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THE USAGE OF MORTGAGE RIGHTS COLLATERAL IN THE MUSYARAKAH MUTANAQISHAH CONTRACT

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ABSTRAK

Penelitian ini bertujuan untuk menganalisis penggunaan jaminan hak tanggungan untuk menjamin akad *Musyarakah Mutanaqishah (MMQ)* sebagai produk Bank Syariah yang didasarkan pada hubungan hukum kerja sama (kemitraan) sementara Akta Pemberian Hak Tanggungan (APHT) digunakan untuk menjamin hubungan hukum utang piutang dalam perjanjian kredit pada Bank Konvensional. Hal ini menimbulkan kerancuan dalam praktik meliputi potensi ketidakpastian hukum pemilik objek jaminan dan ketidakpastian pengalihan objek pembiayaan, ketidakjelasan harga objek pembiayaan, dan potensi pelanggaran terhadap peraturan Menteri yang mengatur standar baku Akta Pemberian Hak Tanggungan (APHT). Pendekatan yuridis normatif digunakan dalam penelitian ini melalui Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia, dan Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan dan Benda-benda yang Berkaitan dengan Tanah yang dijelaskan secara deskriptif, dan dianalisis secara kualitatif. Hasil penelitian sebagai berikut: **Pertama,** jaminan pada akad MMQ diperbolehkan berdasarkan Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia untuk memastikan Nasabah memenuhi kewajibannya membeli porsi kepemilikan Bank; **Kedua,** penggunaan jaminan hak tanggungan pada akad MMQ masih digunakan dalam praktiknya untuk melindungi kepentingan Bank dan memastikan kewajiban Nasabah memenuhi kewajibannya, namun belum sepenuhnya memenuhi prinsip syariah karena klausul pada APHT dan Surat Kuasa Membebankan Hak Tanggungan (SKMHT) disusun secara baku berdasarkan perjanjian kredit konvensional bukan berdasarkan akad pembiayaan syariah.

Kata kunci: akad *musyarakah mutanaqishah*; jaminan hak tanggungan; prinsip syariah.

ABSTRACT

This research to analyze the use of mortgage rights collateral to guarantee the Musyarakah Mutanaqishah (MMQ) contract as an Islamic Bank product based on the legal relationship of cooperation while the Deed of Granting Mortgage (APHT) is used to guarantee the legal relationship of debt and credit in credit contracts at Conventional Banks. This creates ambiguities in practice, including the potential legal uncertainty of the owner of collateral object and uncertainty transfer of financing object, uncertainty of price of financing object, and potential violation of the Ministerial regulations regulating the standard form of Deed of Granting Mortgage (APHT). A normative juridical research approach is used in this research through the Fatwa of the National Sharia Council of the Indonesian Ulema Council, and Law Number 4 of 1996 concerning Mortgage Rights and Objects Related to Land which are explained descriptively, and analyzed qualitatively. The results of the research are as follows: First, the collateral in the MMQ contract is allowed based on the Fatwa of the National Sharia Council of the Indonesian Ulema Council to ensure customer fulfills his obligation to buy the Bank's ownership portion; Second, the use of mortgage collateral in the MMQ contract is still used in practice to protect the Bank and ensure customer fulfills his obligations, but it does not fully comply with sharia principles because clauses in Deed of Granting Mortgage (APHT) and the Power of Attorney to Enforce Mortgage Rights (SKMHT) are standardized based on conventional credit contracts not based on sharia financing contracts.

Keywords: *mutanaqishah musyarakah contract; mortgage collateral; sharia principles.*

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INTRODUCTION

Banking regulations in Indonesia regulated in Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking and Law Number 21 of 2008 concerning Islamic Banking, which has been amended by Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector (Law No. 21 of 2008). Based on this regulation makes the banking system in Indonesia as dual banking system that requires conventional banking and Islamic banking. In its operational implementation, conventional banking applies the interest system and rewards in a certain period, whereas Islamic banking does not apply the banking interest system *(riba),* speculation *(maisir),* uncertainty *(gharar),* haram or injustice, therefore, Islamic banking conducts its operations based on Islamic law.[1]

Based on Article 2 of Law No. 21 of 2008, the principles to be followed by Islamic banks in conducting their business activities are as follows: "Islamic banking, in conducting its business activities, shall be based on Shari'ah principles, economic democracy and prudential principles". This states that Sharia Principle, Prudential Principle and Principle of Economic Democracy apply to operating an Islamic Bank with respect to the Sharia Principle based on Article 1 point (24) of Law No. 21 of 2008, which is explained as follows: "Shari'a principles are the principles of Islamic law based on fatwas and/or statements of Shari'a conformity issued by institutions authorized to issue fatwas in the field of Shari'a". Based on this regulation, an institution issues Sharia principles as defined in Article 26, paragraphs (1) and (2) of Law No. 21 of 2008. This states that Shariah principles issued by the Indonesian Ulema Council (Majelis Ulama Indonesia/MUI) must be followed by business activities of Shariah products and services. This is known as the Fatwa of the National Shariah Council (Dewan Syariah Nasional/DSN) MUI (Fatwa DSN MUI). [2]

