



MORTGAGE RIGHTS FOR THE SHARIA BANKING MURĀBAḤAH CONTRACT: Its Position and Application

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Abstract: This research aims to explain the practice of mortgage rights in Islamic banking, the legal position of mortgage rights as a form of collateral in Islamic banking financing, the application/implementation of mortgage rights in Islamic banking financing, and explore whether mortgage rights as a form of collateral in Islamic banking financing have an equal position with credit in conventional banking. This research uses a sociolegal approach with secondary data sources, namely a review of primary legal texts, secondary legal literature, and non-legal sources. This research concludes that: 1) Mortgage Rights' validity in Islamic banking financing can be observed through the institution of Mortgage Rights regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Related Objects. 2) In Islamic banking practice, there is a strong emphasis on the existence of collateral in the assessment of providing financing to customers. 3) Mortgage rights as collateral have a different position between conventional and Islamic banks. This research contributes to understanding the legal position and application of mortgage rights as collateral in *murābahah* contracts in Islamic banking. It compares it with the credit system in conventional banking. The research results are expected to provide policy references in the banking sector regarding more effective implementation of mortgage rights in *murābahah* contracts.

Keywords: financing; mortgage rights; *murābahah contract*; sharia banking.

Abstrak: Penelitian ini bertujuan untuk menjelaskan praktik hak tanggungan di perbankan syariah, kedudukan hukum hak tanggungan sebagai bentuk jaminan dalam pembiayaan perbankan syariah, penerapan/implementasi hak tanggungan dalam pembiayaan perbankan syariah, serta mengeksplorasi apakah hak tanggungan sebagai bentuk jaminan dalam pembiayaan perbankan syariah memiliki kedudukan yang setara dengan kredit dalam perbankan konvensional. Penelitian ini menggunakan pendekatan sociolegal dengan sumber data sekunder, yaitu telaah teks

hukum primer, literatur hukum sekunder, dan sumber-sumber non-hukum. Penelitian ini berkesimpulan, bahwa: 1) Keabsahan hak tanggungan dalam pembiayaan pada perbankan syariah dapat diamati melalui keberadaan lembaga hak tanggungan yang diatur dalam Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan atas Tanah Beserta Benda-Benda yang Terkait. 2) Dalam praktik perbankan syariah, terdapat penekanan yang kuat pada keberadaan agunan dalam penilaian pemberian pembiayaan kepada nasabah. 3) Hak tanggungan sebagai bentuk jaminan memiliki kedudukan yang berbeda antara bank konvensional dan bank syariah. Penelitian ini berkontribusi dalam memahami kedudukan hukum dan penerapan hak tanggungan sebagai bentuk jaminan dalam akad *murabahah* di perbankan syariah, serta membandingkannya dengan sistem kredit dalam perbankan konvensional. Hasil riset diharapkan dapat memberikan rujukan kebijakan di sektor perbankan mengenai implementasi hak tanggungan yang lebih efektif dalam memastikan keamanan dan keberlanjutan perbankan syariah.

Kata Kunci: hak tanggungan; pembiayaan; akad *murabahah*; perbankan syariah.



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INTRODUCTION

The existence of banks in support of the country's economic growth has grown with the enactment of the Sharia Banking Act in 2008.¹ This gives the banking sector a boost to improve and expand the programs they run. The Sharia Banking Act aims to avoid standard interest practices in conventional banking and replace them with investment programs and profit-sharing following Sharia principles. As described in Law Number 21 of 2008 concerning Sharia Banking, the definition of Sharia banks is as follows:² "Everything related to sharia banks and business units includes institutions, business activities, and methods and processes in carrying out their business."

A significant development in the Sharia banking sector in Indonesia occurred in 2008 when Law No. 21 of 2008 was passed on Sharia Banking (after this, 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

¹ Suryani Suryani et al., "Good Corporate Governance (GCG) Principle in Sharia Banking: An Islamic Law Perspective," *International Journal of Law Reconstruction* 5, no. 2 (September 18, 2021): 242-54, <https://doi.org/10.26532/ijlr.v5i2.14973>.

² Law Number 21 of 2008 Concerning Sharia Banking.

Banking still needed to be more specific. Hence, it needs to be explicitly regulated through self-regulation.³

Linguistically, sharia banks are a combination of two words: banks, which refer to financial institutions tasked with storing and distributing funds to the community, and Sharia, which refers to religious laws derived from the Quran and Hadith.⁴ From this description, it can be concluded that Sharia banks are financial institutions that perform their duties following Sharia principles. As intermediation institutions, Sharia banks have several main functions, such as raising funds through savings, giro, and deposits using a gift and trust scheme and distributing the funds to the public under a different scheme from conventional banks.⁵ In principle, the activities carried out by Sharia banks are different from traditional banks because Sharia banks follow Sharia principles and precautionary principles, thus giving Sharia banks advantages over conventional banks.⁶

Meanwhile, financing transactions are carried out with the *Qard* Contract. Funding activities in Sharia banks involve spending funds to support planned investments, both by banks and other parties. The funds must be used properly and fairly, with transparent terms and conditions. Banks provide financing to customers based on trust, so customers are expected to be able to return the funds following the agreed-upon agreement.⁷

In Islamic banking, *murābahah* is one of the most used contracts. In terms of terms, *murābahah* is a merchandise purchase contract in which the seller mentions the acquisition price of the merchandise and adds the profit margin agreed with the buyer.⁸ In the context of Sharia banking, *murābahah* provides ease in licensing and monitoring products and helps industry players implement and develop products.⁹

³ Sawitri Putri Nursakti, "Jaminan Hak Tanggungan Pada Produk Pembiayaan Murabahah dan Musyarakah di Bank Muamalat Indonesia," *DiH: Jurnal Ilmu Hukum*, 2018, <https://doi.org/10.30996/dih.v0i0.1596>.

