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Principles of sharia law on collateral in Islamic contract law (fikih mu'amalah)

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ABSTRACT

The importance of collateral in the debt agreement is as the means of legal protection for the security of creditors in overcoming risks, therefore a concrete certanty exists which obligates the debtor to repay the loan. Meanwhile, sharia bank system sees the concept of guarantee or collateral from the concept of Rahn and Kafalah, although in practice sharia bank guarantees and collateral practices use similar guarantee-related legal norms based on the Indonesian positive legal system which are adapted from the western legal system and national legal system. Collateral is a type of additional guarantee, either in the form of movable objects as well as immovable objects handed over by the owner of the aforementioned collateral to the Institution finance or the creditor to secure the settlement of the debtor's obligations as the borrower. If the debtor fails to pay the debt, then the lender may confiscate the collateral objects to be sold or auctioned in order to pay off the debt in the agreement or contract made by the debtor to the creditor by granting preference rights in accordance with the execution of the guarantee institution and or through a judge's decision. The principles of binding and sharia guarantees have been emphasized in Article 2 of the Islamic banking law elucidation states that business activities based on sharia principles, among others, is a business activity that does not contain elements of: a. riba, b. maisir, c. gharar d. haram and e. zalil. Sharia binding and sharia guarantees are 2 (two) things in context law that cannot be separated, the existence of new sharia guarantees arises after the existence of a sharia agreement. This is analogous to the concepts in Civil Law, then the sharia guarantee is a 'follow-up agreement' (accessoire), while the sharia bond is the principal agreement. This means the legal principle that underlies the sharia agreement, mutatis mutandis, can also be applied as a legal principle of sharia guarantees.

Keywords: Sharia guarantees, accessoire agreements; Islamic financial institutions

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1. INTRODUCTION

The Islamic economic system began to emerge in the mid-20th century. Starting with the formation of *sharia* banks in several Islamic countries such as in Egypt, other early history for the development of *sharia* banks, namely by the establishment of the Islamic Development Bank (IDB) in Jeddah 1975, initiated by the Member States of the Organization of the Islamic Conference (OIC). Then the establishment of the IDB motivated the birth in many other countries to establish Islamic financial institutions, In Indonesia, the existence of new *sharia* banks exists since mid-1992, after the passing of Act No. 7 of 1992 as the legal basis, which was later amended to Act No. 10 of 1998. Concerning Banking which accommodates *sharia* banking other than conventional banking and to initiate a specific banking system with *sharia* system according to the formal juridical basis of the Act No. 21 of 2008 concerning *sharia* Banking.

The importance of guarantees in debt agreements is one of the legal protection for creditor security in overcoming risks, hence there is a certainty that the debtor will repay the loan. In the elucidation of Article 8 of Act No. 10 of 1998 states that guarantees for granting credit, which concerns with the ability of the debtor, to pay off obligations in accordance with what was agreed is an important factor that must be noticed by the bank.

The guarantee right, which will be referred to as collateral, is intended as the warranty of the debt to the related creditor, namely the holder of the guarantee right, to take precedence over other creditors if the debtor defaults. In the agreement credit, usually the parties have agreed that if the debtor breached the contract, the creditor has the right to take part or all of the proceeds from the sale of assets as the repayment of the debtor's debt (*verhaalsrecht*). If there are several creditors, then the distribution among the creditors takes precedence over those who owns special collateral binding such as guarantees of mortgage rights, fiduciary, lien, mortgage or other security rights that gives the creditor the propriety of reference to receive payment in full.