Application of Sharia principles is a necessity to be followed by Islamic banking in its journey, so it can be in line with Sharia rules derived from Islamic teachings which is the Al-Quran, Al-Hadith, *ijma* and *ijtihad* of scholars who the Fatwa DSN MUI has determined because sharia principles are one of the characteristics of Islamic banking that is different from other banks.[3]

Growth of Islamic banking related to Sharia principles is undoubtedly related to Islamic financial system formed by Sharia principles itself. So these two things must go hand in hand. This also have to be followed by enthusiasm to develop Islamic banking products and the benefits. Considering that Islamic banking is a business activity must have development including provide innovations in development of Islamic banking products. As well as provide a variety of banking product choices for customers, such things must be accompanied by awareness between the development of Islamic banking products and sharia principles. So, its making the development of Islamic banking products progress.[4]

There are several Islamic banking products, include fund-raising products known as *wadi'ah* contracts and *mudarabah* contracts. Fund financing products known as *murabahah* contracts, *istishna*

[1]Siti Soimah, "Keabsahan Akad Perbankan Syariah Dengan Pengikatan Jaminan Hak Tanggungan", *Jurnal Officium Notarium*, Vol. 2, No. 2, 2022,hlm.371-378.
[2]*Ibid.*
[3]Muhammad Kurniawan*, Bank dan Lembaga Keuangan Syariah*, Adab, Indramayu: 2021,hlm.70.
[4]*Ibid*

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contracts, *ijarah* contracts, *mudarabah* contracts, *qardh* contracts, *musyarakah* contracts, and so on. *Musyarakah* contract is an Islamic banking product has concept of cooperation with a profit-sharing system. This agreement is also known as a *partnership* agreement which there are 2 (two) parties providing and receiving financing with a particular portion of capital and sharing profits and losses based on an agreed ratio.

Musyarakah Mutanaqishah contract based on the Fatwa DSN MUI Number 73/DSN-MUI/XI/2008 concerning *Musyarakah Mutanaqishah* (Fatwa DSN MUI No 73/DSN-MUI/XI/2008), explains as follows: "*Musyarakah* or *Shirkah* in which the ownership of assets (goods) or capital of one party (*syarik*) decreases due to gradual purchase by the other party", in this contract consists of a *Musyarakah* / *Shirkah* contract and a Sale and Purchase contract. Based on this regulation, the *Musyarakah Mutanaqishah* contract (MMQ) is a cooperation contract between the Islamic Bank and the Customer, both of them contribute in the form of funds to own an object (goods) and ownership of the object will pass to one of the parties intact at the end of contract. [5]

MMQ contract specifically for financing products also regulated by Fatwa DSN MUI Decree Number 01/DSN-MUI/X/2013 concerning Guidelines for the Implementation of Musyarakah Mutanaqishah in Financing Products (Fatwa DSN MUI Decree Number 01/DSN-MUI/X/2013). This is in connection with obligation of Islamic banks to apply the prudential principle when facilitating financing by paying attention to the collateral provided by the customer.[6]

Fatwa DSN MUI also regulates the collateral used in Islamic banking based on Fatwa DSN MUI Number 74/DSN- MUI/I/2009 concerning Sharia Collateral, which regulates Sharia collateral as a guarantee between parties based on Sharia principles. This is followed by Fatwa DSN MUI Number 92/DSN-MUI/IV/2014 concerning Financing accompanied by *Rahn*, which regulates the execution of the guarantee can be done if the Customer doing prohibited acts (moral hazard).

In general, the use of collateral is used to guarantee the debtor's obligations. If the object of the guarantee is a land and/or building object, then the applicable regulations are based on Law Number 4 of 1996 concerning Mortgage Rights and Objects Related to Land (Law No. 4 of 1996). This is also used to ensure legal certainty for creditors if the debtor defaults, and makes the creditor's position higher among other creditors because the repayment of his debt takes precedence and priority over other creditors.[7]

About granting of mortgage rights collateral, explained based on Article 10 paragraph (1) of Law No. 4 of 1996 as follows: "The granting of a Mortgage Right is preceded by a promise to grant a Mortgage Right as security for the repayment of a certain debt, which is stated in and forms an inseparable part of the relevant debt agreement or other agreement that gives rise to the debt." This means that granting Mortgage Rights collateral, guarantees the repayment of certain debts and previously preceded by the main agreement creates legal relationship of debt and credit.

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[5]*Ibid,* hlm.40.
[6]Lastuti Abubakar, dan Tri Handayani, "Accelerating Growth Through The Implementa-Tion Of Islamic Banking Governance", *Journal of Islamic Law Studies (JILS)* , Vol. 2, No. 3, 2019,hlm.13.
[7]Ayu Ainun Mardiyah, et.al., "Pengajuan Pencabutan Sita Eksekusi Hak Tanggungan Atas Akad Musyarakah Di Pengadilan Negeri (Analisis Putusan Kasasi MA No 2799/K/Pdt/2016)", *Jurnal Taman Litera*, Vol.1, No.1, 2021,hlm.6.

