

JURIDICAL REVIEW OF IMPOSITION OF DEEDS FOR GRANTING OF COLLECTIVE RIGHTS IN SHARIA BANKING IN INDONESIA

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ABSTRACT

Abstract: This study aims to describe and then find out how the granting of Mortgage Deeds institution Sharia Banking Finance made by Land Deed Officials regulated in the Regulation of the Head of the National Land Agency Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning Provisions for Implementation of Government Regulation Number 24 of 1997 concerning Registration Land As well as affiliated provisions. By using the Normative Juridical research method with the conclusions: 1. The granting of Mortgage Guarantees for financing contracts in Islamic banking is guided by the Mortgage Law which proves the occurrence of a mixture of two principles in the implementation of mortgage guarantees in Indonesia; 2. Formulation of the Mortgage Deed Institution Islamic Banking Finance uses the same formulation as Conventional Banking Financial Institutions, so it needs to be designed separately for the Formulation of the Deed of Imposing Sharia Mortgage on several Sharia terminologies

Keywords: Mortgage; Sharia Principles; Financial Institutions; Islamic Banking

Introduction

Basic human needs are the fulfillment of clothing, food, and shelter, these three things require exchange rates. Exchange Rates/exchanges are the role of Financial Institutions which, among other things, is to expedite, collect and create good facilities for Exchange Rates to fulfill clothing, food, and human housing (Fadlan, 2022). Another function of financial institutions in the aspect of raising is collecting funds from the public in the form of savings and channeling them to the public in the form of loans in other words, financial institutions collect funds from parties who have excess funds and distribute them to those who lack funds (Hermawan & Sulastri, 2023). Activities channeling funds to parties in need are required for security for the availability of a supply of funds and a revolving refund in the form of a guarantee. Financial institutions in Indonesia include Conventional Banking and Sharia Banking, Conventional Banking in channeling funds to the public is called providing credit and Islamic Banking is called providing financing. The difference in the facility for providing funds to the public occurs due to differences in the principles of profit that apply to the two banks.

Conventional Banking is known as interest-based banking (Interest-based) and Islamic Banking is known for financing based on the desired real profit (margin) or profit sharing (Profit Sharing) (Mustofa & Muhson, 2014) There is a series of positive laws regarding banking after issuing various statutory provisions including laws, government regulations, Bank Indonesia Regulations, and other implementing regulations, all of these laws and regulations in the banking sector are strung together as a system bound by certain legal principles (Usman, 2003) Lending and Financing in Indonesia is regulated by separate laws, starting from the analysis stage, recommendation stage, decision stage, stage negotiation, agreement stage, and the credit/financing disbursement procedure stage, the granting of credit is regulated in Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking and Provision of Funding is regulated in Law Number 21 of 2008 concerning Islamic Banking (Indonesia, 2008). The equation stipulated in the Act is that both provide guarantees for giving with the intention of channeling funds called Debts in Conventional Banks and Financing in Islamic Banks, both of which are required to provide guarantees because considering all the risks that will occur during the credit agreement or financing is in progress (Iska, 2018).

One of the guarantees that is legal or regulated in Indonesian law is the provision of guarantees in the form of certificates Land rights, hereinafter referred to as Mortgage Rights, are regulated in Law Number 4 of 1996 Concerning Mortgage Rights The Mortgage Law applies to Conventional Banks and Islamic Banks, meaning that the nature of the Mortgage guarantee in Indonesia is still one door or there is no difference in the application and its derivatives which will impact the mixing of interest principles with sharia principles in the application of Mortgage guarantees. Other guidelines are regulated in the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning the provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration in the appendix stipulates the Formulation of Deed of Granting Mortgage Rights.

