Transformation of Down Payment in Sharia Financing in Indonesia Based on Buying and Selling *'Urbūn* and *Ḥāmish Jiddiyyah*

Hasanudin

Abstrak: Uang panjer lumrah dipraktikkan di masyarakat. Hukum Islam mengenal konsep *'urbūn* dan *ḥāmish jiddiyyah* yang memiliki kemiripan makna dengan uang panjer. Namun konsep hukum adat dan hukum Islam tersebut tidak seluruhnya sama. Ada perbedaan dan status hukumnya pun berbeda di kalangan ulama. Artikel ini bertujuan menganalisis korelasi konsep uang panjer dan *'urbūn* dan *ḥāmish jiddiyyah* dan status hukum uang panjer dalam perspektif hukum Islam. Dengan metode pendekatan hukum normatif, tema ini dikaji dengan mempertimbangkan pandangan fikih yang dicetuskan ulama masa lalu dan kontemporer serta mempertimbangkan pertimbang ushul fikih. Hasilnya, perdebatan ulama tentang uang panjer berawal dari status kepemilikan uang tersebut dan dampaknya ketika jual beli batal dilakukan. Di sisi lain, sisi keharaman dan kemaslahatan saling berkelindan. Fatwa kontemporer mengambil pendapat boleh dengan pertimbangan kemaslahatan dan kebutuhan modern. Implikasi dari temuan ini, penggunaan uang panjer akan semakin luas di kalangan masyarakat dan sektor keuangan syariah. Diperlukan skema pengawasan agar praktik uang panjer tersebut tidak melanggar ketentuan syariah.

Kata kunci: uang panjer, *'urbūn,* hukum adat, hukum Islam, *ḥāmish jiddiyyah*

Abstract: Down payment is commonly practiced in society. Islamic law recognizes the concepts of *'urbūn* and *ḥāmish jiddiyyah*, which have a similar meaning to a down payment. However, the concepts of customary law and Islamic law are somewhat different. There are differences in ulama's opinions concerning the permissibility of a down payment. This article aims to analyse the correlation between the concepts of down payment, *'urbūn, ḥāmish jiddiyyah*, and the legal status of a down payment in Islamic law. Using a normative legal approach, this topic is is examined by considering the *uṣūl al-fiqh*-based views of the classical and contemporary ulama. This study shows that scholarly debate about down payments starts from the ownership status of the money and the impact when the sale and purchase are canceled. Besides, the aspect of its prohibition and benefit are intertwined. Contemporary fatwas allow the practice of down payment with the consideration of modern needs and *maṣlaḥah*. This finding implies that down payment will become more widespread among the public and the Islamic finance sector. Therefore, A monitoring scheme is needed to avoid the violation of sharia in down payment implementation.

Keywords: Down payment; *'urbūn*; customary law; Islamic law; *ḥāmish jiddiyyah*

Introduction

Islamic economic law emphasizes the importance of conformity in business financial flows. The aim is to maintain a fair balance of contracts, provide equal benefits for all parties, and protect the funds of individuals, groups, or institutions in business activities. To support this suitability, the Islamic economic legal framework stipulates various types of commercial contracts such as buying and selling (*al-buyū'*), leasing (*al-ijārah*), participation (*mushārakah* and *muḍārabah*), guarantees, securities, delivery of down payments *('urbūn*), and so forth. The terms of the contract must meet the requirements of sharia law, such as mutual agreement, transparency, equality, and fairness in the distribution of profits and losses. In addition, the contract must also pay attention to the interests of society and the environment and not harm the parties involved.

One of the concepts used in the framework of Islamic economic law to maintain the balance of contracts is *'urbūn*. *'Urbūn* concept is applied with the principles of fairness and equality in transactions because it protects the interests of both parties in the contract and minimizes the risk of loss. However, using the *'urbūn* type of contract can cause problems related to the non-refundable delivery in the event of business contract cancelation. Although this practice is common (Yunus, 2020), Fiqh experts have different opinions regarding the legality of *'urbūn* . They differ in opinion regarding the legal status of this down payment, some forbidding it and some allowing it (al-Dharir, 1993). Those who oppose the use of *'urbūn* say that the contract violates Sharia principles such as justice, freedom, and equality and can trigger riba practices and harm consumers in the event of cancelation (Ibrahim & Salam, 2021). On the other hand, jurists allow the use of *'urbūn* by stipulating certain conditions, such as an agreement between the two parties, a reasonable amount of down payment, and guarantees for the down payment submitted (Yunus, 2020).

Regarding the dynamic debates on *'urbūn* practices, Muslim economists have discussed *'urbūn* as a link to modern Islamic financial practices. For example, Rostami Chelkasari E. and Alinezhady Gvrabjvary M. (2013) studied juridical evidence and the legal basis of *'urbūn* in Iran. They concluded that *'urbūn* has a unique property, considered as the payment of a part of the total contract price, and

if the contract is made later, it is regarded as the paramount price (Chelkasari & Gvrabjvary, 2013).

Siham Omranaa and Rajae Aboulaichb (2015) discuss the problem of *bayʿ ʿurbūn*, which is similar to a Call Option. However, in practice, it significantly differs in its compliance with Sharia principles. Omranaa and Aboulaichb present two models to evaluate *ʿurbūn* deposit amounts. They find that the *bayʿ ʿurbūn* contract is only enforceable at maturity and consider the Black & Scholes model. In the second part, they model the binomial approach to pricing *ʿurbūn*, given that the contract can be executed before maturity. The final finding of this paper leads to the conclusion that *bayʿ ʿurbūn* can be a Sharia-compliant alternative to conventional call options for risk management in Islamic financial institutions (Omranaa et al., 2015; Omranaa & Aboulaich, 2016).

