

## URGENCY OF THE APPLICATION OF SHARIA GUARANTEE IN ISLAMIC BANKING IN INDONESIA

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**Abstrak:** Undang-undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan dan Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah telah mengamanatkan agar bank syariah selalu mengacu pada perjanjian kehati-hatian dalam berbagai kegiatan usaha, termasuk dalam pembiayaan operasional dengan pengadaan barang jaminan (collateral). Lembaga Penjaminan yang berlaku pada bank syariah adalah Lembaga Penjaminan yang juga digunakan pada bank konvensional. Idealnya, praktik Jaminan Syariah harus dipertanggungjawabkan dengan jaminan syariah dengan instrumen Rahn berdasarkan prinsip syariah yang berjalan secara kaffah dalam operasional perbankan syariah. Namun hal ini terkendala dengan belum adanya hukum positif tentang Penguatan yang mendukung Jaminan Syariah. Berdasarkan permasalahan di atas, penelitian ini mengusulkan untuk melihat penerapan hukum penjaminan di perbankan syariah dan permasalahan hukum yang muncul terkait penerapan agunan pada perbankan syariah terkait kanon Barat, dan tawaran kebutuhan akan keamanan syariah yang didasarkan pada hukum Islam. Temuan penelitian ini adalah: pertama: Peraturan hukum lembaga perasuransian dalam operasional perbankan syariah masih dalam payung hukum bagi lembaga penjaminan dengan sistem perkreditan perbankan konvensional yang sesuai dengan undang-undang ini, tidak semua ketentuan prosedural dirancang khusus untuk keuangan. kepentingan bank syariah bertentangan dengan prinsip hukum perbankan syariah. Kedua; Lembaga Penjaminan yang diterapkan dalam perbankan syariah adalah gadai, hipotek, hipotek, fidusia dan jaminan resi gudang dalam perspektif hukum ekonomi Islam terkait dengan semua yang termasuk dalam kategori akad rahn yang berkaitan dengan penjaminan harta, hanya saja rahn yang digunakan lebih banyak. bersifat universal dan didukung, karena lembaga Pengamanan dibedakan satu sama lain berdasarkan jenis bendanya baik benda bergerak maupun benda tidak bergerak (tetap) dan bentuk benda yang dijamin.

**Kata Kunci:** Aplikasi; Syariah; Urgensi; Menjamin; Perbankan Islam

**Abstract:** Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking and Law No. 21 of 2008 concerning Sharia Banking has mandated that Islamic banks always refer to prudential agreements in various

business activities, including in operational financing with the procurement of collateral (collateral) goods. The Guarantee Institution that applies to Islamic banks is the Guarantee Agency that also uses in conventional banks. Ideally, the practice of Sharia Guarantees must be accounted for by sharia guarantees with Rahn instruments based on sharia principles running in kaffah in sharia banking operations. But this is constrained by the absence of a positive law concerning Strengthening that supports Islamic Guarantee. Based on the above problems, this study proposes to look at the application of guarantee law in Islamic banking and legal issues that arise related to the implementation of collateral in Islamic banking related to the Western canon, and the offer of the need for sharia security that is based on Islamic law. The findings of this research are: first: The legal regulations of insurance institutions in Islamic banking operations are still under legal umbrella for security institutions with conventional banking credit systems that are in accordance with this law, not all of the procedural provisions specifically designed for financial interests in Islamic banks conflict with Islamic banking law principles. Second; Guarantee Institutions that are applied in Islamic banking are liens, mortgages, mortgages, fiduciary and warehouse receipt guarantees in the perspective of Islamic economic law related to all those included in the rahn contract category relating to the guarantee of property, only that rahn is used more universally and is supported, as the Securing institutions are distinguished from each other based on the type of object both movable and immovable (fixed) objects and the shape of the objects guaranteed.

**Keywords:** Application; Sharia; Urgency; Guarantee; Islamic Banking

## INTRODUCTION

One of the principles held by Islamic banking in its operations is prudential banking principle;<sup>1</sup> this is because the funds used are public funds. Guarantees related to the risk of violation (*ta'addi*), negligence (*taqsir*), and violates the agreement that has been determined (*mukhalafatuhu al-syurut*).<sup>2</sup> Collateral referred to as collateral is a material guarantee (*zakelijke zekerheid*) or in the form of insurance commonly known as collateral. Like conventional banking, Islamic banking puts collateral or collateral as an essential factor in analyzing customer feasibility in financing.<sup>3</sup>

There is a difference between guarantees in positive law and guarantees in Islamic law. Guarantees in positive law in

Indonesia are regulated in Book II of the Civil Code and outside Book II of the Civil Code. In general, based on its nature, guarantees can be divided into two, namely individual warranties and material guarantees. Material security consists of: mortgage, hypothetical, fiduciary protection, mortgage and warehouse receipt guarantee. Guarantees in Islam can be divided into two forms, namely collateral in the way of objects (*rahn*) which are commonly called mortgages and warranties in the form of people (*kafalah*) or widely called assumption of responsibility.<sup>4</sup>

Theoretically, the application of rahn as a form of sharia collateral in the concept of fiqh is only related to the loan-receivable agreement (*dayn*) to protect of

<sup>1</sup> Pasal 2 Undang-undang No. 10 Tahun 1998 tentang Perubahan UU No. 7 Tahun 1992 tentang Perbankan.

