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Legal Aspects of Liability in the Sharia Banking Financing System: Its Position and Application

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Abstract

The writing of this article aims to explain the definition of liabilities and Sharia banking, knowing how the legal position of liabilities is as a form of guarantee in Sharia banking financing, implementation/implementation of liabilities in Sharia banking financing, and to find out whether the liability as a form of guarantee in Islamic banking financing has a position equivalent to credit in conventional banking. Many references are used to explain the formulations of the problem. Methodological techniques were used in this study, including describing and explaining the rights of Islamic banks and dependents, and the position between Islamic banking financing and credit in conventional banking. This article uses a normative legal approach method with secondary data sources, i.e., the original legal text, secondary legal literature, and non-legal sources so that it can be concluded, that: 1. The validity of the Rights of Liability in financing Islamic banking can be observed through the existence of the Rights of Liability institution regulated in Law No. 4 of 1996 concerning the Rights of Liability to Land and Related Objects. 2. In the practice of sharia banking, there is a strong emphasis on the existence of collateral in assessing and providing financing

to customers. 3. Hak Tanggungan as a form of guarantee has different positions between conventional and sharia banks.

KEYWORDS

Financing, Liability, Sharia Banking.

Introduction

As a developing country, Indonesia experiences significant economic growth every year. This phenomenon cannot be separated from the presence of financial institutions in the country. One institution that has a crucial role is the banking sector. Banks are not only responsible for collecting funds from the community in the form of deposits or deposits, but are also responsible for distributing funds to the community in the form of credit or financing.

The existence of banks in support of the country's economic growth has grown with the enactment of the Sharia Banking Act in 2008. This gives the banking sector a boost to improve and expand the programs they run. The purpose of the Sharia Banking Act is to avoid interest practices commonly found in conventional banking, as well as to replace them with investment programs and profit sharing by sharia principles. As described in Law No. 21 of 2008 on Sharia Banking, which asserts the definition of Islamic banking is as follows:

"*Everything concerning sharia banks and sharia business units, includes institutions, business activities, and methods and processes in carrying out their business.*"

Sharia banking was born out of a strong drive to organize banking transactions by Sharia principles from the beginning of its history. For pioneers, especially Muslim economists, the need for Sharia-based banking institutions is a significant challenge. They believe that all Islamic rules or laws have a purpose for the good and well-being of the people. Therefore, they are determined to fight so that the concept of Islamic perfection can be implemented operationally in banking activities.

An important development in the Sharia banking sector in Indonesia occurred in 2008 when Law No. 21 of 2008 was passed on Sharia Banking (hereinafter referred to as the Sharia Banking Act). The establishment of this law is due to the increasing public demand for sharia banking services. Previously, regulations on Islamic banking in Law Number 10 of 1998 on Amendments to Law Number 7 of 1992 on Banking were still less specific, so it needs to be regulated specifically through self-regulation.

Linguistically, Sharia banks are a combination of two words, namely banks which refer to financial institutions tasked with storing and distributing funds to the community (Partanto & Al Barry, 1994), and sharia which refers to religious laws derived from the Quran and Hadith (Annisaa et al., 2019). From this description, it can be concluded that Sharia banks are financial institutions that perform their duties by Sharia principles. Syariah banks, as intermediation institutions, have several main functions, namely as a place to raise funds in the form of savings, giro, and deposits by using a gift and trust scheme, and distribute the funds to the public under a different scheme from conventional banks. In principle, the activities carried out by Sharia banks are different from conventional banks because Sharia banks follow Sharia principles and precautionary principles, thus giving Sharia banks advantages over conventional banks (Wafa, 2017).

Sharia banking activities, as regulated in the Sharia Banking Law, consist essentially of three types, namely funding, service services, and financing. Funding activities involve raising funds in the form of savings, giro, and deposits. Savings and deposits were made through the mudharabah account, while the gyro used the wadi'ah account. These fundraising transactions can use other contracts that conform to Sharia principles. Furthermore, service activities include debt collection based on accounts and trustee functions based on accounts. Meanwhile, financing transactions are carried out with Akadqard. Funding activities in Sharia banks are expenditure of funds to support planned investments, both by banks themselves and by other parties. The funds must be used properly

and fairly, with clear terms and conditions. Financing is provided by banks to customers based on trust, so customers are expected to be able to return the funds by the agreed agreement (Shandy Utama, 2020).