Terengganu Darul Iman and Kuala Terengganu Campus (2017) examine the application of sharia principles to commodity derivatives as an alternative to conventional derivative contracts in risk management. Most Sharia clerics consider derivative contracts non-Shariah compliant, owing to selling something that does not exist, deferral of counter values, uncertainty, gambling, speculation, and selling of one's debt for another. This study revealed that the application of *wa'd*, *ḥāmish jiddiyyah*, *bayʿ al-murābaḥah/musāwamah* is the most relevant and suitable principle to be adopted because of its flexibility and easiness of application in forward, futures, option, and swap contracts (Terengganu Darul Iman and Kuala Terengganu Campus, 2017).

In their research, al-Mu'mini and Musa (2019), describe alternative traditional hedging instruments using a combination of *murābaḥah* and *ʿurbūn* contracts. The remaining money in the contract is used as a down payment (*ʿurbūn*) at an agreed price in the asset purchase contract. If an expected increase does not occur, the borrower will only be asked to cancel the contract and lose the amount paid as *ʿurbūn*, borne by the *murābaḥah* profit margin (al-Mu'mini and Isra Musa, 2019). Laita Ibtihal Fares, Abdellah Marghich, and Mohamed Habachi (2020) discuss the *ʿurbūn* (down payment) contract according to Islamic law and the positive law used in several Muslim countries by providing technical and legal comparisons between the two contracts. This research argues that *ʿurbūn* 's practice is permissible and, as an alternative contract, adapts to modern Islamic finance's development (Fares et al., 2020).

Nasir Mansoor (2020) has raised several *'urbūn* issues that are of concern not only to industry practitioners but also to other stakeholders such as regulators and academics. The problem relates to *ḥāmish jiddiyyah* that its practical implementation is non-sharia compliant. The discussion in this study is to identify contemporary Sharia law, regulation, and risk management associated with *ḥāmish jiddiyyah* and *'urbūn*, which have been applied to Islamic contemporary banking contracts, such as murābaḥah, *ijārah* and *ijārah muntahiyah bī al-tamlīk* at State Bank of Pakistan (Mansoor, 2020).

There has been ongoing debates and discussions in various Islamic countries about the use of *'urbūn* in Islamic business practices. Some Islamic clerics and economists criticize the use of *'urbūn* because it violates the principles of justice and equality in business transactions—however, some view *'urbūn* as a form of protection for both parties in a business contract. However, along with the development of Islamic economics and a better understanding of the concept of *'urbūn*, it is hoped that there will be a solution that meets the principles of Sharia law and avoids the risk of loss for all parties involved in a business contract. Thus, along with the times and changes in business practices, the concept of *'urbūn* has also experienced changes and spawned controversy.

In Indonesia, *'urbūn* practice is based on institutionalized habits in society related to transactions that are *tijārah* (business) in nature, especially those using *mu'āwaḍah/mubādalah* (exchange) and *tamlīkat* (contracts with legal consequences) schemes. In particular, it is the transfer of ownership of the contract object (*intiqāl al-milkiyyah*), known as a down payment, first payment, term deposit, and other terms. The practice of down payment and the like includes living legal provisions and development in society based on an agreement based on *ḥurriyah al-ta'āqud* (freedom to contract), which is also regulated in Article 1338 of the Civil Code (Sinaga et al., 2016).

Freedom of contract can be understood as the freedom to choose and make a contract; the freedom to create and not to make a contract; the freedom of the parties to determine the contents and their promises; and the freedom to choose the subject of the agreement. Thus, the freedom to contract has a positive meaning if the parties have the freedom to make a contract, reflecting the parties' free will. Freedom

of contract can also have a negative meaning if the parties are free from an obligation as long as the binding agreement does not regulate it. Freedom of contract, until now, remains an essential principle in the legal system of contracts in civil law, common law, and other legal systems. This is because the freedom principle of contract is a universal principle that applies in all countries. Furthermore, the freedom principle of contract implies a manifestation of the parties' free will in an agreement (Rusli, 2015).

In some areas, this down payment is made as a commitment to buy and sell. With the down payment, the status of the object being sold will be withheld from being sold to other parties. This practice is also known in Islamic law, but its legal status is debated among clerics. The terms used in Islamic law are *'urbūn* and *ḥāmish jiddiyyah*.

The issue regarding the down payment concerns returning the money to the buyer when the sale and purchase are canceled. This problem is also questioned in Islamic law. Apart from that, the clerics also questioned the permissibility of paying debtors *('urbūn*). Do they include buying and selling, which are paid strictly, or buying and selling gradual payments? For sellers and buyers who make transactions through Sharia financing, practical and Sharia issues merge into the practice of these down payments. This paper discusses *'urbūn* and *ḥāmish jiddiyyah* with jurisprudential and *uṣūl al-fiqh* approaches. The aim is to examine the actual procedure and views of the ulama regarding their legal status to obtain legal certainty.

Method

This study uses a qualitative methodology with document analysis. This analysis is used as a stand-alone methodology. The primary documents consist of classic fiqh books on Islamic jurisprudence and authoritative MUI fatwas. Meanwhile, the secondary documents consist of secondary Islamic jurisprudence books, presenting commentaries or clarification of fiqh books and fatwas in the authoritative texts mentioned earlier, as well as research articles from journals and conferences related to the *'urbūn* discourse.

Data were collected and then evaluated using the content analysis method proposed by Bowen (2009). The data was then structured to

produce laws and their interpretations that can be understood, digested, and used as research findings.

Terms of Down Payment and *'Urbūn*

Down Payment is a concept related to business transactions. A down payment is the money the buyer gives to the seller as collateral in a business transaction. This down payment shows the buyer's seriousness in making a transaction and minimizing the risk of cancelation. According to customary law experts, a down payment refers to transferring land rights in selling and purchasing land. The land rights transfer must be carried out in the presence of the customary leader, who is responsible for the legality of the rights transfer so that it becomes known to the public. The transfer of land rights must also be in cash; that is, payments are made simultaneously or partly considered cash. However, if the buyer does not pay off the balance, the terms of credit apply, not the terms of sale and purchase (Sutedi, 2018). This is by the principles of fairness and equality in business transactions to minimize the risk of loss and create an honest business relationship for all parties involved (Muhammad, 2006; Soekanto & Taneko, 2020; Sutedi, 2018).

