MURABAHAH FINANCING IN ISLAMIC BANKS WITH FIDUCIARY COLLATERAL REVIEW FROM THE PERSPECTIVE OF LEGAL CERTAINTY AND UTILITY

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ABSTRACT

One of the financing contracts offered by Islamic banks is the Murabahah financing contract. The Murabahah financing contract functions to increase the utility of money and capital, as well as the utility of goods. Article 127 of the Compilation of Sharia Economic Law (KHES) allows the seller to request the buyer to provide collateral in the Murabahah contract. Fatwa DSN-MUI No. 03/DSN-MUI/IV/2000 regarding Murabahah permits banks to request collateral from financed customers. This provision aims to ensure that customers are serious about making payments. Based on KHES and the fatwa, banks are allowed to request collateral from customers to protect or ensure that their rights are not violated. In practice, to ensure that customers comply with payments, banks request collateral from customers. This collateral can be movable or immovable property. Collateral in the form of immovable property is called fiduciary collateral. Fiduciary collateral is regulated in Law No. 42 of 1999 concerning Fiduciary Collateral (UUJF). According to Article 5 paragraph 1 of UUJF, the imposition of collateral with fiduciary collateral “must” be made by a notarial deed. With this provision of UUJF, there is a difference. KHES and the fatwa of DSN MUI do not require financing contracts to be made using a notarial deed, while UUJF requires it to be made by a notarial deed. Islamic banks, some of which require financing contracts to be made by a notarial deed, while others do not. The adoption of UUJF in Islamic financing is considered inappropriate because it violates Sharia values. Objectives: (1) Explain the regulations used in Murabahah financing contracts in Islamic banks with fiduciary collateral according to the objectives of legal certainty and utility. (2) Describe the implementation of legal protection for customers using Murabahah financing contracts in Islamic banks with fiduciary collateral according to the objectives of legal certainty and utility. Research Method: Research approach: normative juridical. Research nature: descriptive analysis. Data types: secondary data and primary data. Sample determination technique: purposive sampling. Data collection technique: literature study and interviews. Data analysis technique: interpretation and legal analogy.

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Introduction

The economic development of a nation requires the support of financial institutions. Financial institutions act as intermediaries between parties with surplus funds and those in need of funds[1]. One such financial institution is a bank. Banks serve as financial intermediaries for the public[2]. In terms of operational principles, Indonesia recognizes conventional banks and Islamic banks. Islamic banks offer services based on Sharia principles, including finance company services, investment banking, as well as combinations of commercial banking, finance companies, and merchant banks.

In other words, Islamic banks function as multi-finance companies. One of the services offered by Islamic banks is Murabahah financing. According to the Fatwa (DSN-MUI) No. 04/DSN-MUI/IV/2000, Murabahah is a contract in which a seller sells a commodity to a buyer at an agreed-upon cost which includes a profit margin. According to the explanation in Article 19 Paragraph 1 (d) of Law No. 21 of 2008 concerning Sharia Banking, Murabahah contract refers to financing a commodity by specifying its purchase price to the buyer, who then pays it with an agreed-upon profit. Article 127 of the Compilation of Sharia Economic Law (KHES) states that "the seller may request the buyer to provide collateral for the commodity sold in the Murabahah contract." DSN-MUI, in its fatwa No. 03/DSN-MUI/IV/2000 regarding Murabahah, allows banks to request collateral from financed customers[3].

The content of the fatwa is as follows: "Collateral in Murabahah is allowed so that customers are serious about their orders. The bank may request customers to provide collateral that can be held." In banking practice, banks usually bind the goods being sold as collateral for the settlement of customer obligations. This is called the principal collateral. Loan agreements can include goods as collateral for debts, whether in the form of pledges or mortgages for the debts incurred. However, goods pledged for various reasons cannot have their ownership rights transferred to the creditor. Objects of collateral like this are called fiduciary.[4]

Fiduciary collateral is regulated in Law Number 42 of 1999 concerning Fiduciary Collateral[5] The Fiduciary Collateral Law (UUJF) requires that every object encumbered with fiduciary collateral be made through a notarial deed and registered at the Fiduciary Registration Office. Article 5 paragraph 1 of UUJF. The notarial deed is a formal requirement for the provisions of UUJF on fiduciary collateral agreements to take effect, and serves as evidence.

Protection for banks as fiduciary receivers can be obtained after the fiduciary collateral is registered at the Fiduciary Registration Office and the fiduciary collateral certificate has been received. Based on the provisions of Article 27 of the Fiduciary Collateral Law (UUJF), the creditor or fiduciary receiver has a preferential right over other creditors[6] From preliminary research results, some Islamic banks use fiduciary collateral with a notarial deed, while others do not. This needs to be examined from the aspects of legal certainty and utility.