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The Land Deed Official (Pejabat Pembuat Akta Tanah/PPAT) has the authority to do an authentic deed related to the mortgage rights collateral contract, based on Article 1 point (5) of Law No. 4 of 1996, stating that the Deed of Granting Mortgage Rights (Akta Pemberian Hak Tanggungan/APHT) explained as follows: "a deed of PPAT containing the granting of Mortgage Rights to certain creditors as collateral for the repayment of their debts."[8]

Procedures of making APHT must fulfil with clauses determined based on standard form or draft regulated in the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration (Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012), which explains that the Deed of Granting Mortgage Rights/APHT is based on the repayment of debt and credit agreements.[9] This is means, the standard form or draft stipulated in that minister regulation above is the basis for granting mortgage rights between the parties with binding rights and obligations of the parties in it. This is also a standard form or draft obeyed by The Land Deed Official/PPAT in making the Deed of Granting Mortgage Rights/APHT.

In practice, it was found redactional form changes in Deed of Granting Mortgage Rights/APHT to integrated with the MMQ contract. This should not be in accordance with the standard form regulated by Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012. So, there is ambiguity about the granting of mortgage collateral rights from sharia financing contracts as outlined in the Deed of Granting Mortgage Rights/APHT. The formulation of Deed of Granting Mortgage Rights/APHT in its ideal condition to bind the MMQ contract needs to be formulated like the main agreement, because it is impossible for MMQ contract to contain debt and credit terminology or things related to legal relationship of debt and credit.[10]

Tolerating the redactions of Deed of Granting Mortgage Rights/APHT determined by Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012 by integrating the redaction of its deeds can be potentially violation of and inconsistency of minister regulation above. Because, the redaction of standard form Deed of Granting Mortgage Rights/APHT is very substantial, debt agreement as the basis for the mortgage rights collateral cannot be equalized with the MMQ contract in Islamic banking.

If examined more closely at the clauses of Deed of Granting Mortgage Rights/APHT, Article 1 of Deed of Granting Mortgage Rights/APHT states guarantee statement clause by the first party as the giver of the mortgage rights, which is as follows: "The First Party guarantees that all the Mortgage Objects mentioned above, really belong to the First Party, are not involved in a dispute, free from encumbrances and free from any unrecorded burdens." So, when the Deed of Granting Mortgage

[8]Dewi Sulastri, dan Sarip Muslim, "Jaminan Hak Milik dalam Perbankan Syariah dalam Perspektif Hukum Islam", *Jurnal Al-Muamalat*, Vol.5, No.2, 2019,hlm.27.
[9]Yovita Christian Assikin, et.al., "Tanggung Jawab Pejabat Pembuat Akta Tanah Berkaitan Dengan Dibatalkan Akta Jual Beli Ditinjau Dari Peraturan Perundang - Undangan Yang Berlaku". Jurnal Acta Diurnal, Vol. 3, No.1, 2019,hlm.84.
[10]Alfian Izzat El Rahma, "Eksekusi Hak Tanggungan Dalam Prinsip Ekonomi Syari'ah." *Jurnal Ekonomi Syari'ah Lan Tabur* , vol. 1, No. 1, 2019,hlm. 50.

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Rights/APHT is signed, making the first party as the mortgage giver, guarantees that the ownership of the object of the mortgage guarantee owned by them, and free from disputes or other things.

MMQ contract based on the parties' cooperation to own certain assets, which will decrease due to the gradual transfer of ownership by one of the parties. Therefore, the legal relationship between the main agreement of the Islamic Bank and the customer is based on capital cooperation. In contrast, the legal relationship between debt and credit does not necessarily occur, which can be said that the legal relationship between debt and credit will arise when the customer defaults or commits prohibited acts (moral hazard).[11]

MMQ contract mechanism based on cooperation ownership of particular objects. This contract reduces the ownership rights of certain parties while increasing the ownership rights of other parties. This transfer of ownership through payment for the ownership rights by other party. Thus, the ownership of the MMQ contract financing object is the jointly owned by Islamic Bank and Customer. Mechanism of MMQ contract is also related to concept of a hybrid contract (multi-contract) which consist of a *syirkah* (partnership) contract and a *ba'i* (sale and purchase) contract. So, it combines the *Musyarakah* contract for equity participation in an object, an *ijarah* contract for leasing an object of financing to seek benefits to earn profits on a profit sharing basis, and a *ba'i* (sale and purchase) contract, to transfer ownership of a portion of the capital. These things in sharia principles has potential for uncertainty in the transfer contract and unclear prices of the contract object in practice.[12]