Article 23 Paragraph (2) of Act No. 21 of 2008 concerning with *sharia* banking states the existence of warrant and collateral. It is mutually exclusive to the provisions of Article 8 of Act No. 10 of 1998 concerning with banking, which do not mention the terms of guarantee and collateral. This has a significant impact, in which that as if there is a shift between the two norms. Whereas if the concept is viewed based on the conception of warrant and collateral in conventional banking and *sharia* banking provides a different premise. Warrants and collateral in conventional banks occur if the creditor-debtor relationship exists. This relationship has implications for the legal obligation to have warrant and collateral based on the provisions of Article 1131 of Civil Law Act as a general guarantee that positions creditors as concurrent creditors and the positioning of material guarantees creditors' concerns with a *free reference* position in each credit transaction if in the principal agreement is followed by a special agreement. Meanwhile*, sharia* banking sees the concept of warrant and collateral from the concept of *Rahn* and *Kafala.* Even though in reality, warrants and collateral in *sharia* banks are still using legal guarantee

norms based of the Indonesian positive law system which originates from the Western legal system and national legal system.

In Islamic banking law collateral is an additional form of warrant, either in the form of movable or immovable objects submitted by the owner of the collateral to *sharia* Banks, in order to guarantee the payment of the debtor's obligations as the moneylender. Collateral in this sense acted as an *accessoire*. The purpose of the collateral is to obtain facilities from the bank. This warrant is submitted by the debtor to the bank. Collateral elements, namely: a) Additional collateral; b) To be submitted by the debtor to the bank; and, c) To obtain credit or financing facilities.

The study of the legal principles of warrant (including the legal principles of *sharia* guarantees) has an important meaning, since economic activities nowadays which are based on *sharia*, especially the field of *muamalah* has developed rapidly. This is proven by the appearance of various *sharia* financial institutions and businesses such as *sharia* banking, *sharia* insurance, *sharia* pawnshops, *sharia* guarantees, *sharia* bonds and others.

"Fiqh" is understood as a compilation of Islamic law that is fully standardized and assumed to be as strong and sacred as the *nushush syariyyah* contained in *al-Quran* or *al-Hadith*. In fact, this is not the case, as the rule above that the renewal of Islamic law *(fiqh)* is a necessity, considering the text of the *Qur'an* and *al-Hadith* have stopped, while society continues to change and develop with various problems, according to Ma'ruf Amin[1]. Scholars explain this with the expression as follows: *li anna an-nushus mahdudah walakin al-hawadits wa an-nawazil ghair mahdudah, aw li anna an-nushus tatanaha walakin al-hawadits wa an-nawazil la tatanaha,* (To all intents and purposes, the texts are limited, while the issues that are arising is not limited, or because actually, the text has temporarily stopped while the problems will always arise and never stop).[2]

Financial institutions, both banks and non-banks, which are one of the pillars Economics is an embodiment of Islamic values, especially in the area of "muamalah-shariah al Generaliyyah", where economic issues are in the public domain, humans are given the freedom to draft, organize and run independently as long as it is not contrary to the provisions of Islamic law. The Apostle said "Antum a'lamu bi ummurdunyakum" (you know more about your worldly affairs), but all that remains there are limitations as long as they do not violate sharia principles. Then deep Fiqh rules: "Basically, all forms of muamalah are permissible unless there is evidence who forbid it". This is also related to the problem of sharia economic law, especially regarding guarantee institutions that are applied to financial institutions in particularly Islamic financial institutions

In the perspective of Islamic law, every good transaction is carried out by individuals and institutions in any field are bound by Islamic values. This statement is based on one

[1] Ma'ruf Amin, Renewal of Sharia Economic Law in the Development of Contemporary Financial Products (Transformation of Fiqh Muamalat in Syari'ah Economic Development), Scientific Speech on the Award Honorary Doctorate Degree (Doctor Honoris Causa) in the Field of Sharia Economic Law Presented at before the Open Senate Session of Syarif Hidayatullah State Islamic University, Jakarta, March 5, 2012

[2] Ibid

of the principle of *ushul "al aslu fi al afal at-taqayyud bi hukmi asy-syar'i"*, which hsa the meaning of that the law of origin of an act is bound by *syara'* law. *Shari'a* law relating to the *amaliah* of every Muslim which contains five types of law, namely: *wajib (*obligatory), *sunnah, makruh*, *mubah* and *haram*. However, the provisions of the *syara'* are related to material, more simply known as the type of *halal* and *haram*. Even though in between both of them also have the law of *"subhat"*. For every Muslim is obliged to always live according to *sharia* provisions.