In Law No. 21 of 2008 on Sharia Banking, the term "guarantee" is used as the definition of "guarantee". Collateral is a form of additional guarantee, in the form of movable or immobilized goods, which is handed over by the owner to the Sharia Bank or Sharia Business Unit (UUS), to guarantee the payment of the obligations of customers who receive facilities (Dewi Ayu Safitri et al., 2019). The provision of guarantees by Islamic banks is an effort to ensure that customers fulfill their obligations by the agreement in the contract. One example of guarantees in Sharia banking is land guarantees. In practice, this land guarantee is intended to provide legal certainty regarding the guarantee provided by customers to banks. Sharia banks carry out a similar process to conventional banks, namely by imposing the liabilities on the land through PPAT (Land Deed Making Officials).

To carry out their duties without experiencing problems, Islamic banks implemented the concept of liability rights that are usually applied in conventional banks. As is known, dependency rights are the only form of land guarantee recognized by the State of Indonesia. However, the use of the concept of liabilities in the context of Sharia banks is complicated, as liabilities are generally used as collateral in debt-to-debt agreements between debtors and creditors. Meanwhile, in Islamic banks, there is no debt-to-debt agreement, but rather a financing concept in which customers and banks are involved. Therefore, the term "debt" is not known in Islamic banks, but there is financing done by both parties.

Based on the above background explanation, the author is interested in being able to conduct research under the title: "***The Legal Aspects of the Rights of Liability in the Sharia Banking Financing System: Position and Application***".

Based on the above statement, researchers formulated the following problems:

1. What is the position of the liability law as a form of guarantee in Islamic banking financing?
2. How is the application of the right to dependency in Islamic banking financing?
3. Does the right of dependency as a form of guarantee in Islamic banking financing have a position equivalent to credit in conventional banking?

Methods

The research titled "The Legal Aspects of Liability in the Sharia Banking Financing System: Position and Application" uses a normative juridical approach. Specifications conducted in research using analytical descriptions, in this study intended to describe and explain the liability as a form of Sharia banking financing, then the application of the liability in Sharia banking financing, and the position of liability rights as a form of guarantee in Islamic banking financing with credit in conventional banking. This study was conducted by collecting data and using legislation related to the problems of this study, and will also be viewed based on theories in Civil Law and related regulations regarding Islamic banking and liability rights. The data required in this study were sourced from secondary data found in the analysis of primary legal texts, second legal literature, and non-legal sources.

Result and Discussion

1. Legal Position of Liability as a Form of Guarantee in Sharia Banking Financing

Rights become important when there are many needs of the community related to guarantee institutions that take care of all regulations related to guarantees charged with immovable objects (A. Ningsih, 2021). The validity of the Right to Liability in financing Islamic banking can be observed through the existence of the Right to Liability institution regulated in Law No. 4 of 1996 on the Rights of the Land and Related Objects (hereinafter referred to as the Right to Liability Act). This is related to the validity of the burden of liability in Sharia banking which depends on the creation of the Liability Burden Act (APHT) or the Certificate of Charge of Liability (SKMHT) by the Land Certificate Making Officer (PPAT), which is then related to the significance of the accounts in financing in sharia banks. In addition, the validity of the liability rights in financing in Islamic banking is also reflected in the Financial Services Authority Regulation Number 16/POJK.03/2014 regarding the Assessment of the Quality of assets of Sharia General Bank and Sharia Business Unit.

Article 1 1 of the Act states that a right of pledge is a right of pledge imposed on land rights by Law No. 5 of 1960 on Agrarian Principal Regulations, together with other items related to the land, either separately or as a unit, for certain debt payments. This gives certain creditors priority in terms of debt payments compared to other creditors. The explanation highlights the existence of liability rights as collateral for debt payments commonly known in conventional banking contexts. However, in Sharia banking, the term used for debt or credit is financing.

Law No. 21 of 2008 on Sharia Banking explains that financing refers to the provision of funds or bills equivalent to that, including:

a) Transactions share profits in the form of mudharabah and prayer.
b) Lease transactions in the form of ijarah or lease purchases in the form of ijarah muntahiya bittamalk.
c) Transactions in the form of qardh receivables; and
d) Service rental transactions are in the form of pilgrims for multi-service transactions.

This is based on an agreement between the Sharia Bank and/or Sharia Business Unit (UUS) and other parties, which require recipients of financing or fund facilities to return the funds after a certain period, in exchange for vows, no rewards, or sharing profits.

