

# AN ANALYSIS OF SHARIA ECONOMIC LAW ON TAKEOVER FROM CONVENTIONAL BANK TO BANK SYARIAH MANDIRI BRANCH IN CIAMIS

Mustofa

Faculty of Sharia and Law, Universitas Islam Negeri (UIN) Sunan Gunung Djati, Bandung  
Jl.A.H.Nasution No. 105 Cibiru Bandung, 40614  
E-mail: mustofahasan@uinsgd.ac.id

**Abstract:** Bank Syariah Mandiri (BSM) branch (KCP) in Ciamis was very transparent in providing financing products, especially *takeover* services or the transfer of customer debt from conventional banks to BSM. This study aimed at analyzing the causes of *takeover* from conventional banks to Bank Syariah Mandiri and analyzing the law of take over. Current research was a qualitative research by using observation and interview techniques. The research process was employed naturally, towards direct observation and in-depth interview. Data obtained were analyzed by applying Miles and Huberman of flow models, including collecting, reducing, displaying the data, and drawing conclusions. The results of the study revealed that the causes of the *takeover* were BSM provided education to customers to transact according to Islamic economic principles; transactions free from usury that led to benefit, justice, and peace. BSM provided several services such as convenient requirements, no penalties, and cheap installments. Benefits and application of Islamic sharia consideration were depicted from findings. The services encouraged customers to perform takeover. However, in terms of Islamic economic law, transfer of customer debt from conventional banks to BSM KCP Ciamis was permitted. This was consistent to Q.S. Al-baqarah [2]: 245; *ijmak* scholars who agreed to allow the transfer of debt; and DSN *fatwa* suggested that *syirkah al-milk*, *murabahah*, *qardh*, *ijarah muntahiya bi al-tamlik* were sharia compliance and avoided from *riba* and *gharar*.

**Keywords:** Islamic economy; *takeover*; Islamic banking; *hiwalah*

**Abstract:** Bank Syariah Mandiri (BSM) KCP Ciamis lebih transparan dalam memberikan produk pembiayaan, terutama layanan *take over* atau pemindahan hutang nasabah dari bank konvensional ke BSM. Penelitian ini bertujuan untuk menganalisis penyebab terjadinya *take over* dari bank konvensional ke Bank Syariah Mandiri dan menganalisis hukum *take over* itu. Penelitian ini merupakan penelitian kualitatif yang menggunakan teknik observasi dan wawancara. Proses penelitian ini dilakukan secara alami, yakni pengamatan langsung dan wawancara yang mendalam. Data yang diperoleh kemudian dianalisis dengan model alir ala Miles dan Huberman, yakni pengumpulan data, reduksi data, penyajian data, dan penarikan kesimpulan. Hasil penelitian menjelaskan bahwa penyebab terjadinya *take over* adalah bahwa BSM memberikan edukasi kepada nasabah untuk bertransaksi sesuai prinsip ekonomi syariah, yakni transaksi bebas dari riba yang akan mendatangka kemaslahatan, keadilan, dan ketentraman. BSM memberikan beberapa layanan seperti persyaratan yang mudah, tidak ada pinalti, dan cicilan murah. Di sini tampak adanya pertimbangan manfaat dan penerapan syariah Islam. Dengan layanan tersebut ternyata banyak nasabah yang melakukan *take over*. Sedangkan dilihat dari hukum ekonomi syariah, pemindahan hutang nasabah dari bank konvensional ke BSM KCP Ciamis itu dibolehkan. Hal ini sejalan dengan Q.S. Al-baqarah [2]: 245; *ijmak* ulama yang bersepakat memperbolehkan pemindahan hutang; dan fatwa DSN yang menyatakan bahwa *syirkah al-milk*, *murabahah*, *qardh*, *ijarah muntahiya bi al-tamlik* itu sesuai dengan syariah yang terhindar dari *riba* dan *gharar*.