Research Method

a) The Approach

The approach used in this research is a normative juridical approach, namely: a problem-solving procedure examined by presenting data obtained from literature observation.[7]

b) Research Specification

The specification used in this research is descriptive-analytical, which describes the applicable laws and regulations associated with legal theories and the practice of positive law implementation related to the issues to be discussed. By presenting the data as it is obtained, followed by analysis that leads to several conclusions.[8], [9]

c) Data Sources and Data Collection Techniques

The data sources in this research are secondary data and primary data. Secondary data consists of primary, secondary, and tertiary legal materials.
The data collection techniques used in this research are as follows:

1. Secondary data is gathered through library research. With this literature study, primary legal sources are obtained as the main legal source in the form of legislation. Secondary legal sources include supporting legal sources, such as books and scholarly journals. Tertiary legal sources consist of legal dictionaries or encyclopedias.

2. Primary data is collected through structured interviews. This involves conducting question-and-answer sessions with various parties in relevant institutions, such as Sharia banks as creditors in Murabahah financing. The selected Sharia banks include Islamic Commercial Banks and Sharia Rural Banks (BPR). Additionally, fiduciary receivers, notaries, and academics are also interviewed. Sampling determination is carried out using purposive sampling.

The analytical tools used are interpretation and analogy. The author conducts interpretation and analogy by analyzing data using descriptive analytical decomposition, which involves uncovering secondary and primary data related to the writing object and existing field issues. The analysis drawn from the gathered research results is conducted in a normative-qualitative manner, revealing existing facts based on research findings in the form of explanations derived from literary materials.

**Result and Discussion**

The novelty in this research lies in examining the Murabahah financing contract in Islamic banks that utilize fiduciary collateral by conducting an analysis from the perspective of legal objectives, namely legal certainty, and utility.

Legal certainty is one of the prerequisites for the enforcement of law, meaning it provides justifiability against arbitrary actions. This implies that an individual can obtain what is expected in certain circumstances.[10] Jan Michielin Otto defines legal certainty as the possibility that in certain situations: first, clear, consistent, easily accessible rules are available, published and recognized by the state. Second, authorities consistently apply these legal rules.

Third, citizens, in principle, adjust their behavior according to these rules. Fourth, judges act independently and apply these rules consistently. Fifth, judicial decisions are effectively enforced in concrete terms.[11] Legal certainty relies on two components: certainty in providing guidance for society (orientierungssicherheit / cerritudo) and certainty in the establishment of law-by-law enforcement (realisierungssicherheit / Securitas).[12]

The role of a notary in creating a murabahah financing agreement between an Islamic bank and a customer is to give authentic status to the document, ensuring legal certainty. The notary who formulates the murabahah financing agreement is expected to observe the essential elements and conditions of the contract as stipulated by Islamic law, examining whether the clauses in each section of the Sharia contract comply with Sharia contract law. Similarly, when creating a fiduciary guarantee, it must be done through an authentic deed with the involvement of a notary as per Article 5 (1) of the Fiduciary Security Law and must be registered according to Article 11 of the same law. An authentic murabahah financing agreement is also referred to as a perfect evidentiary tool because it possesses three strengths of evidentiary value: the strength of external evidence, the strength of formal evidence, and the strength of material evidence.

Jeremy Bentham's theory of utility is known as utilitarianism. This utilitarian theory is a response to the concept of natural law in the eighteenth and nineteenth centuries. One of the purposes of law is to provide utility to achieve happiness. The measure to determine the goodness or badness of an action is how much happiness it brings.[13] Bentham defines utility as something capable of providing benefit, advantage, pleasure, and happiness, as well as something that can prevent harm, displeasure, wrongdoing, or unhappiness. The value of utility exists at the individual level, generating individual happiness and community happiness.[14] For Bentham, the morality of an action is determined by considering its utility in achieving the happiness of all humanity, not the selfish happiness of individuals as advocated by classical hedonism.[14] The Theory of Utility can serve as a reference in every policy.
Government policies are issued to provide benefits to the community with the aim of improving the welfare of society. Each country has different policies based on its own situation and conditions.

The implementation of fiduciary collateral in Murabahah contracts raises several issues, especially in terms of implementation, regarding the applicability of each provision of the Fiduciary Collateral Law (UUJF) in these Murabahah contracts. When related to compliance with Islamic values, inconsistencies between the provisions of UUJF (conventional/non-Sharia) and Sharia provisions can be found. This is detrimental to the customers because the main purpose is to seek blessings from Sharia transactions, but it is tainted by non-Sharia provisions applied in Murabahah contracts.[15]