Practically, MMQ contract by Islamic banks to customers still uses mortgages collateral rights to guarantee Customers obligations as outlined in the Deed of Granting Mortgage Rights/APHT.[13] This must be examined legally because the MMQ contract as a Sharia contract followed by conventional system collateral in the form of mortgage collateral rights, raises big legal questions.[14]

Deed of Granting Mortgage Rights/APHT applied in Islamic banking is legally confusing because the provision of MMQ contract financing facilities based on the cooperation scheme of the parties, so the object of financing and collateral can become jointly owned by the Islamic Bank and the Customer. In this case, the position of the parties is not a creditor and debtor, both are positioned as partners who bear each other.[15]

MMQ contract does not creates a legal relationship of debt and credit, but a legal partnership between the Bank and the Customer. Debt and credit arise when one of the partners commits an act violates the provisions or things are prohibited based on Fatwa DSN MUI Number 92 of 2014. Therefore, the binding of collateral at beginning of MMQ contract raises a question mark because legal relationship of debt and credit does not necessarily occur. MMQ contract as a financing contract, states that Islamic Bank owns a portion of financing object, meaning there is joint ownership between the customer and the Islamic Bank. As outlined in the Deed of Granting Mortgage Rights/APHT

[11]Syauqi Seff, dan Mirza Syifa Anam, "Status Kepemilikan Asset Bersama Akad Musyarakah Mutanaqisah (MMQ) Dalam Perbankan Syariah Di Indonesia.", *Proceeding The 2nd Annual Postgraduate Conference On Muslim Society: "Humanities And Education: Text, Tradition, And Identity In The Malay World,"* Banjarmasin: Pascasarjana UIN Antasari, 2019,hlm.357.
[12]Jureid, "Akad Ganda (Hybrid) Dalam Perspektif Fiqh Muamalah (Analisis Hadis)", *Jurnal J-Mabisya* , Vol. 1, No. 1, 2020, hlm.68-69.
[13]Novita Indah Sulistyowati, "Kedudukan Jaminan Syariah dalam Perbankan Syariah". *Jurnal Officium Notarium*, Vol. 2, No. 2, 2022,hlm.364.
[14]*Ibid*, hlm.365.
[15]Lastuti Abubakar, dan Tri Handayani, "Alternatif Penyelesaian Sengketa Yang Efektif, Efisien Dan Berkeadilan Bagi Perbankan Syariah", *Jurnal Litigasi*, No. 20, 2019.

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stipulated that collateral object belongs entirely to the giver of the mortgage (first party). It is creates legal ambiguity.

Imbalance between the MMQ contract and Deed of Granting Mortgage Rights/APHT raises ambiguity regarding its implementation. MMQ contract has a legal relationship of cooperation (partners), while Deed of Granting Mortgage Rights/APHT, used to guarantee based on the legal relationship of debt and credit between the debtor and the creditor, this is creates the legal uncertainty owner of the object mortgage rights collateral. [16] Also regarding the adjustment of Deed of Granting Mortgage Rights/APHT changes adjusted to the MMQ contract, this has potential violation Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012. Based on the description of the problems above, this needs to analyzed more comprehensively.

METHODS

This research uses normative legal research methods to examine a regulation on legal issues.[17] Specification of this research is descriptive-analytical research to describe and explain comprehensively the use of mortgage rights collateral in *Musyarakah Mutanaqishah* contract based on sharia principles, with the stages of library research searching, inventorying, and reviewing primary, secondary and tertiary legal materials,[18] as for data collected by literature study, and document study as a data collection technique in normative legal research.[19] Data in this research is analysed qualitatively by describing in a qualified and comprehensive form of logical, regular and practical sentences.[20]

RESULTS AND DISCUSSION

The Concept of Collateral in Musyarakah Mutanaqishah Contract Based on Sharia Principles

In addition to being a place to gather and live, houses are currently an investment commodity in the property sector. People in Indonesia perceive home property as an investment that provides enough profit and security. Home financing based on MMQ contract as a cooperation contract to own a house with capital from one party, which later the ownership of one party decreases due to the gradual transfer of ownership by other party. This contract uses the profit and loss sharing method, which Bank and Customer get profit according to the agreed presentation, as well as when a loss occurs, it will be borne together according to the capital contribution of each party.[21]

Concept of collateral *(al rahn)* in Islamic economics is derived from concept of pawn *(rahn)* and concept of individual *(kafalah)*, which is interpreted based on QS. Al Baqarah verse 283, as follows: "If you are travelling (and do business not in cash) and do not have a scribe, then let a bond be held by the creditor. But if some of you trust others, let the trustee fulfil his trust and let him fear Allah his

[16]Sherhan, "Esekusi Hak Tanggungan Akad Musyarakah Mutanaqisah", *Jurnal Jurisprudensi : Jurnal Ilmu Syariah, Perundangan-Undangan dan Ekonomi Islam*, Vol. 15, No.2, 2023, hlm.385–399.
[17]Jonadi Efendi, dan Prasetijo Rijadi, *Metode Penelitian Hukum*, Prenada Media, Jakarta: 2022,hlm.85.
[18]*Ibid,* hlm.80-90.
[19]Muhaimin, *Metode Penelitian Hukum*, Mataram University Press, Mataram: 2020,hlm.82.
[20]*Ibid,* hlm.83.
[21]Sudirman, "Harmonisasi Akad Pembiayaan Syariah Terhadap Jaminan Hak Tanggungan", *Jurnal Media Iuris*, Vol. 6, No. 1, 2023,hlm.151–174.