**Kata kunci:** ekonomi syariah; *take over*; bank syariah; *hiwalah*

## Introduction

Indonesia is a country with heterogeneous community and Muslim majority. As the biggest muslim people in the world, Indonesia becomes potential market for banking system with sharia-

based business expansion. During economic crisis, sharia banking tends to endure due to unavailability of interest rate instrument; while sharing profit is employed to avoid negative spread.

According to certain case, several customers start to confess the advantage of Bank Syariah Mandiri and consider to be partnering with. Therefore, they pleasant to conduct economic cycle based on Holy Quran and Sunnah principal. Understanding of sharia banking not only just determine operational practice aspect, but also discover the perspective of Islamic macroeconomics<sup>1</sup>. Sharia banking is a unit of Islamic economics system which is operated through *riba* (interest) doctrine prohibition. In terms of sharia banking, *akad* (agreement) employed has both *duniyawî* (world life) and *ukhrawî* (hereafter) consequences because it considers Islamic law. Customers are often violent the agreements because they assume that it only a positive law, whereas it will not occur due to its responsibility to *yaumul qiyâmah* (Judgment Day)<sup>2</sup>. As an economic-based organization, Bank is apparently perceptive to this case. Consequently, sharia banks attempt to facilitate society who want to transfer the transaction to sharia services. Takeover also aims to assist society to takeover non-sharia transaction-based to sharia compliant transactions<sup>3</sup>.

One of sharia banking company, Bank Syariah Mandiri branch (KCP) in Ciamis also provides takeover financing services. Currently, this bank considers *qard* (loan) and *murabahah* (cost-plus financing) for debt transfer. Theoretically, this *akad* is not an issue because it is allowed in sharia principle. Problem arises after practicing, certain *akad* seems similar to *bai' al-inah*, a buyout agreement while selling an asset to buyer for sale with immediate repurchase. *Bai' al-inah* is a cash sale followed by deferred payment sale. *Bai' al-inah* is a buy-back transaction to avoid debt and *riba*, which is selling an asset with deferred payment or not received, then buy in cash. The sale and buy-

back agreement of *bai' al-inah* has similarity to cash loan with asset guarantee to conventional bank. The main difference between sharia and conventional bank is the agreement, while physically both banks receive cash. According to Syafi'i sale and buy with *bai' al-inah* is allowed. However, *jumhûr ulamâ* (majority of scholars) agree that this transaction is *haram* (illegal). Likely, Indonesian ulama also agree with this due to three *iwâd* (compensation) elements, they are risk, work and effort, and responsibility, in which all of them are excluded in *bai' al-inah* transaction and documented only in a file<sup>4</sup>.

Debt transfer of debt (takeover)-related issues occurred by conventional to Bank Syariah Mandiri in Indonesia has widely developed since the enactment of Law No. 7 of 1999 on Banking. Bank Syariah Mandiri (BSM) KCP Ciamis case in terms of transparency in providing financial products, specifically takeover, is interesting to be observed. This because takeover implementation is a debt transfer or *hawalah* (debt) by employing *qard*, *bai* and *murabahah akad* for the use of working fund, multipurpose, and investment from conventional bank to BSM.

Financing with takeover mechanism is perceived as a competition among banks in attracting customers' interest, especially after the expansion of sharia banks. Sharia banks offer exceptional advantages to customers, particularly in terms of sharia idealism. Therefore, takeover financing offered by sharia banks to customers who have credit access to conventional banks. Financing takeover in sharia banking is one of the financial services in sharia banks. They assist customers to takeover the transaction into conventional bank to another sharia bank in an Islamic compliant way as requested by customers.

Sharia bank delivers the *qard* to customer to pay off (credit) debt to conventional bank. Therefore, assets purchased by customers are fully owned and they sold back to BSM. The sales revenue obtained is used as *qard* pay-

<sup>1</sup> A. Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Kencana, 2002), pp. 54-55.

<sup>2</sup> Muhammad Syafi'i Antonio, *Bank Syariah dar Teori ke Praktek*, (Jakarta :Gemalnsani, 2001), p. 29.