The procedure for burdening liabilities on Islamic banks, for example, Bank BNI Syariah, is similar to the procedure for burdening liabilities on conventional banks, which uses Law Number 4 of 1996 as the basis of the regulation. Article 10 (1) and (2) of the UUHT Act asserts that granting the Rights of Liability begins with a treaty granting the Rights of Liability as collateral for the payment of certain debts, which is an integral part of the relevant debts or other agreements involving such debts. The process of granting a Right involves creating a Certificate of Granting a Right by PPAT by the provisions of the applicable laws and must be registered with the Land Office (A. S. Ningsih & Dise, 2019).

By the provisions of Article 10 paragraph (2) of the UUHT, the preparation of the APHT deed must be carried out by PPAT by the provisions of the applicable laws and regulations. Therefore, PPAT must refer to the Head of the National Land Agency Regulation Number 8 of 2012 concerning the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration (abbreviated as Kabupaten Number 8 of 2012) (A. I. El Rahman, 2019). This regulation

guides PPAT in drafting acts, including SKMHT and APHT. In the regulation, there are also examples of SKMHT and APHT formats that form the basis for PPAT in drafting acts related to the burden of Liability.

According to Article 96 paragraph (2) of Kabupaten Number 8 of 2012, the preparation of the act as specified in Article 95 paragraphs (1) and (2) shall use a form that conforms to the format provided. Article 96 paragraph (3) stipulates that changes in land registration data as described in Article 95 paragraph (1) and the preparation of the Act on Granting Rights as mentioned in Article 95 paragraph (2) shall not be made based on acts in violation of the provisions of paragraph (2). Article 95 paragraph (1) explains that the land deed prepared by PPAT to be used as the basis for registration of changes in land registration data includes the Act on Granting Rights mentioned in letter (f) of that article (Surachman, 2022). Article 10 (1) of the Liability Act expressly states that granting the liabilities begins with a promise to grant the liabilities as a guarantee of payment of certain debts, which is described and is an integral part of the relevant debt-to-debt agreements or agreements that cause such debts. From this explanation, Liability is an absolute requirement for debt repayment.

According to the author's view, in Sharia banking, financing can guarantee the right of dependency by creating a debt recognition deed by the customer, because financing is different from debt agreements. However, when the financing is paid off, it creates debts between banks and customers, so it is necessary to make a debt recognition certificate as a basis for imposing Liability. A debt recognition certificate is a document containing the recognition of one party's debt, in which the debtor (the customer) admits that he must pay a certain amount of money to the creditor (the bank). Debtor's creation of a debt recognition deed is done through a notary using the head of the deed containing the phrase "For the sake of Justice Based on Almighty God". With the

emphasis on the phrase, the deed of recognition of debt gained executive power.

Although the deed of recognition of debt has an accessory nature, it means that the gross is always dependent on the principal agreement. When the main agreement expires, the deed of recognition of debt also expires. When a debt is repaid by the debtor, the debt agreements are extinguished. Thus, the conclusion of the main agreement resulted in the debt recognition certificate becoming invalid. The main agreement in question is a financing agreement between the bank and the customer (Nurul Musjtari, 2016).

To strengthen the legality of the burden of liability in Sharia banking, Financial Services Regulation Number 16/POJK.03/2014 on the Assessment of the Quality of Asset of Sharia General Banks and Sharia Business Units, Article 46 (1) stipulates that collateral that can be calculated as a reduction in PPA (Attachment Disposition) is a collateral supported by legal documents and bound by applicable legal provisions, giving banks preferential rights. Preferential rights for banks to collateral such as land, buildings, residential houses, and machinery are obtained when the collateral is tied up with liability, by Article 45 letter (b) and letter (c). Binding collateral to a liability right must be by the provisions and procedures stipulated in the applicable laws, including but not limited to registration matters, so that banks have preference rights to collateral bound to the liability.

2. The Application of Liability in Sharia Banking Financing

Based on Article 1131 of the Civil Code, all forms of property owned by debtors, including moving and non-moving, both existing and future, are used as collateral to fulfill their debts to creditors. However, public guarantees such as those stated in the Civil Code are deemed inadequate to protect the interests of creditors. Therefore, creditors then ask for

more specific guarantees based on the agreement, as stipulated in Article 23 of Law No. 21 of 2008 on Sharia Banking which explicitly recognizes the use of collateral with the following provisions:(Pratama, 2020)

1) Before Sharia Bank and/or Sharia Business Unit (UUS) distributes funds to Facility Recipient Customers, they must be sure that the prospective Customers have the will and ability to pay off all their obligations on time.
2) To ensure confidence as mentioned above, Sharia Bank and/or the UUS must conduct a comprehensive evaluation of the character, capacity, capital, guarantees, and business prospects of prospective Facility Recipient Customers.