⁴ Alifia Annisaa, Nurizal Ismail, and Iman Nur Hidayat, "Sejarah Hukum Perbankan Syariah di Indonesia," *Ijtihad Jurnal Hukum Dan Ekonomi Islam* 13, no. 2 (2019).

⁵ Pius A Partanto and M Dahlan Al Barry, *Kamus Ilmiah Populer*, Surabaya: Arkola, 2010, 37.

⁶ Moh. Ali Wafa, "Hukum Perbankan dalam Sistem Operasional Bank Konvensional dan Bank Syariah," *Kordinat: Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam* 16, no. 2 (2017), <https://doi.org/10.15408/kordinat.v16i2.6441>.

⁷ Andrew Shandy Utama, "Perkembangan Perbankan Syariah di Indonesia," *UNES Law Review* 2, no. 3 (2020), <https://doi.org/10.31933/unesrev.v2i3.121>.

⁸ Ahmad Supriyadi, "Implementation Reconstruction of Sharing Profit and Losses in Murabahah Financing in Sharia Bank Indonesia Based on Islamic Justice Perspective," *Jurnal Pembaharuan Hukum* 4, no. 3 (December 15, 2017): 324-32, <https://doi.org/10.26532/jph.v4i3.2328>.

⁹ Mohammad Ghozali et al., "The Law Concept of Sharia Banking Compliance on Murabaha Financing in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (August 24, 2024): 1391-1408, <https://doi.org/10.22373/sjhk.v8i3.11313>.

This academy also provides legal certainty and transparency that supports the principle of consumer protection in the service of Islamic banking services.¹⁰ Nevertheless, *murābahah* is quite different from ordinary banking interest rates. *Murābahah* is an agreement between the bank and the customer to provide financing to purchase goods the customer needs. *Murābahah* financing will only be provided if the purpose of the funding is known and if banks and customers reach an agreement.¹¹ *Murābahah* can be defined as an agreement between a bank and a customer to provide financing to purchase goods or services required by the customer.¹² Article 19 paragraph (1) letter d of Law No. 21 of 2008 defines "*murābahah*" as an account of financing goods by affirming the price of the goods purchased to the buyer, which the buyer pays at more than the agreed price.¹³

In Law No. 21 of 2008 Concerning Sharia Banking, the term "*guarantee*" is defined as "*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.¹⁴ Islamic banks provide guarantees to ensure that customers fulfill their duties following the agreement in the contract. One example of a guarantee in Sharia banking is land guarantees. In practice, this land guarantee is intended to provide legal certainty regarding the guarantees customers offer 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).¹⁵

There are two types of guarantees: material and individual. While the guarantee of an individual's property is guaranteed only by the person who guarantees the fulfillment of the relevant bond, the guarantee of an entity gives the

¹⁰ Nofialdi Nofialdi, "Doktrin dan Hukum Ekonomi Islam," *El -Hekam* 5, no. 2 (2020), <https://doi.org/10.31958/jeh.v5i2.2662>.

¹¹ Reni Anggriani, Galang Rizki, and Wida Febriansyah, "The Mortgage Right as Murābahah Financing Security," *Jurnal Hukum Novelty* 10, no. 1 (2019), <https://doi.org/10.26555/novelty.v10i1.a13692>.

¹² Nur Hidayah et al., "Sharia Banking Disputes Settlement: Analysis of Religious Court Decisions in Indonesia," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 23, no. 1 (June 27, 2023): 75-92, <https://doi.org/10.30631/alrisalah.v23i1.1347>.

¹³ Reni Anggriani, Galang Rizki, and Wida Febriansyah, "The Mortgage Right as Murābahah Financing Security," *Jurnal Hukum Novelty* 10, no. 1 (2019), <https://doi.org/10.26555/novelty.v10i1.a13692>.

¹⁴ Sri Dewi Ayu Safitri et al., "Analisis Pengaruh Nisbah Bagi Hasil, Inflasi dan PDB Perkapita Terhadap Permintaan Sukuk di Indonesia," *Jurnal Ekonomi Daerah (JEDA)* 7, no. 3 (2019).

¹⁵ Hilman Akbar Nurrobby, Ramdan Fawzi, and Panji Adam, "Analisis Putusan Perkara Sengketa Ekonomi Syariah Nomor 0124/Pdt.G/2017/ PTA.Bdg Tentang Wanprestasi Akad Pembiayaan Murabahah Nomor: TSM/024/2014

right to precedence over objects. It has the nature of attaching and following them.¹⁶ A guarantee agreement always depends on the principal agreement; if it is concluded, it is also concluded because it is likely that everyone will be willing to guarantee a debt if it exists. In the main agreement, it should only be stated that there are guarantee promises that will be used as a basis for issuing guarantee agreements desired by creditors and debtors. Therefore, creating a guarantee agreement is one of the leading implementations of the agreement.