<sup>3</sup> Saraswati, Distie and Syamsul Hidayat, "Implementasi Hybrid Contract Pada Take Over Pembiayaan Hunian Syariah Dari Bank Konvensional ke Bank Syariah Dalam Perspektif Hukum Islam," *Jurnal Jurisprudence* 7.1 (2017), p. 81

<sup>4</sup> Ascarya, *Akad dan Produk Bank Syari'ah*, 1<sup>th</sup> Edition, (Jakarta: Raja Grafindo Persada, 2007), pp. 189-190.

off to BSM. The sharia bank sell the asset by *murabahah* to customers in installments with net price plus margin.

According to the background of the study, the writer is interesting in conducting further research in debt takeover from conventional to Bank Syariah Mandiri. There are two issue emerge, 1) Reason of takeover financing from conventional to BSM KCP Ciamis, and 2) Sharia law analysis to takeover transaction legality.

## Method

This study employs qualitative descriptive research. According to Sukmadinata<sup>5</sup>, descriptive refers to description of facts such as activities, characteristics, changes, relationships, similarities, and differences. Investigation of the emergence of takeover from conventional bank to BSM is the focus of current study. Therefore, takeover description in BSC is suitable with research's objective. As Sukmadinata argues, descriptive research does not require treatment, manipulation or free variable changes, but depicts actual condition both within individual or group.

In qualitative research, researcher was a main instrument to observe social issue as well as human behavior, in case of takeover from conventional bank to BSM. Moleong<sup>6</sup> suggests that qualitative research requires researcher, as an informant, to involve directly with customer, observe their behavior, and interact longer with them.

Techniques of data collection employed were observation and in-depth interview. Collected data was analyzed with flow model by flow model of Miles and Huberman, including data collection, data reduction, data presentation, and conclusion drawing or verification.

## The Reasons for Takeover in Bank Syariah Mandiri KCP Ciamis

After observing number of customers and interviewing the head of BSM KCP Ciamis, Darwis

Satria Dijaya (October 26, 2018), it revealed several common factors caused takeover. First, BSM KCP Ciamis had job duty and responsibility to customers to educate how to take proper transaction based on Islamic principles, which were free of interest and tend to emphasize *maslahah* (public interest), equity, and peace. Second, business strategy implemented is minimize risk due to financial drawback of customers' experience in conventional bank. Third, opportunities challenged to enhance assets as well as outstanding financial outlet and branch office.

Besides aforementioned factors, it showed that internal factor was related to management policy of financing. It was a policy that provides convenient requirements. In order to increase takeover customers, BSM determined simple requirements, so customers feel facilitated. Takeover was performed through common takeover, for example remaining principal loan in former bank was took-over by BSM. Second policy was unavailability of penalties and low installments since no high interest rate for customers in sharia finance. The other policy was efforts to encourage well-mannered customers from another banks. BSM carried out promo banking which commonly carried out personally by delivering information and description of sharia financial product towards takeover.

Moreover, external factors encompassed anything form outside BSM, such as customers as well as their environment. First, profit and benefit consideration of sharing profit (margin) financing. Convenient financing and penalties restriction were advantages for customers who mostly medium and small enterprises (SME). Second, customers' request to be loyal in Islamic principles. Third, the rise of interest rate lead to increase life burden of customers. In this condition, they attempt to find a way out, including took a takeover transaction credit to BSM.

Takeover financing process in BSM KCP Ciamis not always goes as expected. Darwis Satria Dijaya asserts that during takeover process,

<sup>5</sup> Nana Syaodih, Sukmadinata, *Metode Penelitian Pendidikan*, (Bandung: PT RemajaRosdakarya, 2010), p. 72

<sup>6</sup> Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, (Bandung: Remaja Rosdakarya, 2000) pub, 18, p.5

there are constraints experienced. First, one of the requirements for taking takeover is debtor credit operation process level in former bank. This one of assessments employed to know customer ability, either individually or business to pay installment financing which to be takeover. Second, BSM does not conduct survey beforehand. Third, former bank process inhibits customer payment causes certificate, which used as payment guarantee, cannot be issued on the same day. Fourth, late administration requirements should be completed. This correlates with another party, for example Indonesian National Land Office (BPN) in terms of mortgage transfer guarantee. Administration process of mortgage transfer guarantee in BPN takes time and sometimes not be getting as scheduled between BSM and debtor. Consequently, in terms of takeover process in BSM KCP Ciamis, notary gives letter of statement of mortgage transfer guarantee arrangement process. Additionally, the notary presents guarantee that the process will be accountable for customers until it is accomplished.