The buying and selling procedure begins with an agreement between the prospective seller and buyer regarding the object of the sale and purchase, namely the land whose ownership rights are to be sold and its price or nominal value, through deliberation. After they agree on the object of sale and purchase, it is usually followed by the submission of a down payment as a sign that the sale and purchase agreement will be executed. With the down payment, the parties feel morally bound to keep their promises to proceed with the sale and purchase contract at the agreed time (Sutedi, 2018). The submission of a down payment does not mean that a sale and purchase contract has been carried out, but its function is only as a sign (so) that the sale and purchase will be carried out.

During the grace period between the sale and purchase agreement and the execution of the sale and purchase contract, the parties have the right to refuse not to enter into a sale and purchase contract. If the refusal is made by the prospective buyer (who submits the down payment), the down payment belongs to the recipient of the down

payment (prospective seller); conversely, if the down payment recipient (prospective seller) is in default, the nominal down payment must be returned to the prospective buyer. Sometimes, the amount is double the original down payment amount (Sutedi, 2018). If the parties ignore the right of refusal, the sale and purchase contract is carried out at the time agreed in front of the *adat* (customary council) to express the intentions of each party.

In customary law, there are at least two forms (contents/provisions) of buying and selling: a) loose sale (buying and selling which results in the transfer of ownership rights forever (the terms used are *ojol pas, runtemurun*, and *menjual jaja*); and b) sale and purchase of pawnshops (sales that result in the transfer of ownership rights temporarily, either in the form of pawnshops [other terms are *jual gade*, *adil sende*, and *ngejual akad* or *gade*] or in the form of selling the benefits of land (another term is an annual sale, and *adol oyodan*) (Muhammad, 2006; Soekanto & Taneko, 2020; Sutedi, 2018).

The down payment given by the prospective buyer to the prospective seller in a sale off has the following functions: a) as a moral bond for the parties so that there is little possibility of broken promises; and b) the main agreement (due to the specific legal consequences of the sale and purchase contract) has not (there) been implemented due to the existence of the down payment as the sole reason. The sale and purchase agreement or contract is made when the parties negate and do not exercise the right of denial (Sutedi, 2018).

The word *'urbūn* has different expressions. Some read it *'arabūn, 'urbūn,* and *'urbān*). *'Arabūn* and *'urbūn* are *fuṣha* or *faṣihah* (eloquent) expressions, while the word *'urbān* includes the word mu'arrab, namely non-Arabic words accepted as part of the Arabic language (*mu'arrab*). The literal meaning of *'urbūn* is *al-taslif* (putting forward) and *al-taqdim* (guarding) (Jumuáh & Badran, 2009a). It is generally attached to buying and selling (*al-bay'*) *'urbūn*.

Bay' 'urbūn is a party buying something (*mabi'*) from the seller. For example, the buyer gives 1 dirham (or other amounts) to the seller; if the price is paid, then the money received by the seller is calculated as the price. Buying and selling are not continued if the buyer does not pay the price. In this case, 1 dirham received by the

seller is considered a gift (grant) from the buyer (al-Dharir, 1993; al-Syaukani, 2004).

Wahbah al-Zuhaili explained that *'urbūn* buying and selling is a transaction with a down payment in which there is khiyar (for the buyer to continue the transaction or not). The down payment is considered part of the agreed price if the transaction proceeds. For example, two parties agree to buy and sell a house for 100 million rupiahs, with a down payment of 1 million. If the transaction occurs, the buyer only pays the remaining 99 million. This is because the one million was already paid when the contract was made. If the sale and purchase are canceled, the buyer is considered to have donated 1 million rupiahs to the buyer (al-Zuhaili, 2002).

Imam Malik explained that what is meant by *bay' 'urbūn* is someone buying or renting something (goods), then the buyer or lessee declares to the seller by saying, "I give you one dinar or one dirham on my behalf; if I take your goods, then the money is the price (or *ujrah*) of the goods purchased or rented; and if I do not take your things, then the money is for you (al-Syaukani, 2002).

Legal Status of *'Urbūn*

Ulama differ on the legal status of *bay' 'urbūn*. The majority of the ulama see that *bay' 'urbūn* is prohibited (*mamnū'*) and illegitimate (*ghair ṣaḥīḥ*) trading. Hanafiah ulama classify it as a fasid (broken) sale and purchase. Meanwhile, other clerics classify it as a false sale contract (canceled). The ulama who forbid the buying and selling of *'urbūn* are Hanafiah, Malikiyah, Syafi'iah, Syi'ah Zaidiah, and Abu al-Khaththab (Hanabilah). The Jumhur's opinion is based on the view of ulama from among the tabiin, namely Ibn 'Abbas and al-Hasan (al-Dharir, 1993).

Hanabilah, in the book Ghayat al-Muntaka (2: 26), see that buying and selling *'urbūn* is permissible trading. The opinion of Imam Ahmad Ibn Hanbal is in line with the view of the ulama from among the companions and tabiin; which is in line with the opinion of Umar Ibn al-Khatthab, Ibn Umar, Mujahid, Ibn Sirin, Nafi' Ibn al-Harith, and Zaid Ibn Aslam (al-Zuhaili, 2002; al-'Utsmani, 2015).

