



**International Journal of Humanities & Social Science Studies (IJHSSS)**

*A Peer-Reviewed Bi-monthly Bi-lingual Research Journal*

ISSN: 2349-6959 (Online), ISSN: 2349-6711 (Print)

ISJN: A4372-3142 (Online) ISJN: A4372-3143 (Print)

Volume-IX, Issue-III, May 2023, Page No.207-215

Published by Scholar Publications, Karimganj, Assam, India, 788711

Website: <http://www.ijhsss.com>

DOI: 10.29032/ijhsss.v9.i3.2023.207-215

---

## **A Synchronization of Mortgage Deeds in Sharia as a Reflection of the Principle of Expediency**

**Prabandari Tri Hapsari**

*Faculty of Law, Sebelas Maret University, Surakarta, Indonesia*

**Pujiyono**

*Faculty of Law, Sebelas Maret University, Surakarta, Indonesia*

**Hari Purwadi**

*Faculty of Law, Sebelas Maret University, Surakarta, Indonesia*

### **Abstract**

*This study aims to answer problems regarding the argumentation of the need for synchronization of the mortgage deeds in sharia and the role of synchronization for the mortgage deeds in sharia as a reflection of the principle of expediency. The normative and practical problems still marginalize the interests of Muslims with the sharia system, including mortgage deeds as collateral for financing facilities in sharia banks and guided by the provisions in force in conventional law. This condition degrades the aspect of expediency for the benefit of Muslims, which must not only be based on positive law but must also comply with Islamic law in matters of guarantees. The synchronization of mortgage deeds in sharia is needed as a reflection of the principle of expediency for the state, Muslims, and sharia banking. This normative research uses a qualitative approach and inductive thinking. The results of the study show that the argumentation of the need for synchronization of the mortgage deeds in sharia has not been comprehensively regulated in positive law and irregularities in making mortgage deeds substance made before the Land Deed Officials cannot be changed as in a notary authentic deed. The roles of synchronization for the mortgage deeds in sharia as a reflection of the principle of expediency are a means of meeting the needs of Muslims for the mortgage deeds in sharia and unifying the nation by providing expediency to the state, Muslims, and sharia banking to create general welfare.*

**Keywords: mortgage deeds, expediency, synchronization, sharia.**

---

**Introduction:** The welfare state is characterized by the government's responsibility through its function of running the government to accommodate the unfulfilled needs of the people.<sup>1</sup> The consequence is a shift in government policy to accommodate the need for implementing sharia principles in Indonesia, which is predominantly Muslim, including the need for mortgage deeds in sharia. The conventional system still dominates the existing condition of mortgage deeds, and the government's obligation is to accommodate Muslims' needs towards the provision of mortgage deeds in sharia. One of the forms of sharia banking financing is musyarakah, a general form of business partnership with the principle of profit sharing. Two or more parties combine capital or labor in doing business with the proportion of profit sharing according to the portion of responsibility. In musyarakah, the bank places the funds as the customer's business capital, then the bank and customer will share the business results according to the agreed ratio for a certain period of time. This financing facility can finance the procurement of investment goods or business working capital. To determine profit sharing, the customer must submit business reports (realized sales or income) to the bank. In addition to musyarakah, the principle of profit sharing is implemented in mudharabah financing. In fact, the mudharabah contract is not a debt agreement but a cooperation agreement regarding joint ventures with the parties.<sup>2</sup> This is different from a credit agreement, which is an agreement between creditors and debtors. A credit agreement is an agreement in which the creditor lends a certain amount of money to the debtor with terms and conditions set by the parties, such as the debtor is obliged to pay off their debt after a certain period of time plus provisional interest, fines and other fees that have been determined.<sup>3</sup> Due to the difference in the principles of mudharabah contracts and credit agreements, if a binding guarantee is required in a sharia banking transaction, it should be carried out in accordance with sharia principles.