<sup>2</sup>Sutan Remi Sjahdeini, *Perbankan Syariah: Produk-produk dan aspek-aspek hukumnya* (Jakarta: Kencana, 2014), 317-318.

<sup>3</sup>Ibrahim Mohammed, Lawal, "The Permissibility of Security (Collateral) in Islamic

Banking." *Journal of Islamic Economics, Banking and Finance*, Vol.12 Issue 1 (2016): 98-119  
<https://platform.almanhal.com/Reader/Article/89707>

<sup>4</sup>Muhammad Syarif Hidayatullah, *Perbankan Syariah: Pengenalan Fundamental dan Pengembangan Kontemporer* (Banjarbaru: Dreamedia, 2017), 152.

creditor's right to repayment of debt,<sup>5</sup> not to other contracts such as contracts based on cooperation (*mudharabah* and *musyarakah*), leasing (*ijarah*) and buying and selling (*murabahah*). But in the practice of Islamic banking, collateral is applied not only in the loan-receivable agreement (*dayn*), but also in a contract based on cooperation, buying and selling and leasing. In this time, the needs of the practicality of ar-rahn in Islamic banking industry is more insisting than just a conceptual ruling in Scholars of the four schools of Islamic law.<sup>6</sup>

Guarantee institutions for Islamic banking have not yet been clearly and firmly regulated, and therefore the methods applied are also applied by conventional banking. The guarantee institution referred in Islamic banking financing products is the same guarantee institution in traditional credit of banking products. Financing in the operation of sharia banking must be based on sharia principles, its willingness is not only limited to the technical financing scheme but includes what complements it, namely the existence of collateral institutions.

This condition makes Islamic banking in terms of collateral refer to the guarantee philosophy in positive law. Thus, the principles of sharia which become the spirit in the operations of sharia banking and become an absolute differentiator with conventional banking are no longer valid in its application. Image of Islamic banking as a sharia-based bank financial institution is tarnished. This happens because the practice of collateral in Islamic banking

refers to the practice of insurance in conventional banking which is based on national law with sources in Western law. As a result, both the application and the term used for the type of guarantee in accordance with positive law.

Ideally, the practice of collateral in particular material security must refer to sharia guarantees with rahn instruments so that sharia principles operate effectively in sharia banking operations. However this is constrained by the absence of a positive law regarding guarantees that adopt guarantees in Islamic law.

Departing from the above problems, this research aims at least to look at the application of guarantee law in sharia banking and the legal problems that arise related to the application of guarantee law in sharia banking originating in Western law, and the offer of the need for sharia guarantee arrangements sourced from Islamic law. This research uses prescriptive analysis. In this study, researchers provide arguments for the results of research by presenting or evaluating the right or wrong or what should be according to the law of the facts or legal events of the research results.<sup>7</sup>

## METHOD

This type of research is normative legal research, namely legal research, which places the law as a norm system building. The norm system in question is about principles, norms, rules of laws and regulations, court rulings, agreements and

<sup>5</sup>Uzaimah Ibrahim,, and Safinar Salleh. "The objectives of al-rahn and their achievement in charge/mortgage in Islamic home financing: an analysis." *the International Conference on Islamic Jurisprudence and the Challenges of the 21st Century: Maqasid al-Shariah and its Realization in Contemporary Society*. 2006. (Malaysia: International Islamic University Malaysia,2006) 5, accessed April 14 <http://www.iefpedia.com/english/wp-content/uploads/2009/10/THE-OBJECTIVES-OF-AL-RAHN-AND-THEIR-ACHIEVEMENT-IN-CHARGE-MORTGAGE-IN-ISLAMIC-HOME-FINANCING-AN-ANALYSIS.pdf>

<sup>6</sup>Dziauddin Sharif, et al. "The improvement of Ar-Rahn (Islamic pawn broking)

enhanced product in Islamic banking system." *Asian Social Science* 9.2 (2013): 36., et al. "The improvement of Ar-Rahn (Islamic pawn broking) enhanced product in Islamic banking system." *Asian Social Science*, N0.2 (2013): 36.

[https://www.researchgate.net/profile/Mohamad\\_Mohd\\_Zin2/publication/274631237\\_The\\_Improvement\\_of\\_Ar-Rahn\\_Islamic\\_Pawn\\_Broking\\_Enhanced\\_Product\\_in\\_Islamic\\_Banking\\_System/links/57c06d6208aeda1ec38a4e25.pdf](https://www.researchgate.net/profile/Mohamad_Mohd_Zin2/publication/274631237_The_Improvement_of_Ar-Rahn_Islamic_Pawn_Broking_Enhanced_Product_in_Islamic_Banking_System/links/57c06d6208aeda1ec38a4e25.pdf)

<sup>7</sup>Mukti Fajar & Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2010), 184.