The majority of the ulama believe that the buying and selling of *'urbūn* is an illegal trade (*fasad* in the view of the Hanafiah ulama

and null and void in the view of the Maliki and Syafi'i) (al-Zuhaili, 2002; al-Syaukani, 2002). This prohibition is based on the Prophet SAW's hadith: "The Prophet forbids buying and selling of *'urbūn*." This hadith was narrated by Imam Malik in the book al-Muwaththa', Imam Ahmad, Imam al-Nasa'i, and Imam Abu Daud. Wahbah al-Zuhaili (in footnote number 3) conveys the opinion of the hadith ulama regarding the quality of the hadiths of Imam Malik, Imam Ahmad, Imam al-Nasa'i, and Imam Abu Daud in terms of their sanad. The mentioned hadith is considered *munqaṭi'*. Therefore, it is a *dha'if* (weak) *hadith* (al-Dharir, 1993; al-Syaukani, 2002).

Buying and selling *'urbūn* is prohibited because it consists of *gharar* (i.e., uncertainty in terms of whether or not the sale will be carried out), risky (*mukhaṭarah*), and vanity consumption (*akl al-māl bi al-bāṭil*). The *khiyār* rights contained in *bay' 'urbūn* are *khiyār-sharṭ* rights whose timeframe is unclear (both in terms of having to pay the price and in terms of returning the *mabi'* to the seller). If the buyer already controls the *mabi'*, the *'urbūn* sale is prohibited because of *gharar* or uncertainty in the timeframe for the buyer to proceed or cancel the transaction. The requirement that the down payment be given to the seller if the transaction is canceled (or the buyer does not pay off the remaining price) is a fasid condition.

Lajnah Da'imah li al-Ifta' (8; number 2361) decides and conveys an opinion that is in line with the opinion of the majority of the ulama and hadith (*munqaṭi'*). This hadith is used as evidence by the majority of the ulama, by presenting additional arguments; that is, the price (*thaman*) becomes the object of the contract (*ma'qūd 'alaih*) and becomes the seller's property if the sale and purchase fully proceed. Therefore, the price does not exist for imperfect buying and selling. Hence, *'urbūn* is not a price, and consuming it becomes *akl al-māl bi al-bāṭil*, because the price is the value of *mabi'* (something that is purchased). If the transaction agreement fails to be executed, then there is no object of sale. Also, no particular legal consequences are born, namely the transfer of ownership of the object of the contract (*intiqāl al-milkiyyah*), both in terms of price (*thaman*) and what is purchased (*mabi'*) (Jumuáh & Badran, 2009b: 804).

Some ulama (Umar Ibn al-Khaththab, Ibn Umar, Mujahid, Ibn Sirin, Nafi' Ibn al-Harith, Zaid Ibn Aslam, and Ahmad Ibn Hanbal)

allow buying and selling of *'urbūn* for the following reasons (al-Dharir, 1993; al-Za'tari, 2010; al-Mishri, 2009):

Table 1. Permissible Arguments *'Urbūn*

No	Transmitter	Meaning of Hadith Main Text (Matn)
1	Hadith of the Prophet Muhammad SAW from Nafi' Ibn 'Abd al-Harith	"He bought al-Sijn house for 'Umar RA from Shafwan Ibn 'Umayah RA for four thousand dirhams; if Umar agrees, then the sale and purchase agreement takes place (*nāfiẓ*); if Umar does not agree, the for thousand dirhams is for Shafwan Ibn Umayah." According to Imam Ahmad, this hadith is a da'if hadith.
2	Hadith of the Prophet Muhammad SAW from Zaid Ibn Aslam	"The Prophet SAW was asked about *'urbūn* in buying and selling, He SAW justified it." This *hadith* is considered a mursal hadith (part of a weak/*ḍa'if hadith*) because, in its sanad (chain or transmission), there is a narrator named Ibrahim Ibn Abi Yahya whose transmission is weak (al-Syaukani, 2004, p. 153)
3		In the buying and selling of *'urbūn*, the period for the khiyar rights for the buyer (the right to continue or cancel the sale and purchase that has been made) must be clear so that the waiting time for the seller is certain. Thus, the seller avoids dharar.

The ulama who allow *bay' 'urbūn* consider it to meet terms and conditions of buying and selling (including a valid contract). *Khiyār al-sharṭ* (right to continue or cancel the trading) contained in *bay' 'urbūn* is only the right of the buyer (the seller does not have this right). Therefore, *bay' 'urbūn* for the seller is common. A common contract is a valid contract that cannot be terminated (*infisākh*) except through the agreement of the respected parties. In contrast, for the buyer, *bay' 'urbūn* is *jā'iz*. A *jā'iz* contract is a valid contract that can be terminated (*infisākh*) by one of the parties without requiring the other party's approval (al-Dharir, 1993).

Al-Sadiq Muhammad al-Amin al-Dharir said that the arguments put forward by the ulama (Hanafiah, Malikiah, Syafi'iah, Syi'ah

Zaidiah, Abu al-Khaththab (Hanabilah), Ibn Abbas, and al-Hasan, prohibiting the *'urbūn* transaction, is more substantial in terms of quality. This is because the number of ulama rejecting the hadiths that allow *bay' 'urbūn* exceeds the number of the ulama rejecting hadiths that allow *bay' 'urbūn* (al-Dharir, 1993; al-Zuhaili, 2002).

Opinions of Contemporary Ulama

Majma' al-Fiqh al-Islami, to discuss and formulate decisions related to *'urbūn*, organized a meeting, presenting Islamic jurisprudence experts recorded in the magazine of Majma'. The following table shows the arguments of the ulama with regards to the *bay' 'urbūn*.