Article 1131 of the Civil Code stipulates that "all movable and immovable property belonging to a debtor, whether existing or future, is collateral for the debtor's bond." The debtor must provide the creditor with a guarantee of the debt he has received. The guarantee in financing in Islamic banking is known as collateral, as stipulated in Law Number 21 of 2008 concerning Sharia Banking.

Sharia banks use the concept of liabilities commonly used by conventional banks to avoid problems while carrying out their operations. As is known, the only institution the State of Indonesia uses to guarantee land is liability. However, this concept would be ambiguous if used in Sharia banks because it guarantees debt-to-debt agreements between debtors and creditors. In Islamic banks, however, there is no debt-to-debt agreement other than financing and no term "responsibility." In Sharia banking, the burden of mortgage rights causes problems for PPAT because APHT and SKMHT created by PPAT are standards set by the Land Office. This is by the Regulation of the Head of the Land Agency of the Republic of Indonesia Number 8 of 2012 on Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3/1997 on the Implementation of Government Regulation Number 24/1997 on Land Registration in Article 96 paragraph (1) letter f of the Act on Granting Rights and letter h of the SKMHT whose charging procedure shall be made by the annex to the regulation. In addition, Article 96 paragraph (3) states that "registration of changes in land data and the preparation of APHT cannot be made based on an act that does not comply with the provisions of paragraph (1)", and Article 96 paragraph (5) states that "The Head of the Land Office shall refuse the registration of a PPAT deed which does not comply with the provisions of paragraph (1)." The provisions under paragraph (1) shall be those referred to.

¹⁶ Niken Prasetyawati and Tony Hanoraga, "Jaminan Kebendaan dan Jaminan Perorangan Sebagai Upaya Perlindungan Hukum Bagi Pemilik Piutang," *Jurnal Sosial Humaniora* 8, no. 1 (2015), <https://doi.org/10.12962/j24433527.v8i1.1247>.

Previous studies have often failed to address the obscurity problem in applying Mortgage Rights to the *Murābahah* Academy in Islamic banking, mainly related to legal and operational aspects.¹⁷ Many studies focus only on theory without providing practical guidance that Sharia financial institutions can apply. In addition, there is a lack of analysis regarding protecting the rights of creditors and debtors in the context of the *murābahah* academy. My research seeks to fill this gap by providing a comprehensive analysis covering legal, operational, and protective aspects of the rights of related parties. With a more practical and applicative approach, this study is expected to provide more precise guidance. Sharia banks can implement it to apply the Mortgage Rights to the *Murābahah* Academy.

The purpose of writing this article is: *First*, to know the legal position of mortgage rights as a form of guarantee in the *nisbah* carried out by Islamic banking *murābahah*. *Second*, understand the application of Mortgage Rights in the *nisbah* carried out with the Islamic banking *murābahah*. *They are third*, knowing that mortgage rights are a form of guarantee in the *nisbah* done with the *murābahah* account, which has a position equivalent to credit in conventional banking. This research uses sociolegal, legal, and social approaches by looking at reality in society. Specifications were conducted in the study using qualitative methods with analytical descriptions; this study intended to describe and explain liability as a form of Sharia banking financing. Then, applying liability in Sharia banking financing also explains the position of Mortgage 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. It will also be viewed based on theories in Civil Law and related regulations regarding Islamic banking and Mortgage 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.

LEGAL POSITION OF LIABILITY AS A FORM OF GUARANTEE IN NISBAH IN SHARIA BANKING

Mortgage Rights become essential when there are many community needs related to guarantee institutions that take care of all regulations about guarantees charged

¹⁷ Lukman Santoso and Zumrotul Ainiah, "Implikasi Asas Itikad Baik Dalam Akad Murabahah di Perbankan Syariah," *An-Nisbah: Jurnal Ekonomi Syariah* 4, no. 2 (2018), <https://doi.org/10.21274/an.2018.4.2.73-98>.

with immovable objects.¹⁸ The validity of the Right to mortgage in financing Islamic banking can be observed through the Right to mortgage institutions regulated in Law No. 4 of 1996 on the Rights of the Land and Related Objects (after this referred to as the Right to Mortgage 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 mortgage funding rights 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 11 of the Act states that a right of pledge is a right of pledge imposed on land rights following 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 over debt payments compared to other creditors. The explanation highlights the existence of mortgage 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 Transactions share profits in the form of *mudārabah* and prayer; Lease transactions in the form of *ijarah* or lease purchases in the form of *ijārah muntahiyah bi-t-tamlīk*; Transactions in the form of *qard* receivables; and Service rental transactions are in the form of pilgrims for multi-service transactions.

This is based on an agreement between the Sharia Bank and 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.