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Lord; do not conceal your testimony. And whoever conceals it, then indeed he is a sinner in his heart; and Allah knows best what you do." [22] Based on Surah Al Baqarah verse 283 mentioned above, collateral in Islam is allowed, following 2 (two) concepts, namely material collateral, means the objects held by people who have receivables, and personal guarantees that people will fulfil the obligations of people who owe.

The MMQ contract as a derivative of the Musyarakah contract, still follows the legal regulations of the Musyarakah contract. this is based on point 3 of Fatwa DSN MUI Number 08/DSN-MUI/IV/2000 concerning Musyarakah, which states as follows: "In principle, in musyarakah financing there is no collateral, but to avoid violations, Islamic financial institutions may request collateral." Based on this rule, the existence of collateral in musyarakah financing is only to avoid negligence/violation by the customer.

Based on DSN Fatwa No. 92/DSN- MUI/IV/2014 regarding conditions related to the contract number (2) explained: "..Sharia Financial Institutions may request collateral (marhun) from trust holders (*al-Amin*, including *sharik*, *mudharib*, and *musta'jir)* or third parties." This regulation allows the use of collateral (marhun) from syarik, which is the partner or customer in the Musyarakah Mutanaqishah contract. Therefore, the above-mentioned Fatwa of DSN MUI allows the use of collateral in the Musyarakah Mutanaqishah contract.

Based on the theoretical study of concept of collateral in islamic law, there is hadith of the Prophet Muhammad SAW who said: "*You know better about your world*".[23] This hadith is states that there will be many things that happen after the death of Prophet Muhammad SAW, and there are things that require special solutions or fatwas.[24] Also, there is a fiqh rule "*taghayyiru al-ahkam bi taghayyiru al-azman wa al-amkan*" (the change of law depends on the change of times and places). Then, muamalah fiqh rule tht states: *"wal aslu fil uqudi wal mualamat shohhah hatta yaquumu daliilun alal bathloni wattahrim"* (the original law for muamalat is that all actions are permitted, unless there is evidence that prohibits it), and the rule "*al-adah al-muhakamah"* (custom is law). This rule requires that customs can be considered when determining the law. This rule also known as the rule of *al urf*, related to interpreting law of guarantee in Islam. This can be applied to the rule of collateral, considering that guarantee is part of the customs generally applied to financial institutions, it must be more flexible, emphasising the customs that occur in society.[25]

In providing financing facilities to customers, Islamic banks must be sure that customer has ability and willingness to repay financing obtained. To arrive at that belief, Islamic banks generally conduct an assessment of the customer receiving financing known as the 5C analysis, namely character, capital, collateral, capacity, and condition. This is in line with Article 23 paragraph (1) of Law No. 21 of 2008, which explains the obligation of Islamic banks to have confidence in willingness and ability of prospective customers to fulfil their obligations before channelling financing. It should be noted that collateral is analysed against prospective customers. So, in Islamic banks, the essence of

[22]*Ibid,* hlm.131.
[23]*Ibid*
[24]Suci Dihanna, *Kontribusi Pemikiran Pembaharuan Islam Hasbi Ash-Shiddieqy Dalam Kehidupan Sosial Keagamaan Di Aceh* ,Tesis, Universitas Islam Negeri Ar-Raniry, 2023,hlm.70.
[25]Muhammad Syarif Hidayatullah, et.al, *Op.Cit,* hlm.41.

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concept of sharia collateral must be applied in line with the principles of sharia that must implemented by Islamic Bank.

The prudential principle must applied by Islamic Banks, based on Article 35 paragraph (1) Law No. 21 of 2008, as follows: “Sharia Banks and Sharia Business Unit in conducting their business activities must apply the prudential principle”. So, the obligation of Islamic Banks to apply the prudential principle when providing financing by paying attention to the collateral provided by the customer.[26]

Perspective that Islamic Bank functions as an intermediary institution related to application of collateral at Islamic Banks. However, the financing by Islamic Bank is sourced from public funds which is customers who deposit their funds in Islamic Banks or third parties. So, Islamic Bank has responsibility to the customers who deposit their funds or third parties, as well as to reduce the risks arising from the financing. Then, the use of collateral at Islamic Bank is a form of realisation of principles that must be implemented by the Islamic Bank, including the principles of prudence, risk management and so on.