Bank and non-bank financial institutions are currently an alternative for many Muslims, especially Islamic financial institutions, hence in carrying out all its activities, they must always refer to the regulated principles of Islamic law, or *sharia* in the fatwa of the Indonesian *Ulama* Council such as the principle of justice and balance (*'adl wa tawazun*), benefit (*maslahah*), universalism (*alamiyah*), and not contains *gharar, maysir, riba (*usury), *zalim* (unjust) and *haraam* objects. Based on the description above, the formulation of the problem is as follows: how are the principles *Sharia* Guarantee Law in Islamic Contract Law (*fiqh Mu'amalah*).

2. METHODS

In researching the problem of this study, the writer uses descriptive and qualitative methods to describe and map the concepts and the analysis of the *sharia* guarantee principles that can be used in *sharia* bond practices by banking and non-banking financial institutions. In addition, this resarch also uses a normative-juridical approach, namely the disciplinary and legal theory approach, including legal principles of Islamic law which functions to resolve legal issues regarding the implementation of the warrant institutions known in civil law and Islamic law by collecting, evaluating, verifying, and synthesizing evidences related to support facts in order to produce a valid conclusion.

3. RESULTS AND DISCUSSION

Pitlo provides a legal formulation of collateral in the sense of rights, namely rights that are given in order to provide creditors a secured position, thus the law products concerning with collateral is interpreted as a legal regulation governing creditor's receivables against a debtor.[3] Then according to J. Satrio collateral law as a legal regulation governs the warrant of a person's receivables, in this context, creditor to debtor.[4] Furthermore, collateral law is the "whole of legal rules governing the legal relationship between the giver and the recipient of the warrant in relation to the imposition of collateral to obtain credit facilities".[5]

Collateral terms can be found in Article 1 number 23 of Act No. 10 of 1998 concerning the Amendments to Act No. 7 of 1992 concerning with banking. Collateral by definition is an "additional warrant handed over by debtor to banks in order to obtain

[3] J. Satrio, *Hukum jaminan ,hak-hak jaminan kebendaan* , citra aditya bakti bandung 1996. pg. 3
[4] J. Satrio, Ibid
[5] H. Salim, Op.cit, pg. 6

credit facilities or financing based on *sharia* principles". Collateral is an additional warrant submitted by debtor to banks in order to obtain credit or financing facilities based on *sharia* principles. Collateral are assets of the debtor warranted to the guarantor if the debtor cannot fulfill their obligations to pay. If the debtor fails to pay the agreed amout of debt, then the creditor can confiscate the collateral objcts agrd in the aforesaid agreement. The objects can be put for sale or auction, to pay off the debt of the debtor to the creditor.

Sharia guarantees in practice are divided into 2 (two) forms, the first is al- rahn (as an institution) which is a material guarantee and al-kafalah which is an individual guarantee. So that in Sharia Economic Law it relates to Debt guarantees are known by two terms, namely kafalah and rahn. Kafalah is a guarantee given by the guarantor (kafil) to a third party to fulfill its obligations second or borne (makful'anhu, ashil).[6] while kafalah According to the Bank In Indonesia, kafalah is a guarantee contract (Makful alaih) given by one party to other parties where the guarantor (kafil) is responsible for payment return a debt that is the right of the recipient of the guarantee (makful). Kafalah one Islamic banking products in the service sector have obtained a legal basis in the Law Law Number 10 of 1998 concerning Banking. With the promulgation of the Act Number 21 of 2008 concerning Islamic Banking, kafalah has a legal basis stronger. Article 19 of the Sharia Banking Law states that activities Sharia Commercial Bank business includes buying, selling, or guaranteeing against risks own third party securities issued on the basis of real transactions based on sharia principles, such as ijarah, musyarakah, nudharabah, murabahah, kafalah, or hawala.