National laws that are just and orderly can be a definite measure in society, but in reality, the above legal events are still not accommodated and are far behind the development of Islamic banking in Indonesia which must comply with Sharia Compliance or Sharia Compliance, thus causing confusion or chaos in cross-systems. application of Sharia principles to Sharia banking in Indonesia. The importance of implementing appropriate rules to maintain legal certainty that is stable and flexible and able to keep abreast of developments without eliminating noble national values by the basic principles of the formation/implementation of provisions (Mitendra, 2018)

In connection with the explanation above regarding the legal vacuum governing Mortgage Rights over Sharia banking which is still guided by the Mortgage Law and

also applies to conventional banking, the authors hypothesize that there is a mixing/merging of two principles that are contradictory in their implementation, with that the author conducted a study with the title "Juridical Review in the Imposition of Deeds for Granting Mortgage Rights in Islamic Banking in Indonesia". The formulation of the problem which is the limitation of this research are:

1. What is the Procedure for Providing Financing with Guaranteed Mortgage Rights in Islamic Banking;
2. How to formulate the Grant of Dependent Rights Act that meets Sharia compliance.

Research Method

This study uses a juridical-normative research method that emphasizes the science of law, with an approach made to literature studies of library research. This research is descriptive-analytical, namely by describing the state of the research object and then connecting the problems found with the object study with the Law or positive law in force.

Result And Discussion

Procedures for Provision of Financing with Mortgage Guarantees in Islamic Banking

Banks in providing financing must notice this prudential principle is regulated in Article 2 of Law Number 21 of 2008 Concerning Sharia Banking 2008 which will hereinafter be referred to as the Sharia Banking Law "The precautionary principle is a guideline for managing a Bank that must be adhered to to create healthy, strong and efficient banking. by the provisions of the legislation". The precautionary principle or prudent banking principle is a principle or principle which states that a bank in carrying out its functions and business activities must be prudent(prudent) to protect public funds entrusted to him (Disemadi, 2019).

The procedure for providing financing to Islamic banking must meet legal aspects, including (Rachmadi Usman, 2022a):

1. In the initial process of granting financing, attention is paid to the identity of the prospective debtor where identity is an important factor for early identification both from a personal perspective and from a business activity perspective, including 1) Legal Aspects of Personal Identification regarding Indonesian Citizen/Foreign Documents, skills of prospective debtors; 2) Legal Aspects of identification The reputation of the prospective debtor is seen from the history of relations with financial institutions from BI blacklist data, debtor information systems, bank information, and internal blacklists; 3) Legal aspects of the identification of business/professional licenses for potential borrowers for business licenses and professional licenses; 4) The legal aspect of identifying the form of business of the prospective debtor, including an individual company or partnership company.
2. The process of legal aspects in the realization of financing, as stated in Article 1320 of the Civil Code, must meet objective and subjective legal requirements and this is a

Bank Indonesia mandate so that the requirements are fulfilled by valid law in the making of financing agreements which are also about the principles or principles of agreement law regarding the consensual basis, freedom of contract, personality, and optionality.

3. Process Legal Aspects of Guarantees, binding guarantees can be given in the form of material Guarantees, one of which is the Guarantee of Dependency Rights.

Financing provided by Islamic banks in channeling activities funds to the community in Article 21 of the Syariah Banking Law in the form of:

- a. Lag Mudharabah and Covenant Musyarakah which is profit-sharing financing;
- b. Lagsmurabahah, greetingsoristishna';
- c. Lag Qard, Ijarah Agreement, Agreement Vomit bite-sized, and Covenant Hawalah.

Financing agreement on contract murabahah, greeting soristishna carried out with a buying and selling system and using a buying and selling legal structure while Akad mudharabah and Covenants Musyarakah Carried out with a profit-sharing system that uses a partnership or partnership legal structure (Harmoko, 2018). It is contained in Article 23 of the Sharia Banking Law in assessing the belief in will and the ability of the prospective customer receiving the facility to pay off all obligations for the distribution of funds to be provided by the Bank is carried out by assessing the collateral or collateral provided. Etymologically, collateral means collateral for loans received and regulated in Article 1131 BW "All property belonging to owe, both movable and immovable, both those that already exist and those that will exist in the future, are the responsibility for all engagements individuals".