doctrines (teachings).<sup>8</sup> In other terms, Soetandyo Wignjosebroto was quoted by Bambang Sunggono using the name doctrinal research for this type of legal analysis.<sup>9</sup> The approach used is the statutory approach and the *maslahat* approach. The legal materials used consist of primary, secondary and tertiary legal materials. Primary legal documents, namely: 1) Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking; 2) Law No. 21 of 2008 concerning Islamic Banking; 3) Law No. 42 of 1999 concerning Fiduciary Guarantees; 4) Law No. 4 of 1996 concerning Mortgage Rights and Objects Related to Land; 5) Law No. 9 of 2011 concerning an amendment to Law No. 9 of 2006 concerning the Warehouse Receipt System; 6) Supreme Court Regulation No. 2 of 2008 concerning Compilation of Sharia Economic Laws; 7) DSN Fatwa Number 25 / DSN-MUI.IV / 2002 concerning Rahn; 8) Fatwa DSN Number 26 / DSN-MUI / III / 2002 concerning Rahn Emas; 8) DSN Fatwa Number 26 / DSN-MUI / III / 2002 concerning Rahn Emas, 9) DSN Fatwa Number 92 / DSN-MUI / IV / 2014 concerning Financing accompanied by Rahn (*at-Tammil al-Mautsuq bi al-Rahn*). Secondary legal materials are all legal publications which are not official documents.<sup>10</sup> The secondary licensed content in this study is derived from books, journals, papers, and other scientific written sources related to the discussion in research (legal issues) as a theoretical study used in the analysis. Also, in this normative legal research, the results of interviews with related parties are supplemented as

secondary legal materials to support research. A tertiary legal document is material that provides instructions and explanations for primary and secondary legal materials.<sup>11</sup> The tertiary legal material used is a dictionary and encyclopedia.

## RESULTS AND DISCUSSIONS

The term guarantee is a translation from the Dutch language, namely *zekerheid* or *cautie*. *Zekerheid* or *cautie* includes in general ways that creditors guarantee the fulfilment of their bills, in addition to the debtor's public liability for his goods. Then in another definition stated that the guarantee is something that is given by the debtor to the creditor to create confidence that the debtor will fulfil obligations that can be valued with money arising from an engagement.<sup>12</sup> Material security is one part of the type of collateral that is practiced in banking. Material security is a guarantee in the form of an absolute right to an object that has a direct relationship to a certain object, can be defended against anyone, always follows the object (*droit de suit*) and can be switched.<sup>13</sup> Material guarantees have the characteristics "material" in the sense of giving the right to precede over particular objects and have inherent properties and follow the objects in question.<sup>14</sup> Material guarantees can be classified as follows: (1) pawn (*pand*), (2) fiduciary collateral, (3) mortgages, (4) mortgage rights and (5) guarantee of warehouse receipts.

In addition to the guarantee term, the term collateral is also known for the same meaning.<sup>15</sup> In financing products are further divided into principal collateral and additional collateral.<sup>16</sup> There are 3 (three)

<sup>8</sup>Fajar & Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, 34.

<sup>9</sup>Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: RajaGrafindo Persada, 1997), 43.

<sup>10</sup>Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005), 93.

<sup>11</sup>Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: RajaGrafindo Persada, 1994), 13.

<sup>12</sup>Salim HS., *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: RajaGrafindo Persada, 2012), 21-22.

<sup>13</sup>Salim HS., *Perkembangan Hukum Jaminan di Indonesia*, 46-47.

<sup>14</sup>*Ibid*, 23.

<sup>15</sup>Imron Rosyadi, *Jaminan Kebendaan Berdasarkan Akad Syariah (Aspek Perikatan, Prosedur Pembebanan dan Eksekusi)*, Jakarta:Kencana, 2017, 36.

<sup>16</sup>Veithzal Rivai & Andria Permata Veithzal, *Islamic Financial Manaement* (Jakarta: RajaGrafindo Persada, 2008), 665-666.

functions of collateral in the financing, namely: a) Guarantee of financing as a security of payment of financing; b) Guaranteed financing as a driver of debtor motivation; c) Functions related to the implementation of banking regulations.<sup>17</sup>

Indonesian laws and regulations regulate the issue of collateral in the framework of implementing the prudential banking principle that must be applied by banking institutions, including Islamic banks. UU no. 10 of 1998 reads:

... in providing credit or financing based on sharia principles, commercial banks are required to have confidence based on in-depth analysis or good faith and the ability and ability of debtors to repay their debts or return the financing as stated in the agreement.<sup>18</sup>

Funding based on sharia principles provided by banks carries risks, so in its implementation, banks must pay attention to the laws of financing based on sound sharia principles. To reduce the risk, guarantees of funding based on sharia principles in the sense of confidence in the ability of debtor customers to pay off their obligations as promised is an essential factor that must be considered by banks. To obtain this confidence, before providing financing, banks must make a careful assessment of the character, abilities, capital, collateral, and business prospects of the Debtor Customer. Considering that collateral is an element of credit if based on other items, confidence can be obtained on

the ability of the Debtor Customer to repay his debt, insurance can only be in the form of goods, projects or claim rights financed with the credit concerned.<sup>19</sup>

Collateral is an important part of the analysis. Collateral is a guarantee and collateral referred to herein is not an individual guarantee, but a guarantee of property or can be called collateral which is property of the financing customer, because the collateral is called collateral, while individual collateral is called a guarantee. Collateral is a form of quantitative analysis or ability to pay because it can be a measure of the ability of financing customers and also collateral or collateral will be the payment of financing repayments if the customer experiences problem financing that is already unable to pay, but also can be categorized as qualitative analysis or willingness to pay, because with the customer's property deposited or held in an Islamic bank, it can lead to seriousness and seriousness in managing the business being run and paying instalments every month.