According to Hanafi Madhab (*Imâmî* jurisprudence) Hanafi, rukun *hawalah* (takeover) consists of *ijâb* (statement of doing *hawalah*) refers to first party and *Qabûl* (statement of receiving *hawalah*) for second and third party<sup>7</sup>. There are benefits in transferring debt from conventional bank to BSM, such as assets and financial outstanding increase for BSM KCP Ciamis; low risk because the customers are selected in terms of financing by proving to information financial services system about debtor information; opportunity to *hijrah* (leaving for good) for customers who implements interest rate move into sharing profit system or sharia-compliant transaction. However, the disadvantages are loyal customers of conventional banks commonly difficult to move to BSM; outlet services are a few that should be expanded to district or even rural area, therefore rural customers firm with their

choice to move to BSM because closer to conventional banks. Meanwhile, conventional banks in nearly all districts to accommodate customers to take transaction easier.

Financing in Islamic banking is called as active productive. This term refers to Islamic bank fund investment both in rupiah and foreign currency including financing, *qard* debt, Islamic securities, positioning, complicity of car and contemporary capital, commitment, and contingency of administrative account as well as *wadiah* (asset) certificate<sup>8</sup>.

### Analysis of Islamic Economic Laws to Customer Debt Transfer from Conventional Bank to Bank Syariah Mandiri KCP Ciamis

Islam is the most outstanding and comprehensive religion. Islam doctrines involve and regulate all aspects of human actions, such as issues related to economy including Bank Syariah Mandiri, *aqidah* (creed), *ibadah* (worship ritual), *muamalah* (interactions among humans being and interconnections), politics, *akhlaq* (practice of virtue or manners), and *adab* (etiquette). In terms of *muamalah*, there is over-credit (debt transferred) or known as *al-hiwalah* (transfer of debt).

Terminologically, *hiwalah*- that *ha* read *kasrah* or sometimes read *fathah*- from the origin word *at-tahawwul*, which means *al-intiqal* (transfer or diversion). Arabic people commonly pronounce *Hala'anil'ahdi'* indicates breaking away from responsibility. Abdurrahman Al-Jaziri defines *al-hiwalah*, terminologically is "Transferring from one place to another".<sup>9</sup> Concerning to *fiqh ulama* (Islamic jurisprudence scholar), *hiwalah* means significantly transfer the debt from *muhil* (debtor) to *muhal 'alaih* (others who should pay the debt) responsibility. However, Maliki, Syafi'i and Hanbali argue that *hiwalah* refers to transferring rights of debt payoff from one party to another<sup>10</sup>.

<sup>8</sup> Veithzal Rivai, *Islamic Banking*, (Jakarta: BumiAksara, 2010), p 681.

<sup>9</sup> Abdurrahman Al-Jaziri, *Al-Fiqh 'ala Al-Madzahib Al-Arba'ah*, (Beirut: Darul Kutub Al-Ilmiyah), 2003, p. 210.

<sup>10</sup> H.R. Bukhari, IV:585, no. 2287, and Muslim, V:471, no. 3978; from hadis Abu Hurairah *radhi'allahu 'anh*.

<sup>10</sup> Abdullah Abdurrahim Al-Abadi, *Radd Al-Mukhtar Ala*

<sup>7</sup> Sutan Remy Sjahdeini, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, (Jakarta: PT. Pustaka Utama Grafiti, 2007), p, 96.