So far, no provision explicitly regulates the binding of guarantees for sharia banks. The implementation of the binding of collateral in Mortgage Rights for financing facilities in sharia banks is guided by the provisions applicable in conventional banking concerning Mortgage Rights for sharia banks.<sup>4</sup> Basically, apart from complying with Indonesian laws and regulations, financing in sharia banks must also comply with the principles of Islamic law. This is because banking actually has to accommodate the principle of prudence.<sup>5</sup> In addition, all sharia bank products are based on Islamic law through the legalization of the

---

<sup>1</sup> Ainur Rofieq, "Pelayanan Publik dan Welfare State", *Governance*, Vol. 2, No. 1, November 2011.

<sup>2</sup> Prihati Yuniarlin dan Dewi Nurul Musjtari, *Hukum Jaminan dalam Praktik Perbankan Syariah*, Cetakan Pertama, Fakultas Hukum Universitas Muhammadiyah Yogyakarta, Yogyakarta, 2009, hlm. 88-89.

<sup>3</sup> *Ibid*, hlm. 89.

<sup>4</sup> Faturrahman Djamil, et. al., *Hukum Perjanjian Syariah Dalam Kompilasi Hukum Perikatan*, Citra Aditya Bakti, Bandung, 2001, hlm. 248.

<sup>5</sup> Khanan, Pujiyono, "Aspek Yuridis Keberadaan Agendalam Model Branchless Banking di Sistem Perbankan Indonesia", *Privat Law*, Vol. 4, No. 1, 2016, hlm. 13-20.

National Sharia Board of the Indonesian Ulema Council (NSB-IUC).<sup>6</sup> The granting of Mortgage Rights, whether made in advance with the Power of Attorney Charging the Mortgage Rights or directly made in the Mortgage Deeds (MD) carried out at sharia banks, is not included in a special category because they still use conventional terms and principles. This is different from other sharia bank products, which already have a special legal basis based on legalization through a fatwa issued by the National Sharia Board. Sharia banks must understand the concept of financing using Mortgage Right guarantees based not only on positive law but on Islamic law principles. Since sharia guarantees are not regulated in legislation, in fact, sharia banks based on sharia principles and conventional banks (through Sharia Business Units) that provide sharia financing still apply conventional guarantees. From a formal juridical point of view, these activities are not against the law, but when analyzed, they will raise legal issues in the sharia context. Contextually, the provision of financing facilities in sharia banking that uses collateral must be linked to sharia guarantees. If there is a distribution of financing in sharia banking but does not apply guarantees with sharia principles, then it is an act contrary to sharia principles. This problem needs to be resolved immediately.<sup>7</sup>

### **Research Questions**

1. How is the argumentation of the need for synchronization of the mortgage deeds in sharia?
2. How is the role of synchronization for the mortgage deeds in sharia as a reflection of the principle of expediency?

**Methods:** This study was normative by combining primary and secondary legal materials and processed using a qualitative approach and inductive thinking.

### **Discussion:**

#### **1. The Argumentation of the Need for Synchronization of the Mortgage Deeds in Sharia**

##### **Mortgage Deeds in Sharia Have Not Been Comprehensively Regulated in Positive**

**Law:** This discussion relates to the argumentation of the need for synchronization of the mortgage deeds in sharia. Indeed, the availability of legal instruments in the form of laws and regulations can be studied. This can be seen from the perspective of juridical factors and the implementation domain, which is then used to compile arguments regarding the importance of synchronizing mortgage deeds in sharia. In fact, several differences in principle between the requirements of conventional and sharia agreements affect the form of collateral. The need for sharia-based guarantees is essential and is highly expected in sharia banking, especially the financing of profit-sharing transactions based on sharia principles of

---

<sup>6</sup> Khotibul Umam, "Legislasi Fikih Ekonomi Perbankan: Sinkronisasi Peran Dewan Syariah Nasional dan Komite Perbankan Syariah" *Mimbar Hukum*, Vol. 24, No. 2, Juni 2012, hlm. 360.