Financing risks occur due to defaults caused by financial difficulties or bankruptcy experienced by financing customers. In addition, if the debtor's health criteria are not met, the potential for default and customer downgrading will result from a decrease in customer performance. Potential financing risks can also arise due to weak financing contracts, leading to breaches of financing contracts.<sup>20</sup>

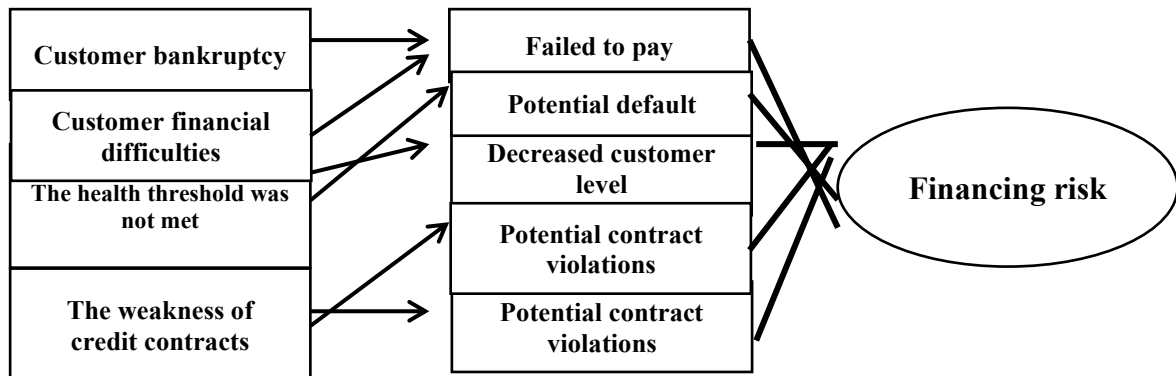
<sup>17</sup>M. Bahsan, *Hukum Jaminan dan Jaminan Kredit Perbankan Indonesia* (Jakarta: RajaGrafindo Persada, 2012), 103-105.

<sup>18</sup>Section 8 Paragraph 1 of Law No. 10 of 1998 About Banking.

<sup>19</sup>Elucidation of Section 8 paragraph 1 of the Law No. 10 of 1998 About Banking.

<sup>20</sup>Ikatan Bankir Indonesia, *Mengelola Bisnis Pembiayaan Bank Syariah* (Jakarta: Gramedia Pustaka Utama, 2015), 83.

### Correlation of Each Aspect in Risk of Financing



Source: Indonesian Bankers Association, *Managing Sharia Bank Financing Business* (Jakarta: Gramedia Main Library, 2015), 84.

The final part of a financing cycle is financing payments. Repayment of financing ideally occurs in accordance with the financing tenor agreed in the financing agreement. But it can also occur not in accordance with the contract. Not in accordance with the tenor of the contract can occur early / accelerated repayment of the tenor specified at the beginning of the contract or even past the agreed tenor.

Customers who have excess funds and want to complete the financing cycle immediately can submit early repayment or accelerated repayment at Islamic banks. When that happens at conventional banks, a penalty or penalty will be imposed, because when repayment is accelerated at a conventional bank, the same is true of cutting conventional bank profits and is a financial loss for conventional banks because the source and withdrawal of profits derived from loan interest on loan money transactions and is considered an act that violates the contents of the contract (default) by conventional banks. Whereas if that happens at an Islamic bank, then there is absolutely no penalty or penalties, because when there is an accelerated

repayment at the Islamic bank, then that is the same as accelerating the delayed profits for the Islamic bank because the source and withdrawal of the profits come from margins on the transaction sale and purchase of goods on credit whose sale price was known from the beginning of the contract.

Repayment can also occur outside the schedule specified in the financing agreement due to the appearance of problem financing or problem financing / non-performing financing. If this happens, then the Islamic bank must strive to improve the quality of customer financing optimally with professional performance. The final goal is to save financing so that it becomes relevant.<sup>21</sup>

The method that can be taken by Islamic banks in saving financing on financing for productive use purposes with the use of large amounts can be in the form of financial restructuring, namely the improvement efforts undertaken by banks against financing customers who are having difficulty meeting obligations. The criteria for customers in financing restructuring are financing customers who have potential or have experienced difficulty paying repayment, financing customers have good faith and cooperation, and financing customers have good business prospects and are projected to be able to meet

<sup>21</sup>Indonesia, *Mengelola Bisnis Pembiayaan Bank Syariah*, 83.

obligations after restructuring. Another way is by the liquidation of collateral, namely the disbursement of collateral for financing customers' financing facilities to reduce or pay off customers' financing obligations to Islamic banks. Liquidation of guarantees can be done through the sale of guarantees or the redemption of guarantees. In addition to the two previous methods, financing can also be done through a third party, and the purpose is to be done through a judicial institution within the religious court environment.

Material collateral or collateral is the second way out "second way out" to save the financing provided to customers if the customer can not pay off obligations. The sale of assets pledged by a default financing customer in the form of funding non-performing can be made by selling

under the hand or by auction. Both underhand sales and auctions (general upfront sales) are the choice in their application. However, legally the public upfront sales or auctions are more legally mandated because they are carried out by competent authorities who are professionally skilled in carrying out transactions in the form of auctioned collateral items. In the sale of collateral, if the sale proceeds to exceed the amount of the remaining instalment of the customer's payment, the excess will be returned to the customer. Still, if the sale proceeds inadequate or does not cover enough the remaining instalments to be paid, the customer needs to add more payments to cover the shortfall.