Following Article 36 of Law No. 21 of 2008, when Sharia Bank and the UUS provide financing and other business activities, they must act in a way that does not harm Sharia Bank and the UUS and the interests of customers who entrust their funds. Sharia banks require guarantees for customers who want financing as part of their practices. This is done to comply with the principles of caution and ensure the

¹⁸ Ayup Ningsih, "Kajian Yuridis Efektifitas Penyelesaian Kredit Macet Melalui Lelang Hak Tanggungan," *Arena Hukum* 14, no. 3 (2021), <https://doi.org/10.21776/ub.arenahukum.2021.01403.7>.

survival and health of banks. Sharia banks themselves use the term collateral to describe collateral. Collateral is an additional guarantee submitted by the owner of the collateral to the Sharia bank and the UUS to guarantee the repayment of the obligation of the customer receiving the facility. Collateral can be a moving object or a stationary object. Mortgage right is one of the most common collateral or guarantees used by Islamic banking.¹⁹

Banking provides debt or credit and financing to provide funds. However, in principle, debt or credit and financing differ from financing because of the profits or rewards banks receive for providing such funds. In loans or debts provided by conventional banks, the repayment of lent funds is accompanied by interest, while in financing, the repayment of lent funds is not accompanied by interest.²⁰ In addition, in conventional banking, the provision of funds must be accompanied by debt or credit. In contrast, in Sharia banking, the form of Sharia banking certificates is considered first before financing.

The procedure for burdening liabilities on Islamic banks, for example, *Bank BNI Syariah*, is similar to the method 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 Mortgage begins with a treaty granting the Rights of Mortgage 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 consists of creating a Certificate of Granting a Right by PPAT according to the provisions of the applicable laws, which must be registered with the Land Office.²¹

Following the provisions of Article 10 paragraph (2) of the UUHT, the preparation of the APHT deed must be carried out by PPAT following the requirements of the applicable laws and regulations. Therefore, PPAT must refer to the Head of the National Land Agency Regulation Number 8 of 2012 concerning implementing Government Regulation 24 of 1997 concerning Land Registration

¹⁹ Offi Jayanti and Agung Darmawan, "Pelaksanaan Lelang Tanah Jaminan Yang Terikat Hak Tanggungan," *Kanun Jurnal Ilmu Hukum* 20, no. 3 (2018), <https://doi.org/10.24815/kanun.v20i3.11830>.

²⁰ Mara rinaldi Pakpakhan, M. Yarham, and Ridwana Siregar, "Hukum Perbankan Syariah Dan Implementasinya Di Indonesia," *Jurnal Masharif Al-Syariah: Jurnal Ekonomi Dan Perbankan Syariah* 8, no. 3 (October 18, 2023), <https://doi.org/10.30651/jms.v8i3.20431>.

²¹ Ayup Suran Ningsih and Hari Sutra Dise, "Breach of Contract: An Indonesian Experience in Credit Akad of Sharia Banking," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 19, no. 1 (2019), <https://doi.org/10.18326/ijtihad.v19i1.89-102>.

(abbreviated as *Perka BPN Number 8 of 2012*).²² This regulation guides PPAT in drafting acts, including SKMHT and APHT. In the regulation, examples of SKMHT and APHT formats form the basis for PPAT in drafting acts related to the burden of Liability.

Article 10, paragraph (2) of the UUHT, states that PPAT must prepare APHT acts per the provisions of the applicable laws and regulations. This means that the PPAT must comply with all the rules stipulated in the relevant laws. One of the regulations that must be referenced is the Head of the National Land Agency Regulation Number 8 of 2012, the implementation guide of Government Regulation Number 24 of 1997 concerning Land Registration. This regulation provides clear guidelines for PPAT in preparing necessary acts, including SKMHT and APHT. In the regulation, there are also examples of formats for SKMHT and APHT, which reference PPAT in drafting acts related to the burden of Liability. Thus, PPAT can ensure that all acts follow applicable and legally acceptable regulations.²³

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).²⁴ Article 95, paragraph (1), explains that the land deed prepared by PPAT is to be used as the basis for registration of changes in land registration data, including the Act on Granting Rights mentioned in letter (f) of that article.²⁵ Article 10 (1) of the Mortgage 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.

²² Alfian Izzat El Rahman, "Eksekusi Hak Tanggungan Dalam Prinsip Ekonomi Syari'ah," *Lan Tabur: Jurnal Ekonomi Syariah* 1, no. 1 (2019), <https://doi.org/10.53515/lantabur.2019.1.1.44-59>.

²³ Joesoef Shidqi Marsa Robiyantoko et al., "Analysis on the Adjusting Practice of Mortgage Rights Granting Deed Clause on Sharia Financing by Land Deed Officials in Purwokerto City," *Environment-Behaviour Proceedings Journal* 7, no. SI11 (2022), <https://doi.org/10.21834/ebpj.v7isi11.4173>.

²⁴ M. N. Imron, A. K., & Imanullah, "Pembebanan Hak Tanggungan Terhadap Objek Tanah Yang Belum Terdaftar Bersamaan Permohonan Pendaftaran Tanah Pertama Kali," *Jurnal Repertorium*, no. 4 (2017).

²⁵ Nur Fitriayu Surachman, "Kajian Pembuatan Akta Jual Beli Dari PPATS Sebelum dan Sesudah Perkaban No. 8 Tahun 2012," *Otentik's: Jurnal Hukum Kenotariatan* 4, no. 1 (2022), <https://doi.org/10.35814/otentik.v4i1.3345>.