"Mortgage rights over land and objects related to land, hereinafter referred to as mortgage rights, are security rights that are imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Regulations, as follows: whether or not along with other objects that are an integral part of the land, for the settlement of certain debts, which give priority to the creditor against other creditors" from the provisions of Article 1 point 1 of the Mortgage Law, several elements inherent in the mortgage can be seen, including (Sjahdeini, 1996):

1. One of the guarantee institutions in the context of paying off debt/financing can be in the form of a mortgage right;
2. Which can be the object of dependent rights over land that refers to the Agrarian Tree Law;
3. The imposition of mortgage rights is not only on land which refers to the BAL, but can also be imposed on other objects that are an integral part of the land;
4. The guarantor must be in the form of a certain debt/financing;
5. The priority position is given to creditors holding mortgage rights that are not held by ordinary creditors (concurrent creditors).

Sharia banking in the State of Indonesia legally began to exist after the issuance of the October 1988 Policy Package), while institutionally it began with the establishment of Bank Muamalat Indonesia (BMI) in 1991 as the only bank at that time that purely applied Sharia principles in implementing business activities (Anshori, 2018)

Sharia Banking is a developed banking system whose sources are from Islamic Law, this business is based on Islamic prohibitions to collect or borrow at the same time. calculation interest (usury) (Rachmadi Usman, 2022b). As stated in Article 1 Number 13 of the Banking Law "Sharia Principles is an agreement based on Islamic law between a bank and another party to deposit funds and or finance business activities, or other activities which are stated by sharia, among others financing based on the principle of profit sharing (mudharabah), financing based on the principle of equity participation (musyarakah), the principle of buying and selling goods by making a profit (Murabaha) or financing of capital goods based on the principle of the pure lease without choice (ijarah) or with the option of transferring ownership of the leased goods from the bank by another party (ijarah wa Latina)", whereas, in the Sharia Banking Law, Article 1 number 12 regulates "Sharia principles are Islamic legal principles in banking activities based on fatwas issued by institutions that have the authority to issue fatwas in the field of Sharia". The principles that are adhered to or must be obeyed by banks with a Sharia principle system are the main provisions that must be followed due to violation of Sharia principles causing the prohibition of all bank transactions or activities.

Grant of Rights Dependency on financing provided by Sharia banking is a trust from the concept of Rahn easily which is regulated in the Fatwa of the Indonesian Ulema Council No. 68. DSN-MUI/III 2008 concerning Rahn Tasjili. The provisions of the MUI Fatwa stated that Rahn Tasjili is collateral in the form of goods for debt where the collateral remains in the possession of the owner of the goods or the customer (I scratched), but the proof of ownership is submitted to the lender (curtain) and delivery of collateral in the form of legal evidence does not transfer ownership from womb to curtain (Wahid, 2016)

Draft tasjili is almost the same as the concept of mortgage rights which makes proof of ownership an object of guarantee for the facilities that have been received but the fatwa does not clearly state the process of implementing guarantees so it is very dangerous for both the bank and the customer, considering that collateral is a benchmark used by banks in providing facilities to customers (Fauzi et al., 2021)

The provisions regarding guarantees for mortgages in Sharia banking are guided by the same guidelines as conventional banking, whereas if they are studied further with developments in the emergence of the existence of Sharia principles in the Indonesian economy according to hypothesis the author is irrelevant or there is a legal vacuum. The validation Hypothesis author that a new draft of Sharia Mortgage is needed (Rosyadi, 2017) in his book entitled "Material Collateral Based on Sharia Contracts" gives the understanding that Sharia Mortgage Rights are objects that have been placed Mortgage

rights based on or born from Sharia contracts, the addition of the word "syariah" is intended to distinguish between the imposition of mortgage rights born from conventional contracts and the imposition of mortgage rights born from sharia contracts. This difference is unavoidable due to differences in litigation settlement when disputes occur, where disputes born from conventional contracts become the authority of the judiciary, on the contrary, those born from sharia contracts become the authority of the religious courts.