A comparison between one guarantee agency and another can be seen in the following table:

**Comparison of Characteristics of Guarantee Institutions**

<b>THEORY</b>	<b>PAWNING</b>	<b>Hypnotic</b>	<b>MORTGAGE RIGHT</b>	<b>FIDUCIA</b>	<b>WAREHOUSE RECEIPT GUARANTEE</b>
Juridical Basis	Section 1150 - 1160 Civil Code	Section 1161 - 1231 Civil Code, Civil Code, Law no. 17 years 2008 About Sailing, International Convention on Maritime Receivables and Mortgages 1993 stipulated in Republic of Indonesia Presidential Regulation No. 44 Th. 2005 Regarding Ratification of the International Convention on Maritime Liens and Mortgage 1993, PP No. 51 Th 2002 concerning Shipping of the Minister of Transportation No. PM 39/2017 Regarding Registration and Nationality of Ships	UU no. 4 Th 1996 concerning Mortgage Rights and Land Related Objects	UU no. 42 of 1999 concerning Fiduciary Guarantees	UU no. 9 th. 2011 Regarding Amendments to Law No. 9 th. 2006 About the Warehouse Receipt System
Contract	Pawn Agreement accompanied	Mortgage Deed	Deed of Granting	Fiduciary Certificate of Guarantee	Deed of Collateral Rights Agreement

	by a Power of Attorney		Mortgage Rights		
Object	Movable objects (tangible or intangible)	Immovable objects (fixed), namely ships with a weight of 20 m3 (Section 314 Trade Code)	Inanimate objects such as earth and objects related to the earth	Movable and immovable objects that cannot be bound by mortgages or mortgages	Movable objects in the form of Warehouse Receipt Securities which are documents of ownership of goods (8 agricultural commodities in Permendag No. 26 / M-DAG / PER / 6/2007) which are stored in warehouses and issued by warehouse managers (Section 1 number 2 jo. Section 4 paragraph (2) UUSRS).
Object Mastery	To the creditor or third party (section 1152 (2) of the Civil Code)	To the owner of the object	To the owner of the object	To the owner of the object	Warehouse receipts must be in the control of creditors (explanation of section 12 paragraph (2) UUSRS)
Birth of material rights	When the object is handed over to the creditor or third party (section 1152 (1) of the Civil Code)	When registered at the registration office and recording the name of the ship in Syahbandar	When registered with the Ministry of Law and Human Rights Fiduciary Registration Office (Section 14 paragraph (3) UUJF)	When registered at the land office (section 13 paragraph (5) UUHT)	At the time the Warehouse Receipt is submitted or under the authority of the creditor (Explanation of Section 12 paragraph (2) UUSRS)
Droit de suite principle	Section 1152 (3) Civil Code	Section 1163 (2) Civil Code	Section 20 UUJF	Section 7 UUHT	There is no explicit section in the UUSRG which is an embodiment of the droit de suite principle
Droit de preference principle	Sections 1133 and 1150 (3) Civil Code	Section 1133 and Section 1198 of the Civil Code	Section 1 number 2 UUJF	Section 1 number 1 UUHT	Section 1 number 9 UUSRG
Principle of Publicity	Section 1152 (1) Civil Code	Section 1179 Civil Code	Section 11 paragraph (1) UUJF	Section 13 paragraph (1) UUHT	Section 13 UUSRG
Principle of Priority	Not in a pawn (no repeat pawn for different creditors)	Section 1181 Civil Code	Section 28 jo. Section 17 of the UUJF	Section 5 of the UUHT	Not in UUSRG (section 12 paragraph (2) UUSRG)
Principle of Specialty	No special arrangements	Section 1174 Civil Code	Section 6 of the UUJF	Section 11 of the UUHT	Section 14 of the UUSRG
Guarantee Object Execution	The execution parate (Section 1155 of the Civil Code) was born because of the Act	Execution Parate (Section 1178 of the Civil Code) must be explicitly stated in the agreement	The execution parate (Section 15 in conjunction with Section 29 UUJF) was born because of the Act	The execution parate (Section 6 in conjunction with Section 20 UUHT) was born because of the Law	The execution parate (Section 16 UUSRG) was born because of the UU



There are several legal problems (*syar'i* problems) that arise related to the application of guarantees that are based on legislation and the Civil Code.