<sup>7</sup> Noor Hafidah, "Implementasi Konsep Jaminan Syariah dalam Tata Aturan UU Perbankan Syariah" *Arena Hukum*, Vol. 6, No. 2, Agustus 2012, hlm. 123.

al-mudharabah because of the principle of profit sharing. This specificity is a general characteristic and basic operational basis of sharia banks.<sup>8</sup> A mudharabah contract is a contract that bears profits and losses between the fund owner and the customer. Therefore, a strong foundation of morality is needed in mudharabah financing cooperation. Moreover, according to Muhammad, religious principles can be used as self-control so that a person does not lie and can be honest in conveying the income of their business.<sup>9</sup> The absence of specific arrangements regarding collateral binding for sharia banks has implications for the implementation of binding of collateral in mortgage rights as a financing facility in sharia banks, instead guided by conventional civil provisions. Ideally, sharia bank financing has relevance and is regulated in laws and regulations in Indonesia, especially adjustments to the principles of Islamic law. In practice, other irregularities, including all sharia financial products, should ideally receive approval and recommendations from the National Sharia Board of the Indonesian Ulema Council (NSB-IUC). Therefore, the provision of a mortgage deed in sharia in positive law has not been regulated, which is a challenge for the interests of Muslims to obtain a legal umbrella in the practice of sharia-based guarantees.

The juridical basis is related to the development of guarantee law, especially the extent of the need for guarantees. Thus, guarantee arrangements in the Indonesian Civil Code are no longer relevant to business needs and practices, for example, in the notary protocol in electronic form as a legal consequence related to the cyber notary.<sup>10</sup> In addition to hindering business activities, irrelevant conditions will weaken the competitiveness of business actors, so it is necessary to reform the guarantee law that can accommodate actors' interests, including sharia principles. The challenge is the dualism of the economic legal system with the use of sharia principles in various business activities and customary law being part of the formation of national guarantee laws. With regard to guaranteeing institutions that use sharia principles, it can be concluded that it will slowly lead to establishing a separate law in the future. The separation is needed considering that collateral activities based on sharia principles have substantial and essential differences. The concept of regulating sharia banking, which is separate from conventional banking, can become a model for establishing other fields, such as sharia insurance or sharia guarantees.

**Irregularities in Making Mortgage Deeds Substance made before the Land Deed Officials:** The irregularities regarding the practice of making mortgage deeds substance as made and drawn up before the Land Deed Officials are problems that strengthen the argument for the need for synchronization of giving mortgage deeds in sharia. The mortgage deeds substance is specifically designated for debt agreements in the form of debt that already exists or has been agreed upon with a certain amount based on a debt agreement

---

<sup>8</sup> Muhammad Syafi'i Antonio, *Bank Syariah Dari Teori Ke Praktik*, Cetakan Pertama, Gema Insani Press bekerjasama dengan Tazkia Cendikia, Jakarta, 2001, hlm. 137.

<sup>9</sup> Muhammad, *Manajemen Bank Syariah*, Edisi Revisi Yogyakarta, UPP AMP YKPN, 2005, hlm. 371.

<sup>10</sup> Mohamat Riza Kuswanto, Hari Purwadi, "Urgensi Penyimpanan Protokol Notaris dalam Bentuk Elektronik dan Kepastian Hukumnya di Indonesia", *Repertorium*, Vol. 4, No. 2, 2017, hlm. 62-69.

or other agreement that creates a legal relationship between debt and credit. Meanwhile, a *musyarakah* contract is not a debt agreement but a cooperation agreement. These irregularities are motivated by the weakness of juridical regulation. The regulation of the Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning the Provisions for Implementing Government Regulation Number 24 of 1997 concerning Land Registration, provides the format of mortgage deeds substance which cannot be changed like an authentic notary deed.

This format causes irregularities in making mortgage deeds based on sharia contracts. A credit agreement cannot be equated with a *musyarakah* financing contract because a credit agreement is a trust. Meanwhile, a *musyarakah* contract is a mixture of assets, but both give rise to a legal relationship, in the case of irregularities in making mortgage deeds made before the Land Deed Official because the mortgage deeds substance cannot be changed, such as a notary authentic deed. The implication becomes a consequence for sharia banks to agree to position the sharia contract as a debt agreement as the mortgage deeds substance in order to obtain guarantee certainty and apply the bank's prudential principle. This irregularity will continue to cause problems if allowed to occur. Thus, banks need guarantees that provide certainty and safe protection. Mortgage rights are guarantees that provide privileges (priority) from concurrent creditors. However, the mortgage rights in the regulations are only limited to the scope of debt agreements and agreements that give rise to debt receivables. In contrast, sharia banking does not recognize this thing.