Then in the Fatwa of the Indonesian Ulema Council By DSN No. 57/DSN-MUI/V/2007 kafalah can be interpreted as a guarantee contract given by guarantor (kafil) to a third party to fulfill the obligations of the second party or the other borne (makfuul 'anhu, ashil).[7] Furthermore, the existence of kafalah as a contract in the field services at Sharia Banks and Sharia Business Units have been regulated through the DSN-MUI Fatwa No: 11/DSN-MUI/IV/2000 concerning Kafalah.[8] Whereas Rahn, in terms of terminology, is "Ja'lu 'Ainin Laha Qimatun maliyah fi nadzari al-Syar'i watsiqatan bidainin bihaitsu yumkinu akhdzu dzalika al-Dain au Akhdzu ba'dhuhu mintika al-'aini (making goods that have property value according to the teachings Islam as collateral for debt, so that the person concerned can collect the receivable or take some of the benefits of that item). According to the National Sharia Council, Rahn ie withhold goods as collateral for debt. Meanwhile, according to Bank Indonesia, Rahn is a contract for the delivery of goods/assets (marhun) from the customer (rahin) to the Bank (murtahin) as collateral for part or all of the debt.[9]

[6] Sayyid Sabiq, *Fiqih Sunnah*, PT Pena Pundi Aksara, Jakarta, 2006, 4th Edition, pg. 90

[7] 7 Fatwa DSN No. DSN-MUI 57/DSN-MUI/V/2007 on Letter of Credit (L/C) with *Akad Kafalah bil Ujrah*

[8] Fatwa DSN-MUI No: 11/DSN-MUI/IV/2000 on *kafallah*

[9] Faturrahman Djamil, *Penyelesaian Pembiayaan Bermasalah di Bank Syariah*, (Jakarta; Sinar Grafika, 2012), pg.44

Relating with the existence of *sharia* warrant and the rule of law, especially in daily economic and business activities, the existence of legal principles is an absolute requirement (*conditio sine qua non*). The legal principles of *sharia* warrant will serve as ethical guidance, foundations and guidelines for validating the rule of law on *sharia* warrant. The legal principle of *sharia* warrant (*al-rahn*) still has problems, due to the difficulties to get a *fiqh* book that can be used as a source of reference on finding out the actual legal principle of *sharia* warrant. While the legal principles of *sharia* bonds (*Iltizam*) are easier to comprehend, since there are existing *fiqh* books that discuss the concerning matter. However, it is not the case with the issue of legal principles of *sharia* warrant. Given this context, the author agreed with what was stated by Afdawaisa in his book' which stated as follows: "One of the fundamental problems faced by *muamalah fiqh* in today's contemporary era is how Islamic law answers various kinds of problems and forms of transactions of contemporary economics and its developments that have not yet been regulated in classic *fiqh books*.[10]

This is understandable, since the classical jurists have studied *muammalah fiqh* atomistically, where the jurists immediately enter into small rules and detail without formulating in advance the general principles of law that govern and support these special agreements. In the books of fiqh, the classic *fuqaha* directly discuss the detailed rules of transations, leasing, unions or business alliance.

Collateral in arabic is known as *al-rahn*. *Al-Rahn* in arabic has a fixed and continuous meaning, which is based on the Arabic language اَلرَّاهِنُ المَاء (*rahinulma'u*) which can be defined as uncontinuous and the word رَاهِنَة نِعْمَة (*rahinatul ni'mah*) which can be defined as uninterrupted favors[11] *Al-rahn* can also mean restrained, based on with the word of *Allah QS. Al-Muddassir* verse 38 namely: كل نفس بم كسبت رهينة (*kullu nafsim bima kasabat rahinah*)" or "everyone is responsible (suspended) for what he has done". The word *Rahinah* mentioned in the verse above means to be restrained. This second meaning is almost the same as the first because what is stuck remains in place.

