Syari’ah Tentang Gugatan Wanprestasi Akad Murabahah Di Pengadilan Agama (Studi Perbandingan Pada Putusan Nomor 0945/Pdt.G/2014/PA.ME Dan Putusan Nomor 2370/Pdt.G/2016/PA.Pwt)” (Tesis Master, Lampung, UIN Raden Intan Lampung, 2021), 12, http://repository.radenintan.ac.id/16721/.

A court decision is necessary to resolve a case that has been brought before the court. Court decisions must be able to resolve the issues raised, and they must not exacerbate the situation or cause controversy among legal practitioners and the general public.[68]

Gustav Radbruch delineated four fundamental principles of legal certainty. Primarily, the law provides legal certainty through the enactment of legislation, or *gesetzliches recht*. Secondly, legal certainty is founded upon objective facts (*tatsachen*), rather than the formation of subsequent judicial judgments, such as benevolence or civility. Thirdly, in order to minimize confusion and facilitate the practical application of law, facts must be explicitly and precisely articulated. Fourthly, sound legal principles should not undergo frequent modification.[69] In the view of Gustav Radbruch, legal certainty is the very essence of legal certainty itself. It is the consequence of laws and regulations. According to Radbruch, "positive law", which directs human interests in society, must be obeyed even if it is unjust.[70]

The concept of legal certainty can be exemplified by the court's decision in Case Number 5/Pdt.GS/2021/PA, which demonstrates the application of appropriate legal material, namely legislation. This case can be categorized as an economic sharia case, and thus the relevant sources of sharia economic law in Indonesia should be employed in the legal analysis. The aforementioned sources include the Quran, Hadith, *Fiqh*, and *Ushul Fiqh*; legislation; contracts; jurisprudence; the KHES, and Fatwa of DSN-MUI.[71]

In resolving the issue of default, the judge in the case, as evidenced by the decision No. 5/Pdt.GS/2021/PA, relied on the following legal provisions: Articles 1266, 1267, and 1243 of the Civil Code, Article 174 of the Code of Civil Procedure, and the principle of *pacta sunt servanda*, in accordance with the Islamic legal principle that states:

اَلْمُسْلِمُوْنَ عِنْدَ شُرُوْطِهِمْ

"A Muslim is bound by the covenant he made."

Concerning the legal status of the sale of the collateral by the defendant, the judge based his considerations on the principles of *droit de preference* and *droit de suite* by the provisions of the Mortgage Law. Consequently, the plaintiff is entitled, following the defendant's willingness and consent, to conduct a public auction of the collateral. However, the court's ruling stated that it granted the plaintiff's claim in part and denied the plaintiff's request to establish the plaintiff's right to sell the collateral at the aforementioned contract in an open auction.

The lack of congruence between the legal considerations of the judge and the court's ruling may be perceived as a threat to the fundamental principle of legal certainty, which is a fundamental tenet of judicial decisions. This lack of certainty may result in the deprivation of the parties' rights, as the law is not consistently and effectively applied and enforced. The principle of legal certainty is essential for the protection of the rights of individuals and for maintaining social order.[72]

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[68] Rommy Haryono Djojorahardjo, "Mewujudkan Aspek Keadilan Dalam Putusan Hakim Di Peradilan Perdata," *Jurnal Media Hukum Dan Peradilan* 5, no. 1 (May 2019): 94–95, http://ejournal-pps.unsuri.id/index.php/jmhp/article/view/79.

[69] Achmad Ali, *Menguak Tabir Hukum: Ed.2* (Jakarta: Kencana, 2015), 293.

[70] M. Sulaeman Jajuli, *Kepastian Hukum Gadai Tanah dalam Islam* (Yogyakarta: Deepublish, 2015), 51–52.

[71] Muhamad Kholid, "Kepastian Hukum Dalam Penyelesaian Sengketa Ekonomi Syariah Kepailitan Dihubungkan Dengan Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang" (Disertasi Doktor, Bandung, UIN Sunan Gunung Djati, 2020), 295–96, http://digilib.uinsgd.ac.id/37683/.

[72] Margono, *Asas Keadilan, Kemanfaatan & Kepastian Hukum Dalam Putusan Hakim*, 147.

In essence, the rejection of the plaintiff's petition to sell the collateral in public is without merit. Following the doctrine of Gustav Radbruch, the plaintiff's right to sell the collateral is legally guaranteed by the legislation and explicitly promised in the aforementioned contract.

As both the plaintiff and the defendant have acknowledged, the *Murābahah* financing agreement No. 052/AP-MRBH/XI/2018 was accompanied by the transfer of the property as collateral for the financing. Under Article 44 of the KHES and Article 1338 of the Civil Code, this constitutes:

Article 44 KHES

All valid contracts are considered to be part of Islamic law for those who enter into them.