Regulations that apply to the collateral used in Islamic Banks' financing practices still apply same as those used in conventional Banks. This is due to the regulation that Islamic Banks must obey. In this case, the Fatwa MUI DSN which regulates such matters when referring to the meaning of Law No. 28 of 2008 associated with the legal principle of *lex specialis derogat legi generalis.* It can be concluded that other regulations not regulated in Law No. 28 of 2008 are applied to banking system in Indonesia, meaning the collateral rule applied to contracts in Islamic Banks also use the rule that applied to conventional Banks.[27]

There’s a theory in law, it is known as legal refinement *(rechtsverfijning)* is motivated by regulations that are left behind due to the development of society. This is achieved by extracting the principle from a regulation, so that the principle is applied to special condition that are not regulated.[28] Meaning that Sharia contracts can apply the rule of collateral with conventional banking's regulation of mortgage collateral, as Fatwa DSN MUI has limited regulations on Islamic guarantees.

The Usage of Mortgage Rights Collateral in Musyarakah Mutanaqishah Contract

Based on Article 3 (1) of Law No. 4 of 1996 as follows: "The debt to be secured in repayment by a mortgage right may be an existing or agreed debt of a certain amount or an amount that can be determined at the time of the application for execution of the mortgage right on the basis of a debt and credit agreement or other agreements that give rise to the debt and credit relationship concerned”. This means, the debt concerned is existing or agreed debt base on a contract or other contract establishing a debt and credit relationship. Also, this is explained in the Explanation of Article 3 paragraph (1) Law No. 4 of 1996 described as follows: "Agreements that can give rise to debt and credit relationships can be in the form of borrowing and lending agreements or other agreements,

[26]Djawahir Hejazziey, *Hukum Perbankan Syariah,* Deepublish, Yogyakarta: 2013, hlm.164.
[27]Humaira, & T. Haflisyah, “Objek Syirkah Menjadi Jaminan Hak Tanggungan Pada Pembiayaan Perumahan Melalui Akad Musyarakah Mutanaqishah”, *Jurnal Hukum Samudra Keadilan*, Vol. 18, No. 1, 2023,hlm.121–130.
[28]Sitti Mawar, “Metode Penemuan Hukum (Interpretasi Dan Konstruksi) Dalam Rangka Harmonisasi Hukum”, *Jurnal Justisia*, Vol. 1, 2020,hlm.16.

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such as agreements to manage the assets of minors or those under guardianship, which are followed by the granting of Mortgage Rights by the manager".

Based on regulation's explanation above, connected to the law of contract theory, there's obligatory contract as an contract creates an obligation for one party to do something the other party, such as doing something, not doing something and giving something. So, concept of debt and credit relationship referred based on the regulation above is not slight to the legal relationship of a loan and borrowing agreement or property management agreement, but includes other contracts that creates an obligatory. [29]

MMQ contract for home financing is an agreement between the Islamic Bank and the customer, both of them agree to contribute capital to the ownership of the house. In connection with the hybrid contract which is the mechanism of the MMQ contract, the existence of *ujrah* (lease) contract makes object of financing in MMQ contract an object of *ijarah* and the customer have to pay *ujrah* to the Islamic Bank. There is a descending transfer of ownership of MMQ financing object by the customer from the ownership of the Islamic Bank. So, after full transfer ownership is obtained by the customer, a sale and purchase contract occurs.

This also explained based on the fatwa DSN MUI Number 73/DSN-MUI/XI/2008, the customer's obligation in MMQ contract is to repurchase portion owned by the Islamic Bank. After the repaid, the entire portion of the capital of the Islamic Bank will transferred to customer and object of financing belongs to customer. So, the obligation to repurchase is the essential thing that customer must fulfil to the Islamic Bank. This makes the home financing with the MMQ contract, creates binding contract. Also, it has potential to become a bill of the Islamic Bank, which has been mentioned in the form of an MMQ contract. So, that collateral binding with a mortgage rights collateral can be applied to fulfilment of customer's obligations to Islamic Bank[30]. However, in practice, the use of mortgage collateral in the Musyarakah Mutanaqishah contract is still used refers to the use of mortgage collateral in credit contract in conventional banks as outlined in the the Deed of Granting Mortgage/APHT.

Formating the Deed of Granting Mortgage/APHT based on the MMQ contract as a Sharia contract has to integrated with Sharia principles. Considering the MMQ contract as the main contract, and the Deed of Granting Mortgage Rights/APHT as an additional contract. Also, because the terminology "sharia" is intended to differentiate the granting of mortgage rights collateral based on the main contract of a conventional loan contract than of a sharia financing contract.

Clauses of Deed of Granting Mortgage Rights/APHT must comply with principles Sharia, based on Article 10 paragraph (2) Law No. 4 of 1996, the making of the Deed of Granting Mortgage Rights/APHT must be made based on specific regulations. So it has been standardised form regulated by the Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012. This regulation is an instruction for the Land Deed Officials/PPAT to make deeds about land transfers and encumbrances on land, along with a special appendix as the basis instructions to make Deed of Granting Mortgage Right.