According to Muhammad Syafi'i Antonio, *al-rahn* is holding one's property customers (*rahin*) as collateral (*marhun*) for debts/loans (*marhunbih*) received. *Marhun* or collateral has economic value. Thus the party that detain or the pawnbroker (*murtahin*) obtains a warrant to be able to collect all or part of its receivables.

According to Imam Abu Zakaria Al-Anshary, *al-rahn* is an act of making objects that are property as a warrant from something that can be paid from the property if the debt

[10] Afdawaisa,2008, *Terbentuknya Akad Dalam Hukum Perjanjian Islam*, Journal of Al-Mawarid, XVIII edition, pg. 182

[11] Abdullah bin Muhammad Al Thoyaar, Al Fiqh Al Muyassarah, Qismul Mu'amalah Cet.I, Madara 1425 pg. 115).

is not paid[12], while Abdul Ghofur Anshori defines *al-rahn* as holding the property of the borrowers as collateral for the loan he received[13]

In scientific studies of *fiqh*, collateral is better known as *rahn*. The definition of *rahn* itself has several meanings defined by scholars. Cleric the Maliki School of Thought defines *rahn* as property held by its owner as collateral debt. Hanafi Madhab scholars define *rahn* as making an object as collateral for receivables that may be used as payment. Meanwhile, the Shafi'i and Hanbali schools define *rahn* as a contract with the meaning of making goods as collateral for debt, which can be used as a debt payment if the debtor cannot fulfill the agreed circumstances in the contract after due.[14]

From some of the definitions above it can be concluded that the elements of *al-rahn* is the existence of goods or objects that contains economic value;

a. there is an act of holding goods or objects as collateral

b. benefit;

c. there is a credit agreement.

Thus, the essence of *al-rahn* is holding the property of the debtor or the borrower (*rahin*) who has an object of economic value as collateral to guarantee the existence of a form of repayment of the debt to the creditor or the one giving the loan (*marhunbih*). In *al-rahn* there is an element that requires the existence of goods that can used as collateral. This guarantees the economic value of an object and to ensure that the aforesaid object can be used by *marhunbih* as the recipient of *al-rahn*. Providing benefits means that *al-rahn* provides security to *marhunbih*. In addition, other important elements arise due to *al-rahn* debt agreement that preceded it.

In the concept of contract law acording to positive civil law, *al-rahn* can be analogous to an 'accessoire' agreement or follow-up (additional) agreement. As a concept on warrant law, *al-rahn* can be analogous to a warrant institution, as an institution of other conventional guarantees which are also 'accessoire' agreements, namely mortgage rights, fiduciaries, pawns and mortgages. Another concerning terminology that needs to be understood is that *al-rahn* has the nature of *tabbaru'*[15] due to what has been given by *rahin* to *murtahin,* not in the means of exchanging for something or a charity contract, which does not require compensation[16] Therefore *al-rahn* in principle is a for of loan agreement by mans of charity. The charity concept is implemented in the form of lending

[12] Anshori, Abdul Ghofur. 2006. *Pokok -pokok Hukum Perjanjian Islam di Indonesia*. Jogjakarta: Citra Media, pg. 89

[13] Ibid, pg. 89

[14] Abdul Aziz Dahlan, Ensiklopedi Hukum Islam, 1st publication, Jakarta: PT.Ichtiar Baru Van Hoeve, 5th edition, 1996, pg. 1480

[15] Wahbah Zuhaily, 1999. *Al-Fiqh Al-Islam Wa Adillatuhu (Fiqh Muamalah Perbankan Syariah)*, Counterpart Team of Bank Muamalat Indonesia, Bank Muamalat Indonesia, Jakarta, pg. 2

[16] Ali, Zainuddin, *Filsafat Hukum Islam*. IV Edition, Jakarta: Sinar Grafika, 2010. pg 4

and borrowing. The aforesaid activity concening the loan must be stated in a contract, to ensure that no party related to be put in in th position of disadvatage. Islamic law pays close attention to the interests of creditors.