Article 1338 Civil Code

All agreements made legally shall apply as law to those who make them.

An agreement cannot be withdrawn other than with the agreement of both parties, or for reasons stated by the law as sufficient for that.

An agreement must be executed in good faith

These two articles follow the judge's consideration, which states that the *a quo* contract is *pacta sunt servanda* for both parties. This means that the contract is a law for the parties and must be carried out in accordance with the agreement stated in the contract. Therefore, the plaintiff, as the recipient of the mortgage, is entitled to repay the financing from the land and building collateral in question. In line with this, Article 6 of the Mortgage Law states that:

> If the debtor defaults, the holder of the first mortgage has the right to sell the mortgaged property at auction and to apply the proceeds towards the repayment of the debt.

The determination of the plaintiff's right to sell the collateral in public is a matter of legal certainty. In the case of Number 5/Pdt.GS/2021/PA.Sbg, the plaintiff did not present evidence of the mortgage deed (Akta Pemberian Hak Tanggungan, abbreviated as APHT) and the mortgage certificate. This implies that the transfer of the mortgage security in the form of land and buildings with registration number 660 was not accompanied by the registration of the mortgage. The evidence of the mortgage charge is the APHT, which has been registered, resulting in the issuance of the mortgage certificate.[73]

The failure of the plaintiff and defendant to register a mortgage deed resulted in the inability to proceed with a *parate* execution. The registration of a mortgage deed confers several advantages, including the creation of a title that is final and binding in the same way as a legally enforceable court order.[74] Consequently, in the case of Case Number 5/Pdt.GS/2021/PA, it was necessary for the court to issue a ruling stating that the plaintiff was entitled to sell the collateral if the defendant was unable to fulfill the remaining financing obligations.

In Case No. 5/Pdt.GS/2021/PA.Sbg, the judge has implied an aspect of proportional justice by allowing the defendant three months to work on the remaining financing. As a logical consequence of proportional justice and legal certainty for the plaintiff, the judge should add the following ruling regarding the right to sell the collateral:

> Stating that if the Defendant does not pay off the financing voluntarily after 3 months from the reading of the decision, the plaintiff has the right to sell underhand or in public the collateral in the form of land and buildings

[73] Article 13-14 of Law No. 4/1996 on Mortgage Rights
[74] Article 20 of Law No. 4/1996 on Mortgage Rights

> standing on it based on Certificate of Ownership No. 660 Tambakmekar Village located in Sukamaju, Tambakmekar Village, Jalancagak District, Subang Regency, West Java Province; and Land Measurement Letter No. 351/Tambakmekar/2019 dated January 23, 2019, registered in the name of the defendant, which was pledged to the Plaintiff and the proceeds of the sale were used to settle the Defendant's financing payments to the Plaintiff.

Another legal objective is expediency. In essence, existing laws should provide benefits to humans, or in other words, provide happiness. The implementation or enforcement of the law must provide benefits or uses for the community, not the other way around, namely causing unrest and controversy.[75] The judge's decision must benefit the parties both outwardly and inwardly. This may also imply that the parties must be able to understand what the verdict means and means for themselves.[76]

A judge's decision may be considered expedient when the judge, in applying the law, considers the final result of the decision, whether the ruling imposed is useful for the parties and can be implemented in a way that ensures the parties do not only win on paper. Additionally, the judge's decision is expected to restore the balance of society. In this context, the judge's decision can impose sanctions on the guilty parties and provide adequate compensation or reinstate the rights of other parties who have been harmed. This illustrates that the aspect of expediency is primarily economic.[77]

The fact that the judge's decision is oriented towards expediency does not imply that legal certainty and justice have been overlooked. The judge's decision maintains legal certainty and justice, particularly by offering solutions to the parties' legal problems and following the laws and regulations. In the judge's decision, justice is understood as equal rights and interests.[78]

The principle of expediency is a fundamental principle that is inextricably linked to the principles of justice and legal certainty. The concept of expediency must be addressed while still applying the principles of justice and legal certainty, both for the benefit of the individuals involved and for the benefit of society as a whole.[79]

In Decision Number 5/Pdt.GS/2021/PA.Sbg, the principle of expediency is more closely aligned with the principle of legal certainty. When further elucidated, the defendant, in his answer, asserted that his family's financial circumstances were constrained by the pandemic and were amenable to the confiscation or auction of the collateral.

Concerning the sale of the collateral to a third party by the defendant, even if it is completed, it will not be able to pay off the remaining financing. Based on the testimony of the defendant, the collateral was sold for Rp. 33,000,000 (thirty-three million rupiah) and Rp. 20,000,000 (twenty million rupiah) was paid, leaving only Rp. 13,000,000 (thirteen million rupiah). The remaining financing that must be paid by the defendant is Rp. 38,839,961 (thirty million eight hundred thirty-nine thousand nine hundred sixty-one rupiah). In this case, the auction of collateral can be considered to provide more benefits in resolving the contract dispute.