In Sharia banking, financing can guarantee the right of dependency by creating a debt recognition deed by the customer because financing differs from debt agreements. However, when the funding is paid off, it establishes debts between banks and customers, so making a debt recognition certificate as a basis for imposing Liability is necessary. 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).²⁶ The debtor's creation of a debt recognition deed is done through a notary using the head of the deed, which contains the phrase "*For the sake of Justice Based on Almighty God.*" With the emphasis on the words, the deed of recognition of debt gained executive power.²⁷

Although the deed of recognition of debt has an accessory nature, the gross always depends on the principal agreement. When the main agreement expires, the deed of recognition of debt also expires. When the debtor repays a debt, the debt agreements are extinguished. Thus, the conclusion of the leading deal resulted in the debt recognition certificate becoming invalid. The main agreement is a financing agreement between the bank and the customer.²⁸

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 following 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, following Article 45 letter (b) and letter (c). Binding collateral to a liability right must follow the provisions and procedures stipulated in the applicable laws, including but not limited to registration matters, so banks have preference rights to collateral bound to the liability.²⁹

²⁶ Muh Husein Ahmadi, Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, "Validity of Mortgage Rights Based on Credit Agreement Aspects," *KnE Social Sciences*, 2022, <https://doi.org/10.18502/kss.v7i15.12141>.

²⁷ Khaidir Nasution, Ahmad Fauzi, and Ramlan Ramlan, "Perspektif Hukum Pembebanan Hak Tanggungan Atas Sertifikat Hak Milik Satuan Rumah Susun Sebagai Jaminan Kredit Perbankan," *Doktrina: Journal of Law* 5, no. 2 (2022), <https://doi.org/10.31289/doktrina.v5i2.7439>.

²⁸ Dewi Nurul Musjtari, "Rekonstruksi Lembaga Penyelesaian Sengketa Akad Pembiayaan Dengan Jaminan Hak Tanggungan Pasca Putusan Mahkamah Konstitusi Nomor 93/PUU-X/2012," *Jurnal Media Hukum* 23, no. 1 (2016), <https://doi.org/10.18196/jmh.2015.0068.62-75>.

²⁹ Nur Hidayah, Moch Bukhori Muslim, and Abdul Azis, "Jaminan Fidusia Dalam Pembiayaan Murabahah: Antara Jual Beli Dan Hutang Piutang," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (2021), <https://doi.org/10.24090/mnh.v15i2.5243>.

Based on the above statement, it can be seen that the Legal Position of the Right of Liability as a form of guarantee in the nisbah carried out with the *Murābahah* account in Sharia banking is regulated by Law No. 1. 4/1996 on Liability. In the context of *Murābahah*'s contract, the Right of Liability guarantees the repayment of financing given by Islamic banks to customers. *Murābahah* itself is a buying and selling agreement in which banks buy goods that customers need and resell them to customers by the agreed profit margin. Unlike conventional credit, which uses interest, the *murābahah* Academy uses a profit margin following the Sharia principle prohibiting usury.³⁰

Rights in Sharia banking have unique characteristics compared to conventional banking practices. One of the differences is that all aspects of the transaction must follow Islamic law, including guarantees. The right of dependency in the *Murābahah* deed must comply with the principle of Sharia compliance, which means that the process and object of the guarantee must not conflict with Islamic law. In addition, the risk in Sharia banking is more focused on the ability of customers to pay off financing following the contract. In contrast, the risk is more related to interest rate fluctuations in conventional banking.³¹ Thus, although the position of the Mortgage Rights in these two banking systems is equivalent, the approach and risk management applied differ according to their respective principles and regulations.

THE APPLICATION OF LIABILITY IN NISBAH TO SHARIA BANKING

Based on Article 1131 of the Civil Code, all forms of property owned by debtors, including moving and non-moving, 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:³² 1) Before Sharia Bank and 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

³⁰ Herwastoeti, "Resistance Against Cancellation of Auction Execution on Mortgage Rights Guarantee," *KnE Social Sciences*, 2024, <https://doi.org/10.18502/kss.v8i21.14811>.

³¹ Jefri Iryawanto, "Pelaksanaan Royah Hak Tanggungan Terhadap Bank Syariah yang Dimerger Menjadi Bank Syariah Indonesia (Studi Di Kantor Pertanahan Kota Malang)," *Universitas Islam Malang* (2022).

³² Wahyu Pratama, "Tinjauan Hukum Tentang Sertifikat Hak Tanggungan Menurut Undang-Undang Nomor 4 Tahun 1996," *Legal Opinion* 13 (2020).

the UUS must comprehensively evaluate the character, capacity, capital, guarantees, and business prospects of prospective Facility Recipient Customers.

Based on these provisions, in 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 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 the UUS to guarantee the repayment of the obligation of the customer receiving the facility.³³

In Sharia banking, collateral is a form of additional guarantees, while bank beliefs are the central guarantees. Material guarantees in *murābahah* financing serve 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.³⁴ However, getting a final court decision takes a long because legal efforts can reach the cassation level 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.³⁵ 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.³⁶

³³ Law Number 21 of 2008 Concerning Sharia Banking.