[29]Humaira dan T. Haflisyah, *Op.Cit,* hlm.140.
[30]*Ibid,* hlm.142.

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Power of Attorney to Impose Mortgage Rights/SKMHT contains the same redactions as APHT, but the position of SKMHT use to grant a power of attorney from the customer as the giver of the mortgage right to the Bank as the recipient of the mortgage right for the registration of the mortgage right. One of the reasons for the use of SKMHT is when the object of collateral not yet become the name of the giver of the mortgage or the status of the land has not been certificated.[31]

The use of Attorney to Impose Mortgage Rights/SKMHT in the MMQ contract related to the ownership status of the financing object. Considering that the object of financing contract originally belonged to Bank and Customer. Then SKMHT is needed because the object of collateral has not yet become fully in the name of the customer, so that with the use of Attorney to Impose Mortgage Rights/SKMHT, the customer empowers the Bank to register the mortgage rights collateral.

The redaction of clauses in Deed of Granting Mortgage Rights/APHT based on minister regulation above still refers to the debt and credit relationship determined in conventional banking. Which is as follows: *First,* Use of the terms "Debtor" and "Creditor" as parties in the Deed of Granting Mortgage Rights/APHT; *Second,* The use of redactional phrase"...a debt and credit agreement has been signed..."; *Third,* The use of redactional phrase"..that to secure the repayment of the debt..."; *Fourth,* The use of the redactional phrase "...the parties in matters concerning the Mortgage Collateral Rights mentioned above with all consequences choose domicile at the office of the District Court ..."; and, *Fifth,* The use of the clause "In the event that the debtor is in serious default, the second party is hereby authorised and declared by the first party to accept the authority and, for this purpose, the power to administer the mortgaged property on the basis of the decision of the Head of the District Court whose jurisdiction covers the location of the relevant Mortgage Object".

In practice, it was found that to make the Deed of Granting Mortgage Rights/APHT in line with the Sharia financing contract, the Land Deed Officials/PPAT made adjustments to the Deed of Granting Mortgage Rights/PPAT redaction phrases, including by changing the term of debt and credit agreement with a financing agreement. Changing the term of the Debtor's position to Customer or Financing Facility Recipient, and the position of the Creditor to Bank or Fund Provider. This is because there was no specific regulation to regulate Islamic banking collateral fulfilled sharia principles.[32]

The standard form of the Deed of Granting Mortgage Rights determines the dispute resolution clause refers to the legal domicile between the Debtor and the Creditor through the District Court. In practice this makes the execution of mortgage collateral rights raises controversy because Sharia economic disputes, especially Sharia banking, are the authority of the Religious Court. Based on the Decision of the Constitutional Court (Mahkamah Konstitusi) Number 93 / PUU-X / 2012, the District Court does not have authority to resolve Islamic banking disputes. So, in practice there is a potential overlap authority of judicial institutions. Meanwhile from the banking culture side, there is a reluctance of banking actors to resolve disputes through the Religious Court because of the issue of execution.[33] So, there's potential confusion arises in the judicial environment to execute mortgage

[31]Ni Made Seri Wahyuni Dewi, et.al, "Perjanjian Kredit Bank Dalam Hal Surat Kuasa Membebankan Hak Tanggungan Tidak Diikuti Dengan Akta Pemberian Hak Tanggungan", *Jurnal Interpretasi Hukum, vol. 3, No. 1*, 2022,hlm.188-192.
[32]Sudirman, *Op.Cit,* hlm.159.
[33]Alfian Izzat El Rahma, *Op.Cit.*hlm.45.

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collateral rights based on Sharia contracts. Although, with the issuance of the Constitutional Court's decision mentioned above*,* the authority for Sharia economic disputes is the Religious Courts. So, reconstruction of Deed of Granting Mortgage Rights/APHT in accordance with sharia principles is needed, including judicial authority in examining and deciding on mortgage rights collateral disputes based on sharia contracts.[34]

Deed of Granting Mortgage Rights/APHT defined by the standard form based on Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012, in practice needs to changed to integrate with MMQ contract. Because there is no correlated with the legal relationship of debt and credit. So, there's potential legal confusion, considering the adjusment which not in line with the standard form regulated by the minister regulation itself. This also became one of the reason makes the Land Deed Officials/PPAT not take risk of making Deed of Granting Mortgage Rights/APHT based on Islamic financing contracts.[35]

Based on Article 96 paragraph (1) juncto paragraph (5) of Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012 as follows: "(1) The form of deed used in making the deed referred to Article 95 paragraph (1) and paragraph (2), and the procedure for filling it out shall be made in accordance with the Appendix to this Regulation which consists of: 1. Deed of Sale and Purchase; 2. Deed of Exchange; 3. Deed of Grant; 4. Deed of entry into the company; 5. Deed of Division of Joint Rights; 6. Deed of Granting Mortgages/APHT; 7. Deed of Granting Building Rights/Use Rights on Land of on Freehold Land; 8. Power of Attorney to Impose Mortgage Rights; (5) The Head of the Land Office shall reject the deed of a land deed official that is not in accordance with the provisions as stipulated in paragraph (1)."