The legal framework of *al-hiwalah* permitted is based on *dalil* (meaning) of the Sunnah, *ulama ijma* (consensus), and *qiyas* (analogy), Prophet Muhammad Saw said:

مطل الغني ظلم و اذا أتبع أحدكم على مليء فليتَّب

“Stalling debt payments made by a rich person is a form of injustice. If one of you (credit payment) is transferred to another person who is easy to pay debts, let the transfer be accepted”.<sup>12</sup> In addition, the Prophet Muhammad said, the following translation: “Haram (forbidden) to people who can afford to pay debts to default. If one of you transfers his debt to someone else, let the transfer be accepted, provided the other person (who is asked to pay the debt) is able to pay it. If one of you transfers his debt to someone else, let the transfer be accepted, as long as the other person (who is asked to pay the debt) is able to pay it”<sup>13</sup>.

The *ulama[s]* (scholars) have agreed to allow life. In the encyclopedias of Islamic law it is stated that law determines something on something or exclude it. The study of Islamic economics is bound to Islamic values, or in everyday terms bound by the provisions of *halal-haram*, while the issue of *halal-haram* is one of the scopes of legal studies. It shows the close relationship between law, economics, and sharia. The use of sharia as *fiqh* appears specifically in the inclusion of Islamic sharia as a source of legislation in several Muslim countries, Islamic banking, Islamic insurance, and Islamic economics. From the point of view of Islamic teachings, the term sharia is similar to sharia (*ta' marbuthoh*, the ending is read with ha) whose understanding is directed towards the meaning of *fiqh*, not merely verses or legal

traditions. Thus, Islamic economics is the main arguments about the economy stated in the Quran and Hadith. This provides a demand for the Islamic community in Indonesia to create and implement a sharia economic legal system based on the basic arguments of the Quran and Hadith.

In the context of society, ‘Islamic economic law’ means Islamic economic law that is extracted from the existing Islamic economic system in society, which is the implementation of *fiqh* in the economy by the community. The implementation of economic system by the community requires the law to regulate in order to create an orderly law and resolve issues of dispute that inevitably arise in economic interactions. In other words, the Islamic economic system requires the support of Islamic economic law to resolve various disputes that may arise in society. Concrete sharia economic law in Indonesia in particular can be seen from the recognition of the fatwa of National Sharia Council, as a material law of sharia economics, for the later part of it is set forth in PBI or SEBI. Likewise in the form of a law, for example: Law No. 21 of 2008 concerning Sharia Banking, is expected to fill the legal blanks in the field of sharia economics. For insurance, mutual funds, bonds and sharia capital markets and other sharia financial institutions, indeed also require separate legislation for their development, in addition to other pre-existing laws and regulations. The raw materials of the law include jurisprudence studies of the jurists. The presence of Sharia Economic Law in Indonesian law today is actually no longer merely due to historical and population demands (because the majority are Muslim) as some people or parties assume; however, further than that, it is also caused by the needs of wider community after being known and felt correctly how fair and equitable the Islamic economic system in guarding the welfare of the people aspired by the nation and the Unitary State of the Republic of Indonesia. This, along with the development of an increasingly critical society about the mechanism of investment with the profit and loss sharing system, is implemented and better

Ad-Dur Al-Mukhtar Syarhu Tanwir Al-Abshar, V:340; taken from *Mauqif Asy-Syari'ah min Al-Masharif Al-Islamiyyah Al-Mu'ashshirah*, (Riyadh: Saudi Arabia Dar Alam Al-Kutub, 2014), p.339.

<sup>11</sup> H.R. Bukhari, IV:585, no. 2287, and Muslim, V:471, no. 3978; from hadis Abu Hurairah *radhi'allahu 'anhu*.

<sup>12</sup> Abdullah Al-Bassam, *I'lam Al-Muwaqqi'in 'an Rabbil 'Alamin*, I:380; dinukil from *Al-Mulakhkhas Al-Fiqhi*, Syekh Shalih Al-Fauzan, II:81 dan *Taudhih Al-Ahkam*, IV:579. tt.