³⁴ Rahmat Fizran, Mohamad Andri Ibrahim, and Intan Manggala Wijayanti, "Analisis Hukum Terhadap Putusan Nomor 6234/Pdt.G/2020/ Pa. Badg Akibat Wanprestasi Nasabah Pada Pembiayaan Murabahah," *Bandung Conference Series: Sharia Economic Law* 3, no. 1 (2023), <https://doi.org/10.29313/bcssel.v3i1.5348>.

³⁵ Muhammad Fadhli, "Tinjauan Hukum Islam Terhadap Eksekusi Lelang Jaminan pada Institusi Perbankan Syariah di Aceh," *At-Tasyri': Jurnal Ilmiah Prodi Muamalah*, 2018, <https://doi.org/10.47498/tasyri.v10i2.211>.

³⁶ Afif Noor and Bagas Heradhyaksa, "Execution Mechanism Of Mortgage Rights Using Executorial Title In Sharia Banking Is Whose Authority?," *Diponegoro Law Review* 5, no. 2 (2020), <https://doi.org/10.14710/dilrev.5.2.2020.245-259>.

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 on a particular property, namely land rights, regulated in Law No. 4 of 1996 concerning Land Liability and Land-Related Objects (UUHT). According to Article 1, paragraph (1) of the Act, the definition of the Rights of Mortgage is:³⁷

The right to collateral security imposed on the right to land as defined in Law Number 5 of 1960 concerning Basic Agrarian Regulations, the following or not, other objects that are a unit with that land, for particular debt repayment, which gives the position of priority to certain creditors to other creditors.

The right can be exercised in three ways: 1) Through underhand sales, which are made under the agreement of the giver and beneficiary of the liability. If such a method can be obtained, the highest price is favorable to the parties. The underhand sale can only be carried out after a month has passed since it was announced in 2 newspapers circulating in the relevant area or the local mass media, and neither party has expressed any objection; 2) Through the strength of the executive title listed in the Certificate of Liability, a document that certifies the existence of land rights. The execution of the object of the execution right (i.e., 'For the sake of the Almighty God') of the existence of land rights by applying for the fiat of the execution of the right to the state court; 3) Through the beneficiary's right (part of execution under Article 6 of the Liability Act). Execution is based on one's power (execution part) by applying for an execution auction against the object of liability, which refers to the property or asset that is the subject of the liability, directly to the state auction office.³⁸

The request for assurances in Islam is based on a murmuring problem, which refers to a good that does not have a clear stipulation in *naṣ shar'ī* that explicitly obliges it or prohibits it but logically leads to good.³⁹ The concept of a false matter in

³⁷ Pratama, "Tinjauan Hukum Tentang Sertifikat Hak Tanggungan Menurut Undang-Undang Nomor 4 Tahun 1996."

³⁸ Ana Fauzia et al., "The Conflict of The Norms in the Execution of Secured Objects Which Are Enforced by Liability Rights When the Debtor is Bankrupt," *Progressive In Law* 4, no. 1 (2022).

³⁹ Ahmad Fatur Rahman and Hadi Daeng Mapuna, "Tanggung Jawab Pegadaian Syariah Atas Hilang Atau Rusaknya Barang Jaminan Dalam Prespektif Hukum Islam," *Iqtishaduna: Jurnal Ilmiah Mahasiswa Hukum Ekonomi Syari'ah* 2, no. 1 (2020), <https://doi.org/10.24252/iqtishaduna.v2i1.16207>.

a request for bail refers to a need, interest, or sound in general, with clear principles and proof of sharing. It ensures that it brings good together without causing trouble or loss to the other party.⁴⁰

In Sharia banking, applying dependency rights in the *nisbah* done with the *murābahah* deed is one of the essential mechanisms to ensure the security of financing. Liability provides legal certainty for Sharia banks that financed assets can be sold to cover losses if customers fail to fulfill their obligations. The following is a table describing the implementation of KPR based on the ratios applied to *murābahah* contracts in several Islamic banks:⁴¹

Table 1. Implementation of KPR based *Murabahah*

Sharia Bank	Financing Ratio	Profit Margin	Tenor (Year)	Product Examples
Mandiri Sharia Bank	80:20	10%--15%	5 – 20	KPR Sejahtera iB
BRI Sharia	85:15	8%--12%	5 – 15	KPR Faedah
BTN Sharia	90:10	9%--14%	5 – 20	KPR BTN Platinum Syariah
BNI Sharia	80:20	10%--13%	5 – 15	Griya Ib Hasanah

Description:

- Financing Ratio: Comparison of the amount of financing banks provide with initial contributions from customers.
- Profit Margin: Percentage of profits banks take from home selling prices.
- Tenor: Financing period in years.
- Product Example: Name of KPR product offered by Sharia Bank.

The application of liability in this *murābahah* account ensures that banks have the right to sell property used as collateral if customers fail to pay installments. This

⁴⁰ Ahmad Fatur Rahman and Hadi Daeng Mapuna, "Tanggung Jawab Pegadaian Syariah Atas Hilang Atau Rusaknya Barang Jaminan Dalam Prespektif Hukum Islam," *Iqtishaduna: Jurnal Ilmiah Mahasiswa Hukum Ekonomi Syari'ah* 2, no. 1 (2020), <https://doi.org/10.24252/iqtishaduna.v2i1.16207>.