The implementation of sharia contracts does not recommend guarantees. However, in practice, guarantees are required in Islamic banking. This considers that transactions carried out in financing products or services are known as guarantee institutions, such as implementing *murabaha* and *rahn* contracts. Fatwa of the National Syari'ah Board No: 08/DSN-MUI/IV/2000 concerning *Musyarakah* Financing in provision number 3 letter a paragraph (3): "In principle, there is no guarantee for *musyarakah* financing, but to avoid irregularities, Islamic Financial Institutions (IFI) can ask for guarantees." It is necessary to emphasize that sharia contracts, such as *mudharabah*, are not debts but profit sharing. The guarantees born from *mudharabah* contracts are not based on debt agreements. The problem is implementation, which refers to the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning the Provisions for Implementing Government Regulation Number 24 of 1997 concerning Land Registration. The mortgage deeds whose basis is based on something other than a debt agreement or an agreement that can give rise to debt and credit will be rejected by the National Land Agency. As an implication, the practice of *musyarakah* contracts being made into debt agreements after being made into debt agreements can only be processed by the analyst team and the head of the land office who issued the Mortgage Certificate.

The narrow scope of the Law on Mortgage Rights creates irregularities in the Mortgage Rights guarantee law. The understanding of the Law on Mortgage Rights and its implementing regulations is limited to debt agreements or agreements that only give rise to debts and receivables. Meanwhile, sharia banking uses Mortgage Rights on sharia contract guarantees. Then, there are irregularities from the difference in the substance of the credit agreement with the musyarakah contract. However, as long as there is no dispute, there will be no problem. If there is a dispute, the deed can be canceled or null and void by law. The Land Deed Official who carried out the deed will be degraded into a private deed. Furthermore, the clients will question the capacity of the Land Deed Official. Meanwhile, the musyarakah contract has been canceled since it will be attached to the Mortgage Rights guarantee because it is contrary to sharia principles. Thus, it cannot equate a musyarakah contract with a mortgage guarantee.

## **2. The Role of Synchronization for the Mortgage Deeds in Sharia as a Reflection of the Principle of Expediency**

**The Synchronization of Mortgage Deeds in Sharia as a Means of Meeting the Needs of Muslims:** The state aims to achieve community welfare, which has the consequence of meeting the community's needs, increasing demands for validity, and implementing the mortgage deeds in sharia to fulfill the value of expediency. The legal manifestation of realizing the fulfillment of the value of expediency is to achieve the greatest happiness for the community, as the term expressed by Jeremy Bentham, the great happiness for a great number. The welfare state framework recognizes the promotion of general welfare. It means that promoting the general welfare includes maintaining the common interests of society and preventing joint action from achieving goals where individuals or groups do not get them. This includes conciliation of interests among groups and between individuals or groups and society as a whole.<sup>11</sup> This is related to the urgency of expediency, which is realized through the mortgage deeds in sharia because the state also accommodates the interests of groups and religions as a real reflection of efforts to promote public welfare.

The relevance of expediency is in line with social justice as the ultimate goal of The Five Principles (Pancasila) and embodied in the preamble of the 1945 Constitution of the Republic of Indonesia. The state must be consistent in achieving it. In this effort, the state must adhere to The Five Principles as a reflection of the identity of the Indonesian nation. Thus, it is not surprising that the mortgage deeds in sharia will become a basic need for Muslims in securing collateral for their partnership contract (syirkah), considering this is related to the identity of the Indonesian nation as a religious nation.<sup>12</sup> Therefore, the need

---

<sup>11</sup> Soelistyani Ismail Gani, *Pengantar Ilmu Politik*, Jakarta: Ghalia Indonesia, 1987, hlm. 74. Lihat juga: Charles E. Merriam, *Systematic Politics*, Chicago: University of Chicago Press, 1957, hlm. 31; Gertude Ann Jacobsen & Miriam H. Lipman, *Political Science*, New York: Bernes & Noble, 1956.