The granting of mortgage rights is regulated in CHAPTER IV of the Rights Law Dependency regarding the Chapter on Procedures for Granting, Registration, Transfer, and Deletion of Mortgage Rights Article 10 to Article 15. The procedures for granting Mortgage Rights are carried out in two stages, Imposition of Mortgage through two stages, Granting of Mortgage Rights, and Registration of Mortgage Rights. The stage of granting the Mortgage must be preceded by a promise to provide the Mortgage as a guarantee of repayment facility for the agreed financing and not an integral part of the loan agreement and this agreement can be made in a private agreement or an authentic form (Article 10 paragraph (1) of the Mortgage Law). Provisions of Article 10 paragraph (2) of the Mortgage Law "The granting of Mortgage Rights is carried out by making a Deed of Granting Rights Dependency by the Land Deed Making Officer by the applicable laws and regulations".

Financing provided by Islamic banks and then charged with Mortgage is also strengthened by the principle or characteristics of the Mortgage itself, which is an accessory or follows the principal agreement (Rahmawati, 2021) Land Deed Making Officer or abbreviated as PPAT is an official authorized to make Mortgage Deeds as stipulated in the Government Regulation of the Republic of Indonesia Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning Position Regulations for Land Deed Making Officials. As an official authorized to make binding agreements in the form of Deeds of Encumbrance of Mortgage Rights in the Mortgage Law Article 1 paragraph (4) also regulates this matter. After the stage of encumbering the Mortgage with the making of the APHT by the PPAT, the PPAT is then obliged to register the granting of the Mortgage Right to the Land Office no later than 7 (seven) working days after signing the APHT (Articles 13 to 14 of the Mortgage Law).

Formulation of the Deed of Granting Mortgage Rights in Sharia Banking on Sharia Compliance

The Land Deed Making Officer in their competence to make Deeds for Granting Mortgage rights is guided by the Regulation of the Head of the National Land Agency Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning Provisions for Implementing Government Regulation Number 24 of 1997 concerning Registration Land. Article 96 number (1) Letter mandates that "the form of the deed used in making the deed is made by Attachment number XXI (twenty-one) This regulation includes among others the "Deed of Granting Mortgage Rights '. APHT is a PPAT deed that

contains the granting of Mortgage Rights to certain creditors as collateral for the settlement of their receivables, APHT is an agreement accessory or additional which is the main agreement is a financing agreement or other that gives rise to debts (Mustofa & Muhson, 2014). Other legal provisions used by the PPAT in its authority to make the Mortgage Deed, among others:

1. Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to Land:
 - a. Article 1 Paragraph (5) regulates the definition of APHT;
 - b. Article 1 paragraph (6) regulates the definition of a PPAT as an official authorized to make APHT;
 - c. Article 10 paragraph (2) regulates that the granting of Mortgage Rights must be carried out by binding APHT;
 - d. Article 11 regulates the elements that must be included in the APHT.
2. Government Regulation of the Republic of Indonesia Number 37 of 1998 concerning Regulations for the Position of Officials for Making Land Deeds (State Gazette of the Republic of Indonesia of 1998 Number 52, Supplement to the State Gazette of the Republic of Indonesia Number 3746, regulates the authority of PPATs in making APHT.

The formulation of the Mortgage Granting Deed regulates or includes several clauses, among others, what must be included are:

1. name and identity of the holder and giver of the Mortgage;
2. the domicile of the parties referred to in letter a, and if one of them is domiciled outside Indonesia, a preferred domicile in Indonesia must also be stated for him, and if the preferred domicile is not stated, the PPAT office where the Deed of Granting Mortgage is made is considered as the chosen domicile;
3. clear designation of debt or guaranteed debts as referred to in Article 3 and Article 10 paragraph (1);
4. dependent value;
5. a clear description of the object of the Mortgage Right.

In addition to the above, in APHT clauses can be included that are optional and have no effect on the validity of the deed made, in this case, the parties are free to decide whether to mention or not mention these promises in the deed. (Rosyadi, 2017)

Based on what has been explained above, the difference in the guidelines for making a Mortgage Deed in Islamic banking and conventional banking is in the clause on the selection of dispute resolution. Islamic banking in the dispute resolution clause can resolve through litigation and non-litigation channels covering the Agency Arbitration Sharia and Religious Courts (Saudi 2019). This statement is guided by Article 55 paragraph (1) of the Sharia Banking Law "Sharia banking dispute resolution is carried out by courts within the religious courts".