⁴¹ Anis Muhtarom, "Implementasi Akad Murabahah pada Produk Pembiayaan Kredit Pemilikan Rumah (KPR) di Bank Syariah Mandiri KC Bojonegoro Menurut Hukum Ekonomi Syariah," *Jurnal Justisia Ekonomika: Magister Hukum Ekonomi Syariah* 3, no. 1 (2019), <https://doi.org/10.30651/justeko.v3i1.2960>.

provides security for banks in channeling financing and ensures that Sharia principles are maintained in every transaction.

EQUALITY BETWEEN MORTGAGE RIGHTS IN SHARIA BANKING AND 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.⁴² The role of guarantees in providing financing or credit gives the bank confidence in the debtor's ability to repay the given credit. The guarantee provided to banking institutions is usually an addition or supplement (accessory) arising from principal guarantees in the form of debt receivables.⁴³ The main deal is creating a guarantee agreement, which can be stated briefly about guarantees-related commitments. This commitment then became the basis for creating guarantee agreements desired by both parties, creditors, and debtors. Therefore, creating a guarantee agreement is part of the leading implementation of the agreement.⁴⁴

Similar to the concept of guarantees in civil law, guarantees in Sharia banking can be divided into *kafālah* (personal collateral) and *rahn* (property collateral). *Kafālah* is an act that binds one party to guarantee the repayment of debts that are the other party's responsibility. In this case, the party who provided the guarantee (*kāfil*) is responsible for the debt repayment, which is the right of the other party who received the guarantee (*makfūl*). In the context of conventional banking or those following 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 *kafālah* are regulated in the Fatwa of the National Sharia Council Number 11/DSN-MUI/IV/2000 About *Kafālah*.⁴⁵

The position of Liability as a form of guarantee in conventional banks is imperative as they consistently prioritize the guarantee aspect to protect the loans they distribute.⁴⁶ Liability refers to the right to collateral security granted on a

⁴² Maizal Walfajri, "Pembiayaan Bank Syariah Bertumbuh," *Business Insight*, no. 90855 (2022).

⁴³ Naendhy and Lilla Fadhilah, "Pembiayaan Bank Syariah," *Jurnal Munich Personal RePEc Archive*, no. 90855 (2018).

⁴⁴ Mochammad Lukman and Gunarto Gunarto, "The Role of Notary in the Implementation of Credit Agreement and the Default Settlement With Mortgage Right Warranty (A Study At Bank In Pekalongan)," *Jurnal Akta* 5, no. 2 (2018), <https://doi.org/10.30659/akta.v5i2.3128>.

⁴⁵ Sudirman Sudirman, "Harmonisasi Akad Pembiayaan Syariah Terhadap Jaminan Hak Tanggungan," *Media Iuris* 6, no. 1 (2023), <https://doi.org/10.20473/mi.v6i1.40113>.

⁴⁶ Ayup Suran Ningsih, "Legal Review of Financial Technology Peer to Peer Lending Based on Indonesian Collateral Law Perspective," *Substantive Justice International Journal of Law* 3, no. 2 (2020), <https://doi.org/10.33096/substantivejustice.v3i2.73>.

property to guarantee the repayment of certain debts, prioritizing other creditors. In other words, if the debtor fails to fulfill his obligations, the creditor who owns the Mortgage Rights has the right to sell the land that becomes collateral through public auction following 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.⁴⁷

The following is a table of differences between the right to dependency on Bank Syariah's *murābahah* and conventional credit:

Table 2. The Difference Between the Right to Depend on the Sharia Bank's *Murābahah* Contract and the Conventional Credit

Aspect	Mortgage Rights on <i>Murābahah</i> Contract Sharia Banking	Conventional Credit
Definition	The right to collateralize land and land-related objects for repayment of certain debts.	Loans of money provided by banks to customers with certain guarantees.
Contract	<i>Murābahah</i> Contract is the contract of buying and selling goods gradually at the agreed price.	A money loan agreement between the bank and the customer.
A Guarantor Guaranteed Object	<i>Murābahah</i> financing customers. Soil and earth-related objects.	Debtor customers. Various, such as land, buildings, vehicles, and so on.
Guaranteed Value	Based on the market value of the collateral object.	Based on the collateral object's market value and the customer's credit capability.
Exemption of Liability	It was carried out through the Land Certificate Making Officer (PPAT) with the Act on the Burden of Rights (APHT).	It's done through credit agreements and the Fiduciary Trust Act.
Collateral Billing	We conducted through non-litigation or litigation execution auction mechanisms.	We conducted through non-litigation or litigation execution auction mechanisms.

In addition to the differences mentioned above, as a form of guarantee, mortgage has different positions from conventional banks to sharia banks. In traditional banks, the guarantee position is significant in providing financing funds. However, in Sharia banks, the guarantee of goods referred to as Rahn, although

⁴⁷ Gautam Kumar Jha, Ni Komang Arini Styawati, and I Nyoman Sumardika, "Encumbrance of Mortgage Rights on Uncertified Land," *Sociological Jurisprudence Journal* 5, no. 1 (2022), <https://doi.org/10.22225/scj.5.1.2022.56-60>.

allowed following Sharia principles, is not required in the financing agreement. This is because, in Sharia banks, collateral is not a substitute for debt but a guarantor for customer debt.