<sup>13</sup> H.A. Hafizh Dasuki, *Ensiklopedi Hukum Islam*, ( PT. Ichtiar Baru van Hoeve, Jakarta: FIK-IMA, 1997), p. 571.

impact. The activities of economic actors as legal subjects always show an increasingly established tendency with increasingly rapid frequency and diverse types of legal relations. Basically, economic law always develops based on business opportunities or new ventures; new commodities offered by science and technology; demand for new commodities, trends in market changes; new needs in the market; changes in political economy; and various other driving factors, such as political shifts and market share.

Law should be able to provide solutions that are in accordance with the business development. In this context, legal studies needed are economic law studies and business law studies that are integrated with Islamic principles and in accordance with the needs of times. The implementation of sharia economic law can be distinguished in two dimensions, namely the macro dimension that emphasizes the economic regulation of society in terms of ethical and philosophical aspects, such as how the distribution of wealth by the state, the prohibition of usury, and economic activities that do not provide benefits, and the micro dimension emphasizes more on the professionalism and competency aspects of the executor. As for the values of Islam in the micro dimension, all funds obtained in the Islamic economic system are managed with high integrity and are very careful. To carry it out, there are several characteristics that have been exemplified by the Prophet Muhammad, namely *shiddiq* (truthful), *tabliq* (communicative), *amanah* (integrity), and *fatanah* (intelligence).

This take-over financing uses the services of *hiwalah*, which means the transfer of debtor to others who are obliged to bear it. With this transaction, the bank will get a fee or wage and can also use the services of *qardh* adjusted to the presence and absence of interest elements in customer debt at conventional banks. The transactions are between customers and Bank Syariah Mandiri. In the take-over financing mechanism, the National Sharia Board should actively take participation as the fatwa provider to maintain the application of Islamic law in the contract carried out by Bank Syariah Mandiri. The fatwa is contained in the National Sharia Council Fatwa Number: 31 / DSN-MUI / VI / 2002

concerning Debt Transfer. This fatwa mentions four alternative contracts, namely (1) *qardh* and *murabahah*, (2) *syirkah al-milk* and *murabahah*, (3) *qard* and *ijarah*, and (4) *qard* and IMBT (*Ijarah Muntahiya bi al-Tamlik*).

### Benefits of Sharia Economic Law

Sharia economic law is beneficial in realizing the integrity of a *kaffah* Muslim (whole) so that Islam is no longer partial. If there is a Muslim who is still struggling and practicing conventional economics that contains elements of usury, it means that Islam is not *kaffah* (whole) because the Islamic economic teachings are ignored. In addition, sharia economics implements and practices the Islamic economy through sharia banks, sharia insurance, sharia pawnshops, sharia mutual funds that will benefit the world and the hereafter. Worldly profits in the form of profit-sharing, and reward in the hereafter is in the form of free from usury. A Muslim who practices sharia economics will be rewarded for practicing Islamic teachings and leaving usury. This is because Islamic economic practices are worth worshipping as a form of the practice of sharia of Allah.

In addition to the value of worshipping, practicing Islamic economics through Islamic banks, Islamic insurance and BMT means supporting the economic institutions of the Muslims themselves. Practicing Islamic economics by opening savings, deposits or becoming a customer of Islamic insurance, will automatically support the economic empowerment of Muslims themselves to develop Muslim businesses. It indicates that this practice supports the movement of *amâra'ûf nahî munkâr* (doing things that God commanded and forbade human to do things) because the collected funds can only be used for *halal* businesses or projects. Islamic banks will not want to finance illicit businesses, such as liquor manufacturing businesses, drug and narcotics businesses, gambling businesses, hotels that are used for immorality or entertainment venues such as discotheques and so on.<sup>14</sup>

<sup>14</sup> Mardani, *Hukum Ekonomi Syariah di Indonesia*, (Penerbit PT. Refika Aditama : Bandung, 2011)