Based on the minister regulation above, there is potential violation of the ministerial regulation regarding the adjustment of Deed of Granting Mortgages/APHT and Power of Attorney to Impose Mortgage Rights/SKMHT by Land Deeds Official/PPAT to in line with sharia principles. this is a double-edged knife for Land Deeds Official/PPAT. In one side, this adjustment is used to fulfill the sharia principle, while on the other side, this adjustment can potentially violate the regulation which in turn can potentially lead to rejection of the land office to the deeds.

The execution of mortgage rights collateral can executed by creditor based on Article 6 of Law No. 4 of 1996, which states as follows: "If the debtor is in default, the first holder of the Mortgage Rights has the right to sell the object of the Mortgage Rights under his authority through a public auction and take repayment of his debt from the proceeds of the sale". This requires a Certificate of Mortgage Rights Collateral (Sertifikat Hak Tanggungan) consist of a copy of the land title book and the Deed of Granting Mortgage Rights authorised by the Head of the Land Office. The Certificate of Mortgage has an executorial title that has same power as a court decision contains the *Irah-irah* 'For the Sake of Justice Based on God Almighty'. So, Islamic Bank can carry out execution directly by selling the object of collateral has been agreed with the holder of the mortgage rights collateral.[36]

[34] Sherhan, *Op.Cit,* hlm.396.
[35] Alfian Izzat El Rahma, *Op.Cit,*hlm.51.
[36] Nadila Rahma Dewi, dan Leli Joko Suryono, "Pelaksanaan Eksekusi Kontrak Musyarakah Mutanaqisah di Bank Syariah Indonesia", *Jurnal Media Hukum dan Syariah*, Vol. 2, No. 5, 2024,hlm.141–154.

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In practice, Islamic banks that provide Islamic financing based on collateral rule that apply in conventional banking raise complex ambiguities. Especially regarding compliance with Sharia principles itself. Islamic financing that does not apply Sharia collateral contracts that meet compliance with Sharia principles contradicts the principles of Sharia itself.

Granting of mortgage collateral rights as outlined in Deed of Granting Mortgage Rights/APHT is necessary to comply with sharia principles. Clauses are formed by Minister of Agrarian and Spatial Planning/Head of the National Land Agency Regulation Number 8 of 2012 in Deed of Granting Mortgage Rights/APHT not relevant with MMQ contract as main contract. So, application of sharia principles in the MMQ contract has not fully able reach its additional contract. It can be understood that Deed of Granting Mortgage Rights/APHT has not fully complied with the Sharia principles. This ambiguity can lead to weaknesses in the execution of mortgage rights collateral and even failure due to non-compliance with Sharia principles. So, it need to resolve where the Islamic Banking Law regulates Sharia contracts and the concept of Sharia collateral as part of Sharia bonds, because both are interrelated elements.[37]

It is necessary to change the clauses in the MMQ contract followed by changes in the standard redaction in Power Of Attorney To Impose Mortgage Rights/SKMHT and Deed of Granting Mortgage Rights/APHT which able to reach sharia principles in the MMQ contract. So, the guarantee of mortgage collateral rights in the MMQ contract is not related to debt repayment but regarding certainty to Bank that Customer will fully purchases the portion (*hishshah*) owned by the Islamic Bank. Thus, from this redaction change, there is no more legally confusion in practice. This change must also followed by understanding and application by policy makers both from banking law practitioners, and Land Office administrators. Also it is necessary to strengthen regulations related to the use of mortgage rights collateral in the MMQ contract and harmonize the regulations for making Deed of Granting Mortgage Rights/APHT and Power of Attorney to Enforce Mortgage Rights/SKMHT by policy makers.

CONCLUSION

The concept of collateral in MMQ contracts based on sharia principles is allowed to be used. This refers to the theory in Islamic economics, Fatwa DSN MUI, and the laws that regulate it refers to Law No. 21 of 2008. Based on the Fatwa DSN MUI, it is known that guarantee in MMQ contract used to ensure customers will fulfill their obligations, do not commit negligence or violations of the contract, and to fullfill the prudential principles as one of principles that must followed by Islamic Bank, not to guarantee debt repayment as the concept of granting mortgage rights collateral in credit contracts in conventional banks. Also, the use of mortgage rights in MMQ contracts in practice is still used in same as the use of mortgage rights collateral in credit contracts in conventional banks. This creates confusion in practice and does not fully comply with sharia principles due to the use of Deed of Granting Mortgage Rights/APHT and Power of Attorney to Enforce Mortgage Rights/SKMHT formation standards which are still based on credit contracts in conventional banks.

[37]*Ibid,* hlm.380.

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