There is a legal void above provision sharia mortgage rights in Indonesia is a situation in which the formulation of legal norms of mortgage rights that have been set shows ambiguity and multiple interpretations that are applied by the principle like-like (rules of law applied to the same matter) (Atmadja & Budiarta, 2018)

The theory has also been validated that in practice the Profession of Making Land Deeds is still using APHT formulations or clauses guided by the old rules, and these provisions are no longer relevant to reality. practice making APHT in the field and having to apply the format to the Sharia contract because the financing agreement banking Sharia is different from debts in the conventional banking credit system (Yuriandhan et al., 2022). It is expected that there will be changes in the future by incorporating a standard format adapted to Sharia terminology, for example in binding mortgage rights on financing several terms adapted to Sharia terminology include others (Yuriandhan et al., 2022):

1. "Debts" becomes "Akad
2. "Debtor" becomes "Recipient Payment or the Customer".
3. "Creditor" becomes "Financing Provider/Bank".
4. "Repayment of debt/Debtor/Customer financing facility" becomes "Repayment of the Recipient of Financing's obligations".
5. "Determination of the Chairperson of the District Court" becomes "Determination of the Chairperson of the Religious Court".
6. "District Court Office" becomes "Determination of the Chairperson of the Religious Court".

The existence of Islamic banks is intended to meet the needs of the Muslim community for the implementation of Islamic teachings as a whole including in the distribution of funds, public trust and confidence in Islamic banks are based more on the implementation of the principles of Islamic law adopted in the operational rules of institutions, so that compliance with these principles is required. sharia. Without compliance with Sharia principles, it can affect people's decisions to utilize the services provided by Islamic banks.

From this point of view, Sharia compliance is at the core of the integrity and credibility of Islamic banks (Waluyo, 2016).

In the 1945 Constitution Article 1 Paragraph 3 also states that "The State of Indonesia is a state of law", then in realizing the ideals of a rule of law state institutions or governments have the responsibility to issue legal provisions to ensure the needs of society by engineering something conditions of laws and regulations, compliance and fairness are implemented and enforced in each provision (Indonesia, 2002).

Efforts to preventative action from the legal situation of sharia mortgage rights that have not been formulated, bank guarantees to comply with applicable laws and regulations

through the Compliance Work Unit (SKK) are carried out in several ways according to Waluyo 2016, namely (Waluyo, 2016):

1. Compliance studies namely every banking regulation issued by the regulator is socialized to the management of Islamic banks. Carried out by SKK to the Compliance Director then forwarded to work units related to joint internalization through making or drafting system and procedure activities with the main points of new regulations or changes to regulations issued by Bank Indonesia;
2. Testing of compliance studies through the Decision of the System and Procedure Committee (KKS);
3. Make follow-up efforts that in every policy draft, provisions and internal guidelines must be approved by the Committee before being decided by the directors who will then be socialized through various bank internal media;
4. Compliance opinion, giving opinion or opinion conducted by director compliance through SKK to the board of directors regarding product release plans or implemented developments and certain strategic policies that require opinions or input on aspects of compliance with the precautionary principle.

Sharia compliance is an effort or form of management of Islamic banking in fulfilling Sharia principles that have not been filled out in legal provisions in Indonesia. Fulfillment of Sharia principles is also an effort to maintain and maintain the soundness level of Sharia banks.

Conclusion

First, Giving Financing, the imposition of mortgage rights, and their implementation in the banking system with Sharia principles must be fulfilled and become the main guideline so that what is carried out is legal, legal, and lawful for the parties. However, the legal provisions of laws, government regulations, and fatwas still do not clearly state the process of implementing friendly mortgages that comply with Sharia principles.

Second, it is necessary to draft provisions for the addition of Sharia terminology in the Clause or Formulation of the Deed of Granting Mortgage Rights so that there is no mixing of terms for Sharia principles with the interest/debt principles in conventional banking.

Efforts to review, formulate, and then issue provisions and socialize friendly provisions on Sharia principles are efforts to fulfill that the Indonesian state is a legal state capable of Sharia compliance in economic development

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