In Islam, every transaction must be specific, open and transparent. This means that transactions must be based on good faith so that there cannot be vague or *gharar* (uncertainty) cases. Transaction risk must be managed well to avoid the element of *maysir* (gambling), the risk due to seeking wealth by shortcut. Andrew Shandy Utama said that the biggest *maysir* was in a zero-sum game situation, where one party's profit is another party's loss.<sup>15</sup>

### **Funding Take-Over Implementation in Bank Syariah Mandiri KCP Ciamis**

After the take-over agreement is approved and subsequently set forth in the agreement, the remaining customer obligations to the initial creditor are paid by BSM. This repayment fund will then move into the BSM financing scheme. Thus, in fact there is no transfer of rights and obligations because the customer has completed his obligations to the initial creditor and subsequently the customer's rights and obligations are diverted to BSM. Accordingly, the take-over financing agreement at a sharia bank is a legal relationship between two parties, namely the bank and customer as a partner of the capital owner to finance and run a halal and productive business. This legal relationship will lead to legal consequences, namely mutual rights and obligations for each party. In practice at Bank Syariah Mandiri KCP Ciamis, the legal relationship between the provision of financing facilities between the bank and the customer is contained in a contract or *qardh wa al-murabahah* financing agreement.

According to Suharmoko, the legal consequence for banks and customers is the position of the parties. Credit take-over is an event in which a third party gives credit to the debtor which aims to pay off debtor's debts to the initial creditor and gives new credit to the debtor so that the position of the third party replaces the initial creditor position. In the case of take-

over financing, in accordance with Suharnoko's explanation, the third party in this case is the BSM KCP Ciamis which acts as the new creditor to pay the remaining debts of the customers to the initial creditors. Old debt and all obligations between the creditor and the debtor are written off, and then revived for the benefit of the Bank Syariah Mandiri KCP Ciamis.

Take-over is included in the subrogation at the debtor's initiative in accordance with Article 1401 paragraph (2), which states that the debtor borrows money to a third party to repay his debt to the creditor and stipulates that the third party will take over the creditor's position. The legal consequence of financial take-over is the transfer of creditors' loans to Bank Syariah Mandiri KCP Ciamis, which then replaces the position and rights of creditors. Other rights that should be transferred according to the law are collateral rights for collateral used as collateral. In the *qardh* contract as the main agreement, there is a clause which clearly and expressly states that the loan as referred solely is used to repay the loan (takeover) from the initial creditor.

Based on the provisions of Article 16 of Law No. 4 of 1996 concerning mortgage rights, transfer of collateral is performed by registration as a subrogation event at the National Land Agency (as a condition of publicity). However, in the case of financial take-over at Bank Syariah Mandiri with the object of collateral in the form of land that has been encumbered with mortgage rights, the process is conducted through a *roya* process or deletion at the National Land Agency office to remove the position of the initial creditor as the holder of the guarantee right. The *roya* process is followed by the imposition of mortgage rights is based on a power of attorney to charge the mortgage rights and the deed on mortgage rights made earlier for the guarantee of immovable property. After receiving the original proof of guarantee, a re-imposition of the guarantee is preceded by signing the deed of encumbrance at the same time as the collateral is made. The deletion of registration of mortgage rights can be conducted

<sup>15</sup> Utama, Andrew Shandy. "Sejarah dan Perkembangan Regulasi Mengenai Perbankan Syariah Dalam Sistem Hukum Nasional Di Indonesia." *Jurnal Wawasan Yuridika* 2.2 (2018), p. 190



with or without the return of the mortgage certificate that has been issued, not returned, then it must be recorded in the Land Rights Mortgage Book.<sup>16</sup>

### **The Relevance of DSN Fatwa Number: 31 / DSN-MUI / VI / 2002 to the Financial Take-Over in Bank Syariah Mandiri KCP Ciamis**

The provision of financing through take-over mechanism by Islamic banks to customers is generally due to the principle of sharia idealism in the transaction so that the customer decides to move his credit from conventional banks to Islamic banks. The process of providing funding through a take-over mechanism uses a contract that is in accordance with sharia principles. The practice of financial take-over at BSM KCP Ciamis uses *al-bai'* and *murabahah* contracts.