Based on these provisions, it can be seen that in the practice of Sharia banking, there is a strong emphasis on the existence of collateral in the assessment of financing to customers. Essentially, collateral and collateral terms can be considered the same. Guarantee simply refers to the liability for a given loan. Meanwhile, in banking legal terminology, Article 1 number 26 of Law No. 21 of 2008 on Sharia Banking explains that collateral is an additional guarantee, both in the form of moving objects and immovable objects, which is given by the collateral owner to Sharia banks and/or the UUS to guarantee the repayment of the obligation of the customer receiving the facility (UU Nomor 21 Tahun 2008, 2008).

Collateral in the context of Sharia banking is a form of additional guarantees, while bank beliefs are the main guarantees. The presence of material guarantees in murabahahah financing serves as a second alternative when debtors fail to fulfill their obligations or fail in payment. According to legal principles, any settlement of debt obligations or financing that experiences problems that ultimately lead to the execution of debt guarantees must go through a lawsuit process

in a state court. However, getting a final court decision takes a long time because legal efforts can reach the level of cassation against court decisions.

To prevent such a situation, the regulations provide exceptions regarding the settlement of debts or problematic financing, where execution or sale of debt guarantees can be carried out directly without going through court proceedings, but through public auctions. This is stipulated in Article 224 HIR/258 RBG, article 14 of the Rights Act, and Article 6 of the Law which mandates that the primary Rights Holder has the authority to sell the Rights object through public auction and use the proceeds to pay off his receivables. However, in practice, direct execution of guarantees through auction offices often cannot be carried out because auction offices are reluctant to conduct auctions without court approval because they are afraid of being reported by debtors.

Statutory guarantees, whose existence is determined by the rule of law, do not originate from agreements between relevant parties. This category can be divided into individual guarantees and object guarantees. Individual guarantees that are of a nature include mortgage, mortgage, liabilities, and fiduciary guarantees. Liability is a form of property security derived from an agreement related to a special property, namely land rights, which is regulated in Law No. 4 of 1996 concerning Land Liability and Land-Related Objects (UUHT). According to Article 1 paragraph (1) of the UUHT, the definition of the Right to Liability is: (Pratama, 2020)

"*The right to collateral security imposed on the right to land as defined in Law No. 5 of 1960 on the Basic Regulations on Agricultural Items, whether or not the following other objects are united with the land, for repayment of certain debts, which gives the position of priority to certain creditors of other creditors.*"

The request for assurances in Islam is based on the concept of a murmuring problem, which refers to a good that does not have a clear stipulation in Nash Shar'i that explicitly obliges it or prohibits it, but logically leads to good (A. F. Rahman & Mapuna, 2020). The concept of a false matter in a request for bail refers to a need, interest, or good in general, with clear principles and proofs of shar'i, and ensures that it brings good together without causing any trouble or loss to the other party (Muflihatin & Nursamsi, 2022).

3. The Position of Liability as a Form of Guarantee in Sharia Banking Financing with Credit in Conventional Banking

The presence of guarantees in financial institutions is part of efforts to implement the principle of caution in carrying out their role as fund providers to the community (Maizal Walfajri, 2022). The role of guarantees in providing financing or credit gives the bank confidence in the debtor's ability to repay the given credit (Naendhy & Fadhilah, 2018). The guarantee provided to banking institutions is usually an addition or supplement (*accessoir*) arising from the existence of principal guarantees in the form of debt receivables. To create a guarantee agreement, the main agreement can be stated succinctly about commitments related to guarantees. This commitment then became the basis for the creation of guarantee agreements desired by both parties, creditors, and debtors. Therefore, the creation of a guarantee agreement is part of the main implementation of the agreement.

Based on the provisions contained in Article 1131 of the Civil Code, it can be concluded that there are two types of guarantees, namely general guarantees and special guarantees. General guarantees arise automatically from the Act, without prior agreement between the parties, in which creditors jointly obtain general guarantees established

by the Act. In this general guarantee, all debtors' assets directly become guarantees for creditors, regardless of who made the main agreement first. Although all creditors have the same rights to collateral assets, debt payments are not always evenly distributed from the proceeds from the sale of those assets. On the other hand, special guarantees only apply to certain creditors, with specially designated collateral assets, such as Pawn, Fiducia, Liability Rights, and Bank Guarantee. Special guarantees arise due to the existence of special agreements made between creditors and debtors, which can be in the form of material and personal guarantees.