Pasal 29 ayat 1 Undang-Undang Dasar 1945 states, "The state is based on the belief in the One and Only God." This indicates that Indonesia acknowledges the existence of the One and Only God as the creator of the universe. Additionally, the government grants freedom to every citizen to embrace and worship according to their respective religions and beliefs, as stated in Article 29 paragraph 2 of the 1945 Constitution. This serves as the philosophical foundation to ensure that citizens who adhere to Islam can practice the religious laws correctly in every aspect of life, including in commercial transactions by utilizing Islamic banks as banking facilities aimed at upholding Sharia principles in transactions.[16]

Reading the provisions in the Fiduciary Collateral Law (UUJF), many aspects seem incompatible with Sharia principles. For example, the term "credit" used in the UUJF, whereas Sharia institutions are required to use the term "financing." Additionally, the provisions regarding sanctions and execution of collateral in the UUJF contradict Sharia principles. In cases of default, the solution prescribed is through the 3R consultation method: Rescheduling, Reconditioning, Restructuring, arbitration, and may also be pursued through religious courts according to the agreement in the contract, while still adhering to Sharia provisions. This is because, in practice, there are still instances of non-compliance or partial compliance with Sharia regulations.

Surah Al-Baqarah (2:280):

وَأَحَلَّ اللهُ الْبَيْعَ وَحَرَّمَ الرَّبَا... وَإِنْ كانَ كَذَّابِينَ فَظَاءَةٌ إِلَى مَيْسَرَةٍ...

"And if [the debtor] is in difficulty, then [let there be] postponement until [a time of] ease..."

Surah an-Nisa' [4]: 29:

َّلا يَآ أَيُّهَا الَّذِيْنَ آمَنُوْا لاَتَأْكُلُوْا أَمْوَالَكُمْ بَيْنَكُمْ ب الْبَاط ل إ... أَنْ تَكُوُّنَ ت جَارَةً عَنْ تَرَاضٍ م نْكُمْ...

"O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent..."

The Quranic verse quoted illustrates the importance of giving time to those in difficulty until they are relieved and prohibits taking each other's wealth unjustly. These provisions are not aligned with the rules regarding seizure execution in the Fiduciary Collateral Law (UUJF).

In practice, Murabahah financing contracts burdened with fiduciary collateral occur at Sharia Cooperative Bank X in Tasikmalaya City. Mr. A, as a customer of Sharia Cooperative Bank X, enters into a Murabahah financing agreement with the financing object being a 1997 Isuzu Panther vehicle, with an agreed financing value of Rp. 80,000,000 (eighty million Rupiah). Subsequently, the Murabahah financing agreement is burdened with fiduciary collateral, and the fiduciary collateral deed is prepared by a Notary in Tasikmalaya City.

In this context, it follows that every article in the Fiduciary Security Law (UUJF) applies to murabahah financing agreements as stated in Article 2 of the UUJF. When murabahah financing has only recently commenced and there is a default for three consecutive months, then the Islamic Rural Bank (BPRS) may proceed with the execution seizure of the fiduciary collateral, feeling protected by Articles 29 and 30 of the UUJF, which regulate the execution of collateral.

In Shariah-compliant financing agreements, adherence to Shariah rules, in accordance with the rules in the Quran and also
the Fatwa DSN Number 04/DSN-MUI/IV/2000, which does not justify the existence of execution seizures as outlined in the UUJF, should be strictly followed. This is because the murabahah agreement uses fiduciary collateral. Therefore, the adoption of the UUJF appears forced with the aim of protecting the interests of the Islamic bank. Utilizing rules that are not aligned for the benefit of the bank to gain legal protection creates an imbalanced and unfair condition for customers. Even the intended blessings by the customers are compromised.

Legal protection, according to Satjipto Raharjo, is an effort to provide protection for human rights violated by the behavior of others, with the aim of enabling society to enjoy its rights in the eyes of the law [17]. Building on the theory of legal protection, it can be understood that customers are not protected if Sharia values in the Murabahah contract are compromised by the provisions of the Fiduciary Guarantee Law (UUJF). Although in this case, the Murabahah contract is the principal agreement while the fiduciary guaranteed agreement is an accessory agreement, for the sake of preserving the blessings hoped for as the primary concern, there should still be separate regulations regarding fiduciary guarantees for Sharia financing contracts, which contain provisions relevant to Sharia, for example, by establishing a new provision such as the Sharia Fiduciary Security Law. This is a form of legal protection to prevent the compromise of the objectives of legal certainty and legal benefit. The government in this case should reprimand Sharia banks that are not compliant and/or only partially apply Sharia rules. This illustrates that legislative products are not necessarily ideal and already good, so in this case, the author feels that there is room for improvement, even though the position of fiduciary guarantees as an accessory agreement does not mean that differences in rules in the UUJF that do not comply with Sharia principles can be ignored. It would be better if the principal agreement and accessory agreements were within a single Sharia-compliant regulatory framework. The government should create a new regulation specifically governing Sharia fiduciary collateral to accommodate Sharia values within it.

References