Table 2. Permissible Arguments *'Urbūn*

No	Name of Ulama	Argument
1	Al-Shadiq Muhammad al-Amin al-Dharir	The reason used by the jumhur of the ulama for forbidding *bay' 'urbūn* was more substantial and suggested the participants follow this opinion. No real need (*al-ḥājah al-massah*) is used as the basis for the permissibility of *bay' 'urbūn* (Al-Shadiq Muhammad al-Amin al-Dharir, 1993).
2	Al-Syeikh Abdullah Ibn Sulaiman Ibn Mani', a member of Hai'ah Kibar al-'Ulama of the Saudi Arabian Kingdom,	*'urbūn* has to do with potential loss (*furṣah ḍā'i'ah*) and compensation for losses experienced by the seller (*ta'wiḍ 'an ḍarar muhaqqaq 'ala al-bay'*) and its relationship with contracts and *wa'd* or *muwā'adah*. In this case, he agreed with Ahmad Ibn Hanbal's opinion regarding the permissibility of *bay' 'urbūn* (Al-Shadiq Muhammad al-Amin al-Dharir, 1993)
3	Wahbah Mushthafa al-Zuhaili	Al-Zuhaylī concurred with Ahmad Ibn Hanbal's opinion for different reasons. a) The hadiths used as evidence by the Jumhur Ulama and Hanabilah ulama are inauthentic hadiths (*ḍa'if*) whose feasibility is debated as a legal argument. b) Good habits (*al-'urf*) that apply among business people allow *bay' 'urbūn*. c) There is a real need (*al-ḥājah al-massah*) that can be used as a basis for the permissibility of *bay' 'urbūn* (Al-Zuhailī, 2002).

No	Name of Ulama	Argument
4	Rafiq Yunus al-Mishri, Markaz Abhats al-Iqtishad al-Islami Jeddah,	Al-Mishrī agrees with the opinion of Ahmad Ibn Hanbal with the same conditions; that is, the term of the *khiyār* must be precise (Rafiq Yunus al-Mishri, 2009).

From the arguments presented by al-Sadiq Muhammad al-Amin al-Dharir, 'Abdullah Ibn Sulaiman Ibn Mani', Wahbah Mushthafa al-Zuhaylī, and Rafiq Yunus al-Mishri, responded by other contemporary ulama. There are at least three responses: forbidding, allowing and allowing with conditions.

Those who forbid *'urbūn* feel that there is no emergency or real need to justify *bay' 'urbūn*; they are in the majority opinion. Among them is Al-Sadiq Muhammad al-Amin al-Dharir, whom al-Islam al-Qasimi supports. Muhammad al-Syaibani also agrees with this opinion, as their argument is more substantial. Other ulama such as al-Seikh 'Ali al-Salus also share the same view and agree with the proposals of al-Sadiq Muhammad al-Amin al-Dharir, Darwisy Jistaniyah, al-Seikh Mujahid al-Islam al-Qasimi, and Al-Seikh Muhammad al-Shaibani. Al-seikh 'Ali al-Salus view that *'urbūn* in the *murābaḥah* contract *li al-āmir bi al-shirā* where *'urbūn* is not carried out within the scope of the contract but within the scope of *muwa'adah* (al-Dharir, 1993).

Ali Muhy al-Din al-Qurah Daghi represents the second response allowing the practice of *'urbūn*. The argument that *bay' 'urbūn* is permissible with clear terms of the khiyar-syarth period. Daghi hoped that the forum approve it. This opinion is supported by 'Abd al-'Aziz al-Khayath with the argument that *'urbūn* is permissible in service transactions. Furthermore, the seller can take a portion of the *'urbūn* nominal by considering the *ḍarar* experienced by the seller. Although some clerics allow *bay' 'urbūn*, there has yet to be a consensus regarding its permissibility in Islamic transactions (al-Dharir, 1993).

The third response allows *'urbūn* with many conditions. Among the ulama in this category is Abdullah al-Basam. Al-Bassam sees the prohibition of *bay' 'urbūn* as a precautionary measure to avoid more significant damage, namely *bay' al-najash* (al-Dharir, 1993). However, nowadays, this method is practiced and considered *ijmā' 'amali*. Yusuf

al-Qaradawi rejects the idea that there is no real need for *bayʿ ʿurbūn* and argues that there is a real need for it, so it is permissible (al-Dharir, 1993). Abu al-Satar Abu Ghadah criticized Muhammad al-Amin al-Dharir's analogy of *bayʿ ʿurbūn* with al-ikhtiyarat, which prohibits al-úrbun. However, he offers three alternatives to allow *ʿurbūn* (al-Dharir, 1993). Muhammad al-Mukhtar al-Sulami, Abd al-Qadir al-Umari, and Naji Ajam present an alternative view that allows the seller to take a portion of the *ʿurbūn* based on the potential loss suffered. Ibrahim Basyir al-Ghawil and Abdullah Muhammad, in general, allowed the practice of *al-ʿurbūn*. They propose that *bayʿ ʿurbūn* is permissible as long as it does not violate the conditions of *al-'urf al-mu'tabar* (al-Dharir, 1993).

The decision of Majma' al-Fiqh al-Islami itself is in line with the opinion of Hanabilah, who allows *bayʿ ʿurbūn* and *ijārah bi ʿurbūn*. However, each put forward a different reason. Hanabillah ulama allows the sale and purchase of *ʿurbūn* and *ijārah bi ʿurbūn* based on the hadith from Zaid Ibn Aslam and Nafi' Ibn 'Abd al-Harith. Majma' al-Fiqh al-Islami concur with the opinion of the Hanabilah ulama because this has become a good custom (*al-ʿurf*) that applies in society. This opinion ignores the hadiths used as the basic argument by jumhur and Hanabilah ulama. This is because the hadiths are considered *munqathiʿ ḥadith*. Moreover, the hadiths used by the Hanabilah include mursal hadiths. They are weak hadith (*ḍaʿif*) that are inappropriate for legal arguments.