Courts play a pivotal role in the implementation of legal objectives. The conduct of judges in fulfilling their obligations and responsibilities shapes the procedural framework of the court. As a key figure in the administration of justice, the judge

[75] Margono, *Asas Keadilan, Kemanfaatan & Kepastian Hukum Dalam Putusan Hakim*, 110.
[76] Margono, 113.
[77] Djojorahardjo, "Mewujudkan Aspek Keadilan Dalam Putusan Hakim Di Peradilan Perdata," 96–97.
[78] Djojorahardjo, 97.
[79] Kholid, "Kepastian Hukum Dalam Penyelesaian Sengketa Ekonomi Syariah Kepailitan Dihubungkan Dengan Undang-Undang Nomor 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang," 347.

bears the responsibility of influencing the outcome of cases brought before them. To fulfill this role, judges must maintain impartiality and refrain from being unduly influenced by any party involved in the dispute. Nevertheless, as a legal foundation, the judge is constrained by the events or legal facts presented in the trial, as well as the regulations pertinent to the case.[80]

The judge's decision should be able to predict future possibilities. The judge's decision is one of the manifestations of justice, expediency, and legal certainty that the community expects.[81] Judges in facing a case are always faced with casuistic principles of justice, expediency, and legal certainty. According to Sudikno Mertokusumo, the three principles faced by the judge must be applied in a compromise and proportional manner. It is not necessary for judges to adhere to the principle of priority proposed by Gustav Radbruch; rather, they should apply the principle of casuistic priority or the principle that best suits the circumstances of the case at hand.[82]

The authors posit that, in determining Case No. 5/Pdt.GS/2021/PA.Sbg, the judge is inclined to prioritize principles of justice and expediency. This is evidenced by the decision to grant the defendant leeway in completing the remaining financing. In this case, the judge should be able to balance the principles of justice, expediency, and legal certainty proportionately. Concerning Case No. 5/Pdt.GS/2021/PA.Sbg, the judge may determine the right to sell collateral as a manifestation of the principle of legal certainty based on the contract, the sharia text of the parties, and the applicable legislation.

Conclusion

Based on the presentation of the research findings and the ensuing discussion, the authors have formulated several conclusions. Subang Religious Court Decision No. 5/Pdt.GS/2021/PA.Sbg establishes that the Plaintiff (BPRS Gotong Royong Liquidation Team) filed a lawsuit against the Defendant (the Customer) for defaulting on the financing repayment in accordance with the agreed-upon contract. As a preliminary measure, the Plaintiff issued warning letters and conducted visits to the Defendant. Subsequently, it was discovered that the Defendant had sold the collateral pledged for the financing contract. The Plaintiff then filed a lawsuit at the Subang Religious Court, seeking immediate payment of the outstanding financing balance, the seizure of the collateral, and the determination of the right to auction the collateral as per the financing contract.

In its ruling, the Subang Religious Court considered various legal provisions, including Al-Qur'an Surah An-Nisaa verse 58, Article 1267 of the Civil Code, Article 174 HIR, Article 1266 of the Civil Code, Article 1243 of the Civil Code, and Fiqh principles as the basis for the default claims. The principles of *droit de préférence* and *droit de suite*, as outlined in Law No. 4 of 1996 concerning Mortgage Rights and Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, were used to determine the security claims. However, the authors highlight an incoherence between the evidence presented, the judge's consideration, and the final decision. Furthermore, the judge did not reference Article 197 paragraph (8) HIR/Article 211 RBg jo. Article 728 Rv as the legal basis for rejecting the seizure of the collateral. In cases of default under a *Murābahah* contract, accompanied by the transfer of collateral ownership through a sale, the judge should prioritize the principle of justice by allowing an extension for repayment of the contract. This is in line with the stipulations of Q.S. Al-Baqarah verse 280. However,

[80] Tata Wijayanta, "Asas Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga," *Jurnal Dinamika Hukum* 14, no. 2 (2014): 217, https://doi.org/10.20884/1.jdh.2014.14.2.291.

[81] Margono, *Asas Keadilan, Kemanfaatan & Kepastian Hukum Dalam Putusan Hakim*, 118.

[82] Margono, 148.

the judge did not apply the principles of justice, expediency, and legal certainty in a proportional manner, particularly by denying the Plaintiff's request to establish the right to sell the collateral. This decision does not exemplify the proportional application of these principles. The validity of the sale of financing objects and/or collateral under Islamic economic law depends on notifying and obtaining consent from the relevant parties in accordance with the contract and applicable legal provisions.

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