**The substance of the sections in the Civil Code related to the Guarantee Institution that is Contrary to Sharia Principles (Contains Elements of Usury)**

<b>PAWNING (SECTION 1150-1160 OF CIVIL CODE)</b>	
Section 1155	If the promised parties are not agreed upon by the other party if the debtor or pledge does not fulfil its obligations after the specified time has passed, or after a warning has been made for the fulfilment of the agreement in the event that there are no definite terms of time, the creditor has the right to sell his pawns in public according to local customs and with the usual requirements, with the aim that the amount of the debt with interest and costs can be paid off with the proceeds of the sale. If the pawn consists of merchandise or securities that can be traded on an exchange, then the sale can be made there, provided that the broker is two experts in the field.
Section 1156	In all cases, if the debtor or pawnbroker fails to carry out his obligations, the creditor may sue through the court that the pawning property is sold to pay off the debt along with the interest and fees, in the manner prescribed by the Judge, or for the judge to permit the pawning object to remain on the creditor to cover an amount that will be determined by the judge in a decision, up to the amount of debt along with interest and costs. Regarding the transfer of pawning goods referred to in this section and the previous section, the creditor is obliged to notify the pawner, not later than the next day if there is a post or telegraph connection every day, or if not so, with the first departing post. News by telegraph or registered mail is considered as appropriate news ..
Section 1158	If a receivable is mortgaged, and this receivable earns interest, the creditor may calculate that interest with interest owed to him. If the debt guaranteed by mortgaged receivables does not produce benefit, the attention received by the pawn holder is deducted from the principal amount of the debt.
Section 1159	As long as the pawn holder does not abuse the goods given to him as a pawn, the debtor is not authorized to demand the goods back before he pays in full, both the principal amount and interest and the cost of the debt guaranteed by the pawn, along with the costs incurred for saving the pawned goods. If between the creditor and the debtor a second debt occurs, which is held between the two of them after the time of the pawning and can be collected before the first debt payment or on the day of payment itself, then the creditor is not obliged to release the pawned item before he receives full payment of the two debts. , even though there was no agreement to tie the pawned item for the second debt payment.
<b>Hypnotic (SECTION 1162-1232 OF TRADE CODE and SECTION 314-319 OF TRADE CODE)</b>	
<b>CIVIL CODE</b>	
Section 1178	All agreements that specify that the creditor is authorized to make the mortgaged goods his property are null and void. But the first mortgage creditor, at the time of delivery of the mortgage, may require explicitly, that if the principal debt is not paid off properly, or if the interest owed is not paid. He will be given the absolute power to sell the bound parcel in public so

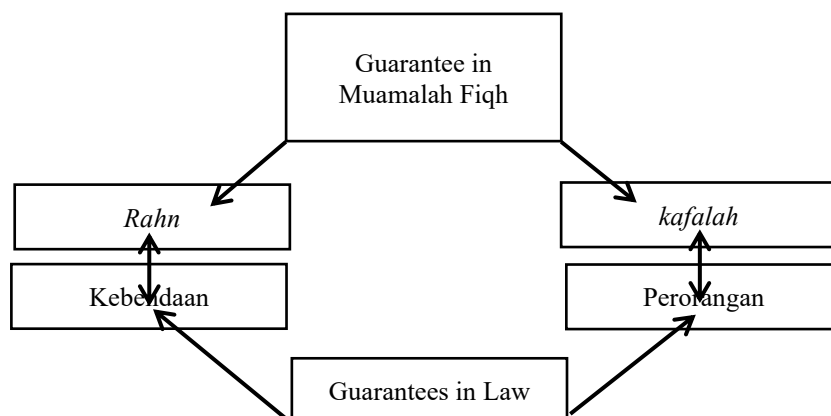
	that from the results are paid off, both the principal amount and interest and fees. The agreement must be registered in the general register, and the auction must be held in the manner instructed in Section 1211.
Section 1184	The creditor listed for the principal amount that generates interest is entitled because the interest is to be placed in the same rate order as for the principal amount, forever for two years from the current year; this does not reduce the right to take special registrations of interest other than those guaranteed on the first registration, which from the day the date will result in a mortgage.
Section 1214	When determining the number of mortgage registrations, the eternal interest will be calculated according to the amount of the principal stated in the deed if it is not stated, according to the amount of twenty times the interest; whereas the interest rates on his life or retirement for life are calculated and determined as the amount of principal, according to the age of the person enjoying it, or according to the age of the person given the live fork, or according to the length of time the enjoyment must take place according to the usual value of the interest on the fork according to expert estimates.
Section 1216	The buyer continues to hold the purchase money until the amount that remains to burden the parcels according to the previous section, if this is not stipulated otherwise in terms of the auction, then he is obliged to pay the above interest and amount of money to the seller or other persons entitled under the law. Invite until the last payment of the purchase price.
Section 1217	However, if the buyer or his successors leave or abandon the parcel in such a way that the guarantee for those entitled to be reduced or lost, then these people have the right to sue in court, so that the purchase money is immediately repaid and deposited, both in registrations in the national loan ledger, or in debt securities at the expense of Indonesia all things in the same relationship and the same conditions, as if the purchase money remained in the hands of the buyer or his successors; all of which do not reduce reimbursement of costs, losses and interest, if there is a reason for it. If the demand for immediate repayment as mentioned in the previous paragraph is granted, then the Judge will also appoint a competent person, who will be assigned to receive and save the purchase money.
Section 1227	Without prejudice to what is stipulated in Section 619, mortgage depositors may never refuse or slow down the registration of the deed of ownership, the registration of mortgage rights, the opportunity to view the statements of demand, with the threat of reimbursing expenses, losses and interest to the parties concerned; for that purpose, at the request of those who want the notary or bailiff with two witnesses, a report will be made on the refusal or delay of the clerk.
<b>TRADE CODE</b>	
Section 315a	If the receivables are interest-bearing, the mortgage also applies as collateral to the interest on the principal amount for the current year, along with the previous two years. (Civil Code. 1184; Trade Code 315c, 316b, 317b, 319, 750.)
Section 316b	Receivables with pre-emptive rights include interest and fees under the law, but this is not included in number 11 section 316. (Civil Code 1250; Trade Code 319, 750.)
Section 317b	Receivables that are entitled to overtake include interest and fees under the law, this is not yet included in number 11 section 317. The right to advance extends to the compensation due due to damage or loss of part of the load. The right to precede does