Bayʿ ʿUrbūn in the Terms of the Contract

In the context of understanding *ʿurbūn* as part of the price (*thaman*), in the proceeded purchase by the buyer, the discussions focus on the notion of *nafidz*, *munajjaz,* and the scope of the contract. In a buying and selling contract, *ʿurbūn* is considered a valid *nafidz* and a valid *munajjaz* contract. Thus, there are rights and obligations of the parties. The seller is obliged to hand over the sold stuff (*mabiʿ*) to the buyer. Meanwhile, the buyer should pay the agreed price (*thaman*) as part of the transaction consequences, i.e., *Intiqal al-milkiyyah* (*mabiʿ*, which initially belonged to the seller, becomes the property of the buyer, and *tsaman*, which initially belonged to the buyer turned into the property of the seller). Thus the thaman in *bayʿ ʿurbūn* and the

way to pay it partially in cash at the time of contract are known to the parties. Moreover, they also acknowledge that the down payment is part of the agreed price (*thaman*).

This above logic makes it reasonable for the *'urbūn* to be owned by the seller, even though the buyer does not continue buying and selling during the khiyar period. This is because the buyer knows and accepts the agreed provision that the down payment submitted will not be returned if he cancels it without any reason (e.g., defects in purchased goods) and if the seller requests the cancelation.

In terms of the clarity of the contract *shighat* (pledge), *bay' 'urbūn* is classified as unclear (*gharar min nahiyyat al-ṣīghah*). This is because all legal actions carried out by the parties, in words, deeds, communication and direct or electronic correspondence, are considered buying and purchase contracts. It is based on the principle *al-'ibrah fi 'al-'uqūd bi al-alfāẓ wa al-mabāni*. This means that the contract made is a sale-purchase contract. However, from a *ta'līq* perspective, the *bay' 'urbūn* contract is part of the *bay' al-mu'allaq bi al-sharṭ* contract, namely *'urbūn* turns into mauhub because it is granted by the seller to the buyer if the sale-purchase contract is canceled. In this case, it is as if the *bay' 'urbūn* consists of *mu'allaqah bi al-sharṭ* grant agreement. With such an explanation, it is reasonable if the jumhur ulama forbid *bay' 'urbūn*, as it contains *gharar*, which is prohibited due to disputes that may occur (*nizā'*). Selling and buying and *ijārah* contracts are part of the tamlikat contract which, in the view of the majority of the ulama, cannot be carried out with the method of *mu'allaq bi al-sharṭ*.

Regarding *intiqāl al-milkiyyah*, the ownership transfer of *mabi'* and thaman occurs because the contract is made (based on the *shighat* contract), and the tenure provisions apply (*al-qabḍ*). If the parties must control the *mabi'* and *tsaman* as a condition of ownership, then the *'urbūn* belongs to the seller when the contract is made. The *mabi'* does not belong to the buyer at the time of the contract if (and usually) the *mabi'* is still controlled by the seller. With such an explanation, it is only reasonable that Imam Ahmad Ibn Hanbal argued that *'urbūn* belongs to the seller even though the seller confiscated the contract (al-Zuhaili, 2006).

A valid contract is not considered *nāfiẓ* and *munajjaz* if there is a khiyar right whose term has not expired. The buyer has the right to continue (*imḍā*) the sale and purchase contract he made or cancel during the khiyar period. Therefore, *bay' 'urbūn* includes a *jā'iz* contract from the buyer's point of view and an ordinary contract from the seller's point of view; i.e., the buyer may not terminate the sale and purchase contract except with the consent of the seller (a kind of *iqalah*); while the buyer has the right to terminate the sale and purchase agreement without requiring the approval of the seller. Because the seller in the *bay' 'urbūn* contract cancels the contract in the *khiyar-syarth* phase, it is logical that the jumhur ulama's view that *'urbūn* does not yet belong to the seller. Therefore, using and consuming *'urbūn* is considered *akl al-māl bi al-baṭil.*

Regarding exchange contract provisions (*muwā'aḍat/mubādalat*), sale and purchase contracts and *ijārah* are considered exchange contracts. The exchanged object in selling and purchase contract is *mabi'* (what is purchased) and *tsaman* (price). Meanwhile, the exchanged objects in the *ijārah* contract are benefit and ujrah (reward). The discussion of *bay' 'urbūn* focuses on the down payment in the sale canceled by the buyer. The ulama agrees that the down payment becomes an aspect of the transaction. The buyer's cancellation does not make the down payment belong to the buyer, as the *mabi'* does not belong to the seller. This is because the exchange has not taken place, while it is the characteristic sale and purchase agreement (al-Zuhaili, 2002; Jistaniyah, 1998; Syubeir, 2018)

Transformation of *'Urbūn* into *Ḥāmish Jiddiyyah*

Al-Sadiq Muhammad al-Amin al-Dharir conveys four forms of descriptions of *bay' 'urbūn*. However, the four forms of *bay' 'urbūn* presented by al-Dharir can be simplified into two: the *bay' 'urbūn* form in the contract range and the *bay' 'urbūn* form in the wa'd range (al-Dharir, 1993). Rafiq Yunus al-Mishri explained that the characteristics of *'urbūn* (*bay' 'urbūn*) are: a) both parties enter into a sale and purchase agreement, marked by a *shighat* contract (offer and acceptance); b) the buyer gives the down payment to the seller; and c) the seller and the buyer agree that the down payment is part of the price if the sale and purchase agreement is executed, and becomes the

property of the seller if the seller cancels the agreement (considered as a gift). If it is agreed that the down payment will be returned to the buyer if the sale-purchase agreement is canceled, the ulama agrees that the transaction is permissible (without any disagreement and, therefore, the down payment is not considered *'urbūn*.

In another transaction, one party gives a sum of money to the owner of the goods and asks him/her not to sell the goods to other people. Furthermore, the owners of the money state that if they do not buy the goods, then the money belongs to the owner, and if they do buy them, then the money is considered part of the price.