The financing of *mushārahah*, following the Fatwa of the National Sharia Council Number 08/DSN-MUI/IV/2000, allows guarantees as a means to ensure that customers will use the funds provided by the bank following the agreement agreed at the beginning of the financing agreement. Due to their basic principles based on investment, Sharia banks recognize that every investment carries the risk of profit and loss. Therefore, Islamic banks prioritize evaluating the business potential of each prospective financing partner/customer and partnership factor.⁴⁸ In the context of Islamic financing, although guarantees are not a significant 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.⁴⁹

Mushārahah financing is a form of Sharia financing that puts forward the principle of partnership between banks and customers. In this scheme, Sharia banks provide funds that customers will use to carry out businesses agreed upon together. Following the National Sharia Council Fatwa Number 08/DSN-MUI/IV/2000, Sharia banks can request customer guarantees. This guarantee serves as a means of ensuring that the funds provided will be used following the original agreement. Although guarantees are not the main element in Islamic financing, Islamic banks are still asking for them as a preventive measure against possible irregularities in the use of funds by customers. This is in line with the precautionary principle held by Islamic banks, considering that every investment has a risk of profit and loss. Therefore, Sharia banks focus more on evaluating potential businesses and customer partnerships to minimize these risks.⁵⁰

⁴⁸ Ilham Soetansah, Joni Emirzon, and Annalisa Yahanan, "Problems of Justice in Legal Protection Efforts against Banks as Separatist Creditors Related to Execution of Collateral Tied with Mortgage Rights on Bankrupt Debtor's Assets," *SASI* 28, no. 3 (2022), <https://doi.org/10.47268/sasi.v28i3.1028>.

⁴⁹ Andi Sunarti, Yuhelson Yuhelson, and Erny Kencanawati, "Eksistensi Putusan Basyarnas Dalam Eksekusi Hak Tanggungan Terhadap Sengketa Perbankan Syariah," *Journal of Legal Research* 4, no. 6 (2022), <https://doi.org/10.15408/jlr.v4i6.29099>.

⁵⁰ Surizki Febrianto and Devi Ayunda, "The Implementation of Execution Auction by Creditors on Debtor Rights' Guarantee in the Office of State Assets and Auction Services (KPKNL)," *International Journal of Innovation, Creativity and Change* 10, no. 5 (2019).

Based on the above statement, it can be seen that the Right of Dependency as a form of guarantee in the *nisbah* carried out with the *murābahah* account in Sharia banking has a position equivalent to credit in conventional banking. However, several specific characteristics distinguish the two. In sharia banking, the *murābahah* Contract involves buying goods by banks to be sold to customers with agreed profit margins, not interest, as in conventional credit.⁵¹ This distribution of profits follows the Sharia principle prohibiting usury (interest). In addition, the liability in Sharia banking must comply with the principle of Sharia compliance, meaning that all aspects of transactions must follow Islamic law.⁵²

These differences affect risk management for financial institutions. In Sharia banking, risks are more focused on the quality and quantity of guarantees and the ability of customers to pay off financing following the contract. Meanwhile, in conventional banking, risks are more related to fluctuations in interest rates and customers' ability to pay interest periodically.⁵³ As a result, although the position of dependency rights in these two banking systems is similar, the approach and risk management applied differ according to their respective principles and regulations.

CONCLUSION

Unlike conventional banking, the concept of liability in Islamic banking, which relies on debt-to-debt agreements, must be adapted to ensure risk minimization while adhering to Sharia principles. While Sharia financing does not utilize debt similarly, liabilities remain essential for legal protection for both banks and customers. In products like *murābahah*, banks require collateral to safeguard against defaults, with the collateral acting as a redemption source. This contrasts with conventional banks, where collateral is critical for securing credit and may lead to priority claims against assets. Therefore, adapting liability frameworks in Islamic banking is crucial to harmonize Sharia compliance with adequate legal safeguards, promoting a fairer and more sustainable financial system.

⁵¹ Nur Asmidah Nasution and Dikko Ammar, "Tinjauan Yuridis Terhadap Pengaruh Penerapan Hak Tanggungan Terhadap Lembaga Jaminan Hak Atas Tanah," *Jurnal Smart Hukum (JSH)* 1, no. 2 (2023), <https://doi.org/10.55299/jsh.v1i2.288>.

⁵² Aan Rizalni Kurniawan, Faisal Santiago, and Evita Isretno Israhadi, "Legal Consequences of Bankruptcy for Creditors Holding Mortgage Rights and Execution Parate," *Jurnal Indonesia Sosial Sains* 4, no. 06 (2023), <https://doi.org/10.59141/jiss.v4i06.817>.

⁵³ Viky Vinola, Syahrudin Nawati, and Ahyuni Yunus, "Upaya Penyelesaian Kredit Macet Dengan Jaminan Hak Tanggungan Pada Bank Perkreditan Rakyat Syariah," *Journal of Lex Generalis (JLS)* 3, no. 3 (2022).

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