<sup>12</sup> Edi Suharto, "Peta dan Dinamika Welfare State di Beberapa Negara", *MakalahSeminar*, "Mengkaji Ulang Relevansi Welfare State dan Terobosan melalui Desentralisasi-Otonomi di Indonesia", IRE Yogyakarta dan Perhimpunan Prakarsa Jakarta, Yogyakarta, 25 Juli 2006.

for synchronization of the provision of a mortgage deed in sharia becomes a means to meet the needs of Muslims for implementing sharia guarantees based on the principles of Islamic law engagement.

Basically, an important aspect that the government must fulfill through the synchronization of the mortgage deeds with sharia principles is to resolve legal dualism. The dominance of conventional guarantees is even forced to implement sharia-based guarantees that are less relevant in accommodating the needs of Muslims. The sharia system has a broader meaning than material interests. However, the spiritual aspect becomes a demand that relates to humans and God. The establishment of a guarantee system based on sharia provisions for Muslims is motivated by the prohibition in Islam to lend or collect loans using loan interest (usury), as well as prohibitions on investing in businesses categorized as forbidden (unlawful). Therefore, especially for Muslims, a guarantee system run by sharia principles can meet the needs of a financial institution, serving economically and spiritually.

**The Synchronization of Mortgage Deeds in Sharia as a Means of Unifying the Nation and Providing Expediency for the State, Muslims, and Sharia Banking:** This discussion makes the sharia banks agree to make the sharia contract into a loan agreement as the substance of the mortgage deeds to obtain guarantee certainty and implement the precautionary principle. The synchronization of the mortgage deeds in sharia as a means of unifying the nation can provide expediency for the state, Muslims, and sharia banking. This is based on the dualism of the conventional and sharia guarantee systems, which in practice are dominated by the conventional implementation of the mortgage deeds, even for sharia guarantees. This problem takes inventory of two things that conflict with each other on a legal basis, a higher law defeats a lower law, and a specific law overrides a more general law. In order to answer these problems, an analysis with legal purposes is carried out. As stated in Gustav Radbruch's thought, the purpose of the law is the basic value of law, which is divided into justice, certainty, and expediency. However, fulfilling the three legal purposes is still wishful thinking, and there will be conflicting opinions about the legal purposes. Various legal definitions aim to achieve peace, justice, expediency, legal certainty, and so on. All of this shows that law is a symptom of society.<sup>13</sup>

The implications must be chosen according to truly relevant legal purposes, and the problems faced. In this position, it is more relevant to relate it to the casuistry principle theory of Achmad Ali. The elaboration of the theory gives priority to determining the relevant legal purposes of the needs and problems. In the context of the problematic dualism of conventional and sharia guarantee systems, which in practice is dominated by the implementation of the provision of mortgage deeds and carried out conventionally even for sharia guarantees, the final path is the need for synchronization of the provision of mortgage deeds in sharia as a means of unifying the nation can provide expediency to the state, Muslim and sharia banking. Therefore, the legal purpose of being achieved is expediency.

---

<sup>13</sup> R. Soeroso, *Pengantar Ilmu Hukum*, Jakarta: Sinar Grafika, 2009, hlm. 56.

Expediency is the most important thing for a legal purpose. Regarding the discussion of legal purposes, the first thing to know is what legal purposes are and what only humans have purposes; laws are not human purposes. Law is only one of the tools to achieve purposes in social and state life. The legal purposes can be seen in its function as protecting human interests; the law has purposes of achieving.<sup>14</sup> When analyzed from the definition of expediency in the Great Indonesian Dictionary, expediency in terminology can be interpreted as use or benefit.