The difference between the two forms of *'urbūn*, presented by al-Sadiq Muhammad al-Amin al-Dharir, is that, first, a down payment is part of the price because there has been a sale/purchase agreement/ contract (the price in the contract buying and selling is a pillar that must exist). However, the buying and selling are incomplete because the buyer still has the *khiyār-sharṭ* rights to proceed or cancel the contract. Second, the parties have not agreed to a transaction but promise to (*muwa'adah*) to have a sale and purchase contract in the future. In this case, the prospective buyer submits money as a down payment when mutual promises are made. This type of down payment is called *ḥāmish jiddiyyah*.

The term *ḥā*mish jiddiyyah (earnest money) is a development of the concept of *'urbūn*. In the 8th Mu'tamar Majma 'al-Fiqh al-Islami, dated 21-27 November 1993, M al-Shaeikh 'Abd al-Satar Abu Ghadah and al-Sheikh 'Abd al-Qadir al-'Umari stated that the down payment is a sign of buyers' seriousness to buy certain goods (*jiddiyyāt al-shirā'*).

Al-Atsram explains that certain parties hand over a certain amount of money to the owner of the goods before the sale and purchase contract is carried out, and the party handing over the money requests that the owner of the goods not sell his/her property to another party (and the owner of the goods agrees); if the goods are not purchased, then the amount of money received by the owner of the goods is accepted by the owner of the funds to become the property of the prospective seller.

After the mutual agreement is made, the owner of the goods and the prospective buyer agree to enter into a sale and purchase contract

as promised, and the money received by the owner of the goods is calculated as part of the price. Hence, the sale and purchase carried out are legal. If the sale and purchase are canceled, the owner of the goods is not entitled to have the money he received as it was obtained without any exchange. The prospective buyer has the right to ask for the down payment received by the owner of the goods to be returned to him. According to the Kuwaiti fatwa, a down payment cannot be regarded as the property of the prospective seller; compensation for the waiting period (*muddat al-intiẓār*); and the loss of the opportunity to sell his/ her goods to other parties (*furṣah ḍāiʿah*) (Jumuáh & Badran, 2009b).

In terms of price (*thaman*) agreement, selling and purchase contract is divided into three: 1) an agreement to pay the price in cash (known as *bayʿ al-ḥāl*, *bayʿ al-naqd*, and *bayʿ al-mu'ajjal*); b) an agreement to pay the price in a deferred manner (known as *bayʿ al-mu'ajjal*); and c) an agreement to pay the price in cash in stages (known as *bayʿ bi al-taqsiṭ*); because of the agreement to pay the price in stages. Thus, it is impossible for the *murābaḥah* contract carried out by the IFI to involve *ʿurbūn*, because *bayʿ ʿurbūn* is only found in buying and selling where the price is agreed to be paid in cash.

The practice of *ḥāmish jiddiyyah* in Indonesian IFIs is connected with murabaha sale and purchase agreements. *Murābaḥah* means buying and selling with a transfer of the acquisition price and an additional profit. *Murābaḥah* comes from the word ribh, which means *ziyādah* (additional), and *nama'* (grows/develops) in commerce (*tijārah*). The specific provisions of a murabaha sale and purchase contract are: 1) The buyer must know the acquisition price or production price of the goods he/she purchases, and 2) the seller and the buyer must know the profit.

The buying and selling of *murābaḥah* at IFI are carried out in the following stages: 1) ordering goods; the customer promises to buy goods, and the IFI promises to sell the goods ordered by the customer. At the time of order, two things occur: a) price negotiation and b) handover of down payment. 2) The procurement of ordered goods can be carried out directly by the IFI by purchasing them from the supplier (conducted by a sale and purchase agreement) or by the IFI authorizing the customer (with a wakalah contract) to buy it from the

supplier. 3) If the IFI already has the goods ordered by the customer, a murabaha sale and purchase agreement is made between the IFI and the customer with an agreement to pay the price in stages (known as the concept of *al- bayʿ bi al-taqsiṭ*).

Al-seikh 'Ali al-Salus expressed his opinion regarding *ʻurbūn* about the *murābaḥah* contract *li al-āmir bi al-shirā'*; i.e., *ʻurbūn* is not carried out within the scope of the contract, but within the scope of muwa'adah to enter into a *Murābaḥah* sale and purchase contract as practiced in Islamic Financial Institutions (*murābaḥah maṣrafiyyah*) (al-Dharir, 1993).

DSN-MUI issued a fatwa Number 13/DSN-MUI/IX/2000 concerning Down Payment in *murābaḥah*. The fatwa does not explain the definition of a down payment explicitly. However, in sociological considerations, it is conveyed that: a) to show the customer's seriousness in requesting *murābaḥah* financing from IFI, IFI can ask for a down payment; and b) that in carrying out a murabaha contract using a down payment, no party is harmed, by the principles of Islamic teachings.

In customary law, a down payment is used as a form of guarantee or a sign of seriousness in a sale and purchase transaction. Down payments are synonymous with money loans whose payments are linked to harvests. This was conveyed by Soepomo based on the results of empirical legal research (Soepomo, 2003). Down payments in customary law in Labuan (Pandeglang) are made between coconut plantation owners and copra traders and between tank plantation owners and chipping traders. In Cisauk (Serang), down payments are made between leather traders and leather brokers. In Rajapola (Tasikmalaya), a down payment is usually made between the owner of the hat company and the craftsmen. Meanwhile, in Cikajang and Cisurupan (Garut), down payments were made between plantation owners and tea growers. Down payment in customary law (West Java) is a loan of money from certain parties (e.g., copra traders) to other parties (e.g., coconut plantation owners) with an agreement that coconut plantation owners are obliged to sell their crops to copra traders (Soepomo, 2003). The nominal debt received by the seller (the owner of the coconut plantation) is calculated as part of the price paid. In this context, a down payment is seen as a sign of a potential buyer's seriousness in buying the product offered and as a guarantee that the seller will fulfill his/her obligation

to sell the goods. This shows that the concept of down payment in customary law has similarities to the concept of *'urbūn* in buying and selling in classical Islamic times, where down payment or *'urbūn* was also used as a form of guarantee or a sign of seriousness in buying and selling transactions.