	not extend to bills arising from the insurance agreement. (Kcivil Code 1250; Trade Code 319, 750.)
<b>MORTGAGE RIGHT (UU NO. 4 OF 1996 CONCERNING DEPENDENTS ON LAND AND OBJECTS RELATED TO LAND)</b>	
Section 3 Paragraph (1) and its explanation	Debt guaranteed by repayment with the Mortgage Rights can be in the form of existing debt or that has been agreed with a certain amount based on a debt-receivable agreement or other agreement that creates a related debt-receivable relationship. Elucidation of Section 3 paragraph (1): Debt guaranteed by the Underwriting Right can be in the form of existing or non-existing debt that has been agreed upon, for example, liability arising from payments made by creditors for the benefit of the debtor in the context of implementing a bank guarantee. The amount can also be determined permanently in the agreement concerned. It can also be determined later based on the method of calculation specified in the agreement that gives rise to the related debt receivable relationship, for example, interest debt on the principal loan and other fees whose amounts can only be determined later .
<b>FIDUCIARY GUARANTEE UU NO. 42 OF 1999 CONCERNING FIDUCIARY GUARANTEES</b>	
Section 7 Letter c and its explanation	Debt whose repayment is guaranteed by fiduciary may be in the form of: c. debts which at the time of execution can be determined based on the principal agreement raises the obligation to meet the conditions of achievement. Elucidation of Section 7 letter c: Debt referred to in this provision is the interest debt on the principal loan and other costs, the amount of which can be determined later.
Section 10 Letter a and its explanation	Fiduciary collateral covers the results of objects which are the object of fiduciary collateral Elucidation of Section 10 letter c: What is meant by "results from objects which are objects of fiduciary collateral" are all things obtained from objects which are burdened with fiduciary collateral.
<b>WAREHOUSE RECEIPT GUARANTEE UU NO. 9 OF 2006 CONCERNING THE WAREHOUSE RECEIPT SYSTEM AS AMENDED BY UU NO. 9 OF 2011</b>	
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Taking into account the above table, it is known that the legal rules underlying the guarantee institutions applied in Islamic banks, not all sections contained in the law can be applied, because there are sections that conflict with Islamic principles, namely interest on debts. Furthermore, it can also be understood, that basically the collateral in the law of the guarantee agency is a follow-up agreement from the main deal, namely the debt-receivable-interest transaction. The interest-bearing debt agreement in the Guaranteed Lemabaga This is seen in the chart below:

Law is in line with transactions that are practiced at conventional banks because indeed the business operations are engaged in loans of interest-bearing loans. Still, for Islamic banks, this clearly contradicts the basis of Islamic banking operations, namely sharia principles, because obviously, the interest on money loans is usury that is forbidden in Islamic law.

When compared with guarantees in legislation in terms of shape, then in fact rahn and kafalah contracts have similarities in several aspects.



Like conventional banks, Islamic banks also apply collateral in financing. This guarantee is one of the parts analyzed to test the feasibility of a financing customer. The existence of collateral in the form of property debt is known in *fiqh muamalah* as *rahn* contract which means *al-habsu* and *al-luzum* (hold).<sup>22</sup> According to Sayyid Sabiq, *rahn* is making valuable goods from the perspective of *syara'* as collateral for debt,<sup>23</sup> while Abu Bakar Jabir al-Jazairi interpreted *rahn*, namely guaranteeing debt with goods that are possible to meet the value of the debt.<sup>24</sup> According to *Mardani Rahn* is to make property as debt collateral so that the debt is repaid (returned) or paid the price if it cannot return it.<sup>25</sup>

*Rahn* contract is basically a contract that arises because the deal is done in the form of *dain* (debts) both money debt / money loan called *qardh* and debt goods / sale and purchase of cash or a tough called *bai 'muajjal*. What is practiced by Islamic banks in financing products with regard to collateral is comprehensive, applied in financing that is based on the principles of buying and selling, profit sharing, leasing or borrowing.

Discussing the character of Islamic finance in Islamic banks is connected with collateral, it can be discussed one by one to find out the nature of its existence because it has been clearly explained beforehand, that the characteristics of financing in Islamic banks are clear and far different from conventional bank loans in the form of interest-bearing loans (*Ribawi* transactions). Diversity of Islamic contracts in financing becomes the choice for Islamic banks to implement them in accordance with the needs and policies taken.

First, the principle of financing lending or borrowing money called the *qardh* contract is connected with *rahn*, then both of them are in harmony, because the guarantee of its existence is indeed in a debt-receivable transaction. There are no debates and gaps in this matter.

Second, tenancy-based financing in the form of contemporary financial transactions in sharia banking can take the form of *ijarah muntahiyah bit tamlik*, that is, rent with the occurrence of a transfer of ownership at the end of the lease period, either through a grant or sale channel. The *ijarah* agreement can be called *bai 'al manfa'ah* or buying and

<sup>22</sup>Wahbah az-Zuhaili, *Fiqh Islam wa Adillatuhu*, Jilid 6, Terj. Abdul Hayyie al-Kattani dkk (Jakarta: Gema Insani, 2011), 106.