In line with the problems that require the synchronization of the provision of mortgage deeds in sharia in positive law, it is indeed aimed at creating usability or prioritizing the benefits of legal purposes both for the state, Muslims, and sharia banking. Legal arrangements are needed that originate from the needs of the community, in this case, the Muslim community, to obtain a guarantee system that is in accordance with sharia principles and Islamic religious teachings. Legal purposes are relevant according to the theory of utility, which aims to guarantee the greatest possible happiness for humans. In essence, according to this theory, the law aims to benefit in producing the greatest pleasure or happiness for many people.

**Closing:** The argumentation of the need for synchronization of the mortgage deeds in sharia has yet to be comprehensively regulated in positive law, and irregularities in making mortgage deeds substance made before the Land Deed Official cannot be changed as in a notary authentic deed. The roles of synchronizing the mortgage deeds in sharia as a reflection of the principle of expediency are a means of meeting the needs of Muslims for the mortgage deeds in sharia and unifying the nation by providing expediency to the state, Muslims, and sharia banking to create general welfare.

---

<sup>14</sup> Said Sampara, et. al., *Pengantar Ilmu Hukum*, Total Media, Yogyakarta, 2011, hlm. 40.  
Volume-IX, Issue-III



**References:**

1. Antonio, Muhammad Syafi'i, *Bank Syariah Dari Teori Ke Praktik*, Cetakan Pertama, Gema Insani Press bekerjasama dengan Tazkia Cendikia, Jakarta, 2001.
2. Djamil, Faturrahman, ET. al., *Hukum Perjanjian Syariah Dalam Kompilasi Hukum Perikatan*, Citra Aditya Bakti, Bandung, 2001.
3. E. Merriam, Charles, *Systematic Politics*, University of Chicago Press, Chicago, 1957.
4. Hafidah, Noor, "Implementasi Konsep Jaminan Syariah dalam Tata Aturan UU Perbankan Syariah" *Arena Hukum*, Vol. 6, No. 2, Agustus 2012.
5. Gani, Soelistyani Ismail, *Pengantar Ilmu Politik*, Ghalia Indonesia, Jakarta, 1987.
6. Jacobsen, Gertude Ann, Miriam H. Lipman, *Political Science*, Bernes & Noble, New York, 1956.
7. Khanan, Pujiyono, "Aspek Yuridis Keberadaan Agen dalam Model Branchless Banking di Sistem Perbankan Indonesia", *Privat Law*, Vol. 4, No. 1, 2016.
8. Kuswanto, Mohamat Riza, Hari Purwadi, "Urgensi Penyimpanan Protokol Notaris dalam Bentuk Elektronik dan Kepastian Hukumnya di Indonesia", *Repertorium*, Vol. 4, No. 2, 2017.
9. Muhammad, *Manajemen Bank Syariah*, Edisi Revisi Yogyakarta, UPP AMP YKPN, 2005.
10. Rofieq, Ainur, "Pelayanan Publik dan Welfare State", *Governance*, Vol. 2, No. 1, November 2011.
11. Sampara, Said, et. al., *Pengantar Ilmu Hukum*, Total Media, Yogyakarta, 2011.
12. Soeroso, R., *Pengantar Ilmu Hukum*, Sinar Grafika, Jakarta, 2009.
13. Suharto, Edi, "Peta dan Dinamika Welfare State di Beberapa Negara", *Makalah Seminar, "Mengkaji Ulang Relevansi Welfare State dan Terobosan melalui Desentralisasi-Otonomi di Indonesia"*, IRE Yogyakarta dan Perhimpunan Prakarsa Jakarta, Yogyakarta, 25 Juli 2006.
14. Umam, Khotibul, "Legislasi Fikih Ekonomi Perbankan: Sinkronisasi Peran Dewan Syariah Nasional dan Komite Perbankan Syariah" *Mimbar Hukum*, Vol. 24, No. 2, Juni 2012.
15. Yuniarlin, Prihati, Dewi Nurul Musjtari, *Hukum Jaminan dalam Praktik Perbankan Syariah*, Cetakan Pertama, Fakultas Hukum Universitas Muhammadiyah Yogyakarta, Yogyakarta, 2009.