DSN-MUI Fatwa Number 13/DSN-MUI/IX/2000 provides provisions regarding down payment in a murabaha financing contract. First, Islamic Financial Institutions (IFI) can request a down payment in a murabaha financing contract if both parties agree. Second, the amount of down payment requested is determined based on an agreement between the IFI and the customer. Third, if the customer cancels the *murābaḥah* contract, the customer must compensate the IFI from the down payment. This provision is enforced to minimize the risks faced by IFI due to the cancelation of the contract by the customer. If the amount of the down payment provided by the customer is less than the loss suffered by the IFI, then the IFI has the right to ask the customer for additional money. However, if the amount of the down payment provided by the customer is greater than the losses suffered by the IFI, then the IFI must return the excess to the customer. This fatwa is hoped to guide IFI and customers into a fair and balanced murabaha financing contract.

The DSN-MUI fatwa explicitly calls it a down payment in murabaha. However, that does not mean the down payment is submitted when the murabaha contract is made. The procedure is that the customer orders the goods to be purchased (*waʿd* to buy), and the IFI accepts it (*waʿd* to sell). When a customer places an order, in general, the IFI does not yet have the item the customer is going to buy; therefore, at that time, no contract is made, but what is done is a mutual promise (*muwāʿadat*) to carry out the sale and purchase at the agreed time. The down payment is handed over when the mutual commitment is made (not when the murabaha contract is made).

The concept and provision of the down payment are closer to *ḥā*mish jiddiyyah in Mi'yar Syar'i Number 8 concerning *al- murābaḥah li al-āmir bi al-shirā'*, and provisions for the down payment in customary law in Indonesia.

First, Islamic Financial Institutions (IFI) are allowed to take a nominal value called *ḥāmish* jiddiyyah, which the customer submits

during the mutually agreed period. Suppose the IFI suffers a loss (*ḍarar*) due to the activities carried out to procure the goods ordered, while the sale and purchase are not carried out. In that case, the money received can be taken as a substitute so that the customer does not need compensation (*ta'wiḍ*) because of the costs incurred IFI. *Ḥāmish jiddiyyah* is not the same as *'urbūn*. *Ḥā*mish jiddiyyah is a trustworthy guarantee of sincerity, both a trust for maintenance (*amanah li al-hifẓ*) and a trust for investment (*istithmār*). If it is agreed that the chosen one is a mandate to maintain, the IFI may not take legal action (*taṣarruf*) on the funds received. If it is agreed that the chosen one is a trustee for investment, the IFI may take legal action (*taṣarruf*) on the funds received.

Second, IFI may not record *ḥā*mish jiddiyyah if the customer cancels his/ her order; IFI rights (to *ḥāmish jiddiyyah*) are limited to the nominal amount of money issued for the procurement of ordered goods; IFI is also not justified in punishing prospective customers for potential loss reasons (*furṣah ḍā'i'ah*/potential loss).

If the sale and purchase of *murābaḥah li al-āmir bi al-shirā'* are carried out according to a promise from the customer and the IFI, the *ḥā*mish jiddiyyah must be returned by the IFI to the customer; and it may also be agreed that *ḥāmish jiddiyyah* is calculated as part of the *murābaḥah* sale price that is carried out.

Third, IFI may apply *'urbūn* to the customer at the time the sale and purchase contract of *murābaḥah li al-āmir bi al-shirā'* is carried out, but *'urbūn* may not be imposed on the customer during the period (*marḥalah*) of mutual promises (*muwā'adah*) to carry out sale and purchase contract *murābaḥah li al-āmir bi al-shirā'*. IFI may only take little money from *'urbūn* based on the nominal money issued to procure ordered goods. What distinguishes the cost of procuring goods from the price if the goods are sold to other parties?

Conclusion

In the view of customary law, there are two terms related to payment before the sale and purchase agreement is made: a down payment and advance money. Down payment, *'urbūn*, and *ḥāmish jiddiyyah* are interlocked concepts related to exchangeable *tijārah*

contracts (*mu'āwaḍat*) and the transfer of ownership of the object of the contract (*tamlikāt*). The prospective buyer submits the advance money to the prospective seller before the sale or lease agreement is made, while the down payment is related to debt. In this case, a particular party borrows money from the trader with an agreement that the borrower is obliged to sell his/ her crops to the lender. The nominal amount of money borrowed is calculated as the price in the sale and purchase agreement.

Bay' 'urbūn is illegal buying and selling in the view of the majority of the ulama but permissible in the view of Ahmad Ibn Hanbal. On the other hand, *Majma' al-Fiqh al-Islāmi* allows *bay' 'urbūn* on the grounds of *al-'urf*. These are a real need for that particular transaction, and it must be clear about the period of *khiyār al-sharṭ*. In *bay' 'urbūn*, *'urbūn* belongs to the seller and is forfeited if the sale-purchase contract is not carried out. Meanwhile, *ḥāmish jiddiyyah* still belongs to the prospective buyer whether the sale-purchase is carried out or canceled. The down payment belongs to the prospective seller if the prospective buyer cancels the purchase and sale and becomes the prospective buyer's property if the transaction is canceled. This is because the prospective seller uses his/ her right of refusal. In this context, it is also found that the down payment provisions contained in the DSN-MUI fatwa Number 13/DSN-MUI/IX/2000 are the same as the provisions for *ḥāmish jiddiyyah* in *Mi'yar Syar'i* Number 8. (Article 2-5-3, Chapters 2-5-4, Chapters 2-5-5, and Chapters 2-5-6).

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