<sup>23</sup>Sayyid Sabiq, *Fiqh Sunnah* (Beirut: Dar Kitab al-Arabi, 1971), Jilid III, 153.

<sup>24</sup>Abu Bakar Jabir al-Jazairi, *Pola Hidup Muslim (Minhajul Muslim): Muamalah* (Bandung: Remaja Rosdakarya, 1991), 97.

<sup>25</sup>Mardani, *Fiqh Ekonomi Syariah: Fiqh Muamalah* (Jakarta: Kencana, 2012), 289.

selling benefits. Exchange occurs as does buying and selling, but there are significant differences. The nature of the transfer is the right of use, not the ownership rights as the sale and purchase. Transactions conducted at Islamic banks in the distribution of funds are in the form of cash and that too on *ijarah muntabiyah bit tamlik* products. Rental transactions whose payments are not cash or delayed, are included in the category of accounts payable and receivable.

Third, financing based on buying and selling principles is *murabaha* financing. *Murabaha* conducted in Islamic banks is not in the form of pure *murabaha* or commonly done in the past in public life involving only two parties (sellers and buyers directly), but *murabaha* in Islamic banks is in the form of *murabaha lil amir bisy-syira*. *Murabaha lil amir bisy-syira* is a term not found in classical jurisprudence. This term is only known in contemporary jurisprudence introduced by Sami Hamoud in his dissertation entitled *Tathwir al A'mal al Masrafiyah Bima Yatta'iq asy-Shari'ah al-Isma'iyah*. *Murabahah lil amir bisy-syira* or *murabahah* to the buyer of the purchase, the *murabahah* contract that occurs when someone orders the goods. So in this case there are three related parties, namely the seller, buyer, and customer. *Murabaha* like this is applied in Islamic banks, because Islamic banks are not the parties that keep stock of goods. In banking transactions, the ones that play a role in this transaction are the bank, customers (customers), and suppliers. Thus the purchase of goods by the bank is done when there is an order of goods from the customer. In addition, *murabaha* can basically be done in cash or debt, because the focus of the term *murabaha* itself is part of the *bai 'amanah* which is a sale and purchase that states the amount of capital (acquisition price). *Murabaha* in Islamic banks is realized in the sale and purchase financing by credit payment (*taqsith*). So the existence of collateral is recognized in

this transaction, because it is in the form of goods debt or non-cash trading.

Fourth, financing is profit sharing based on *mudharabah* and *musyarakah* agreements. The contract in *musyarakah* and *mudharabah* financing is basically a trust contract (*aqad al-Amanah*). This agreement is based on a mandate with each party who formed a partnership to be an *amanah* (trusted) for other partners. This contract is tied to business cooperation. In the perspective of classical jurisprudence of the two agreements, the legal relationship created is based on the trust of one another and both parties who are committed and committed to working together. Associated with debt guarantees, the basic concept does not require collateral, because they must trust each other as a foothold and share risks as well. Besides that, the form of transaction is business cooperation with profit sharing, not other transactions as referred to in the classical fiqh view on *rahn*. Prohibition of guarantees in *mudharabah* by previous scholars written in various traditional fiqh books, can be understood as a standard form that reflects justice in the *mudharabah* legal relationship in the context of place and time. Therefore, collateral in *mudharabah* financing in Islamic banking is placed as an exception to the general norm caused by various variables that position the parties who associate themselves in it as legal relations of particular forms of *mudharabah* that must be understood in the context of place and time. Because as an exception to the general principle, the position of collateral in *mudharabah* in Islamic banking differs from the collateral in conventional banking. *Mudharabah* financing is not debts or non-loans as in conventional banks, so placing a guarantee on *mudharabah* financing is not like a guarantee on conventional banking. The collateral position in *mudharabah* is as a guarantor of the certainty of business actors not to deviate from the provisions contained in the

agreement that has been mutually agreed upon. Guarantees put business operators accountable by mutual agreement.<sup>26</sup>

## CONCLUSION

The rule of law for guarantee institutions in Sharia Banking operations is still legally under the law of guarantee institutions with the characteristics of conventional banking credit systems. In the provisions of the law, not all sections procedurally reflect the characteristics of financing in Islamic banks and even contradict the principles of Islamic banking law. That way there is a legal vacuum (*recht vacuum*) or a vacuum in the law (*wet vacuum*) governing Islamic guarantee institutions that should complement the financing mechanism in Islamic banks.

Collateral institutions that are applied in Islamic banking are liens, mortgages, mortgages, fiduciary and warehouse receipt guarantees in the perspective of Islamic economic law, in general, are all included in the rahn contract category because it is a guarantee of assets, only rahn is more universal and comprehensive, while institutions - guarantee institutions are distinguished from each other based on the type of object both movable and immovable objects (fixed) and the shape of the object guaranteed. But especially and specifically looking at the provisions of the law that governs it, not all of the operations of the guarantee agency are relevant to the *fiqh* of *rahn*, because there are provisions that contradict Islamic law in doing *muamalah* in the case of material security.

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<sup>26</sup> Burhanuddin Harahap, "Kedudukan, Fungsi dan Problematika Jaminan dalam

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