Similar to the concept of guarantees in civil law, guarantees in Sharia banking can also be divided into two types, namely Kafalah (personal collateral) and Rahn (property collateral). Kafalah is an act that binds one party to guarantee the repayment of debts that are the responsibility of the other party. In this case, the party who provided the guarantee (kafil) is responsible for the repayment of the debt which is the right of the other party who received the guarantee (makful). In the context of conventional banking or those by the provisions of the Civil Code, the concept of kafala is the same as a borscht agreement or guarantee, both in the form of personal and corporate guarantees. The rules related to kafalah are regulated in the Fatwa of the National Sharia Council Number 11/DSN-MUI/IV/2000 About Kafalah.

The position of Liability as a form of guarantee in conventional banks is imperative as conventional banks consistently prioritize the aspect of guarantee as an effort to protect the loans they distribute (A. S. Ningsih, 2020). Liability refers to the right to collateral security granted on a property to guarantee the repayment of certain debts, giving priority to other creditors. In other words, if the debtor fails to fulfill his obligations, the creditor who owns the Rights of Liability has the right to sell the land that becomes collateral through public auction by the applicable legal provisions, or even through direct execution as

described in Article 224 HIR and RBg. Sales can be made personally with priority rights over other creditors.

Article 7 of the UUHT emphasizes that the right to dependency will always be bound to the guaranteed object, wherever the object is located. This is a particular aspect of guarantees for the right holder. Although the object of the liability transferred ownership to another party, the creditor still retained his right to execute if the debtor violated his agreement. In addition, the process of exercising liabilities is relatively easy and certain, so debtors do not have to go through a time-consuming and costly civil process.

Hak Tanggungan as a form of guarantee has different positions between conventional banks and sharia banks. In conventional banks, the position of guarantee has a major role in the provision of financing funds. However, in Sharia banks, the guarantee of goods referred to as Rahn, although allowed by Sharia principles, is not required in the financing agreement. This is because in sharia banks, collateral is not a substitute for debt, but as a guarantor for customer debt.

The financing of Musyarakah, by the Fatwa of the National Sharia Council Number 08/DSN-MUI/IV/2000, allows guarantees as a means to ensure that the funds provided by the bank will be used by customers by the agreement agreed at the beginning of the financing agreement. Sharia banks, due to their basic principles based on investment, recognize that every investment carries the risk of profit and loss. Therefore, Islamic banks prioritize evaluation of the business potential of each prospective financing partner/customer and partnership factor. In the context of Islamic financing, although guarantees are not a major element, Islamic banks ask for guarantees as a preventive measure against potential irregularities made by customers. In other words, the role of guarantee in financing the community is not the dominant thing,

but rather part of the principle of Sharia banks' prudence in providing financing to customers (Sunarti et al., 2022).

According to the Fatwa of the National Sharia Council Number 04/DSN-MUI/IV/2000 on Murabahah, it is stated that the use of collateral in Murabahah transactions is permitted, intended that customers show their seriousness in their orders and that banks have the option of asking customers to provide collateral that can be used as a handle. In principle, guarantees in the financing of Murabahah are considered permissible and not a fundamental requirement in the financing process. The guarantee in Murabahah financing aims to provide certainty to the seller that the buyer will fulfill his obligations as agreed at the beginning of the transaction. The guarantee function in Murabahah financing is not to guarantee the capital issued by banks, and the existence of guarantees is not an absolute requirement in Murabahah financing. In other words, Murabahah's transaction can be approved and valid without guarantee.

Conclusion

In the development of Islamic banking in Indonesia, the understanding and application of legal aspects of liability are important to ensure protection for all parties involved in the Islamic banking financing system. Since the enactment of the Sharia Banking Act in 2008, there have been significant changes in banking regulations and practices in Indonesia. Sharia banks are not only expected to comply with Sharia principles in their operations but also ensure adequate legal protection for customers and financial institutions themselves. The concept of liability, usually linked to debt-to-debt agreements in conventional banking, must be adapted to the context of financing in Islamic banking. Although there is no debt-to-debt agreement in Sharia financing, the use of liabilities is still required as a form of guarantee for Sharia banks to minimize risk. The process of burdening

liabilities should be carried out carefully and by the applicable legal requirements, ensuring that the liabilities can provide effective legal protection for banks and customers.

Research on the legal aspects of dependency rights in the Islamic banking financing system is an important step to increase understanding and awareness of the need for legal protection in Islamic banking practices. Thus, it can be strengthened by an adequate regulatory framework and ensure that the rights and obligations of all parties are protected fairly and transparently in the context of Sharia banking financing.

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