The debt transfer facility is carried out using the following mechanism. The first party provides a loan facility (*qardh*) to the second party to pay off at another bank (conventional) which has been used by the second party to buy goods. The amount of the *qardh* loan is a number of obligations that must be paid by the second party, namely to other banks. With the payment of the second party's debt or credit, the goods financed by the credit have become the property of the second party. Furthermore, the second party sells the item to the first party to repay the *qardh* loan given by the first party, while the first party subsequently sells the item to the second party on the principle of *murabahah*. This is in accordance with the statement of M. Ridwan who stated that the *murabahah* contract is a contract commonly used by Islamic banking in Indonesia.<sup>17</sup>

The explanation in the *hawalah* contract does not only mention the statement of debt transfer by the bank, but also the mechanism of debt transfer that consists of a *qardh* contract

as a fund to pay off obligations in the previous bank. It is also mentioned that the assets owned by the customer are sold to the bank, and the assets then belong to the bank. The contract of sale and purchase should use the *al-bai'* contract. The bank resells the asset to the customer by using a *murabahah* contract, and the customer pays the asset or installments on the loan. The contract clearly states the purchase price of the goods and the profit margins obtained by the bank.

The financial take-over agreement is used by Bank Syariah Mandiri in accordance with DSN-MUI fatwa no. 31 / DSN-MUI / IV / 2002 concerning Debt Transfer in alternative I if there were no hawk contracts which should not be one of the contracts in the series of contracts used for financial take-over. *Bai'* contract is used as a form of buying and selling customer assets to the bank for repayment of *qardh* funds provided by the bank to the customer as a bailout for repayment of obligations at the previous bank. Equipped with DSN fatwa, the system has provided other alternatives such as *syirkah al-milk* and *murabahah*, *qardh* and IMBT (*Ijarah Muntahiya bi al-Tamlik*) which according to the author must be in accordance with sharia and avoid elements of *usury*, *maisyrir*, and *gharar*.

### **Conclusion**

Based on the results described above, the causes of financial take-over in Bank Syariah Mandiri KCP Ciamis are as follows: (a) BSM has duties and responsibilities as a BSM bankers that customers are generally given education to make transaction according to Islamic economic principles so that they are beneficial, fair, peaceful, and free from usury; (b) There are internal factors, namely ease of requirements to increase customer's take-over so that it does not complicate customers. These factors include: (1) zero penalty in the implementation of financing in Bank Syariah Mandiri; (2) cheap and fixed monthly installments as there is no charged interest; (3) banking promos to attract customers with good titles from other banks; (c) External factors, including consideration of profits and benefits,

<sup>16</sup> Kartini Muljadi and Gunawan Widjaja, *Hak Tanggungan*, (Kencana Prenada Media, Jakarta, 2006), p. 272.

<sup>17</sup> Ridwan, M. "Implementasi Musyarakah Mutanaqisah sebagai Alternatif Pembiayaan Murabahah di Perbankan Syariah Indonesia." *Tsaqafah* 9.1 (2013), p. 106



where the bank uses a profit sharing system (margin).

The results of the analysis of Islamic economic law on the transfer of customer debt from conventional banks to Bank Syariah Mandiri KCP Ciamis are based on Q.S. Al-Baqarah [2]: 245, the hadith of the Prophet Muhammad SAW that says it is haram for people who are able to pay debts to forget their debts, and *ijma* from ulama. The scholars have agreed to allow the transfer of debt. In addition, economic law basically always develops on the basis of its existence; (1) business opportunity / new business; (2) demand for new commodities; (3) trends in market changes; (4) new needs in the market; and (5) changes in political economy. Sharia economic law can be implemented in two dimensions, namely the macro dimension that emphasizes the economic regulation of the community in terms of ethical and philosophical aspects, and micro dimension that requires all funds obtained in the sharia economic system be managed with high integrity and a very cautious manner.

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