Therefore, the creditor is allowed to ask the debtor's goods as collateral debt, so that if the debtor is unable to pay off the debt, the collateral can be sold by creditors. This concept in *fiqh* is called *al-rahn*[17] The concept of mutual charity is clearly written in the *Qur'an*, namely mutual assistance in kindness, for people who are capable and strong should help those who are unable and weak, the rich help the poor and needy.

In the following passage, the reader can assume the brotherhood that is intertwined in the life of the Muslim. This is as written in QS. Al-Maidah verse 2, which means: "……..and assist others in (doing) virtue and piety, and don't assist each other in sin and transgression. and fear Allah, Verily, Allah is very severe in punishment."

Sharia warrants are guarantees based on the principles of Islamic law. The main characteristic of *sharia* warrants lies in the concept of non-interest which means that there is no additional fee that must be paid by the debitor. *Sharia* warrant in essence is a legal system. In the concept of Islamic law warrants are known as the term of *al-rahn* and has existed since the time of Rasulullah SAW. In the *Hadith* narrated by Bukhari and Muslim it is stated that Rasulullah SAW bought food from a Jew by making his armor as a form of collateral to the Jew. According to Islam legal scientists, the warrant given by the Prophet is the first event regarding guarantees in Islam, which can be interpreted as the Messenger introduced the concept of warrant to be made as a source of Islamic law concerning with guarantees.

Based on the *Qur'an* and *Al Hadith*, *fiqh* scholars agree that *al-Rahn* is a form of warrant under Islamic law. The implementation of *sharia* warrant according to *jumhur ulama* is permissible since there are benefits contained therein in the context of *muamalah* relations between fellow human beings and as a moral embodiment in carrying out Islamic economics.

Actualization of Islamic economic values is an effort and process to understand, conceptualiinge and embodying the values in people's lives. While Islamic values are a collection of principles, the aforesaid principles can be used as a guide in carrying out one's life.[18] The values are mutually exclusive related to form a unified whole, including the values of Islamic economics. As a principle, Islamic economic values contain universal nature, that is to say the meaning of these values is not only focused on one economic field, rather it covers all forms of Islamic economic activity.

[17] Rachmat Syafei,2000. *Fiqh Muamalah*, Pustaka Setia, Bandung. pg. 59

[18] M. Arifin Hamid,2007. *Hukum Ekonomi Islam (Ekonomi Syariah) di Indonesia Aplikasi dan Perspektifnya*, Ghalia Indonesia, Bogor. pg 25

Sharia bonds and *sharia* warants are two legal entities that are not separable. The existence of new *sharia* warrants arises after the existence of *sharia* agreements. This is analogous to the concept in Civil Law which elaborates *sharia* warrant as a 'follow-up agreement' (accessoire), while the *sharia* bond is the main element. This means that the legal principle underlying the *sharia* contract is *mutatis mutandis* can also be applied as a legal principle of *sharia* warrants.

The contract is divided into a principal contract (*al-„aqd al-ashli*) and an accessoir contract (*al-'aqd at-tab'i*). The main contract is a stand-alone contract. Its existence is independent on another matter, while the accessoire contract is a contract which existence does not stand by itself, but depending on the main contract, this contract is an agreement to the terms of guarantee. For this type of contract, the rule of Islamic law applies, which reads "who follows" (*at-tabi 'tabi'*). This means that the accessoire agreement follows the principal agreement. [19]

Warrants are closely related to material rights, warrants are property rights and part of the law of objects as stipulated in the second book of *Burgerlijk Wetboek*/KUHPerdata[20] or the Indonesian Civil Code. The emergence of warrants in relation to this material right is based on general lacks in the system of warrant in article 1131 of the Civil Code. Lawmakers have produced more legal alternative warrant instruments, namely a special guarantee whose object is the property of the debtor, which will be appointed specifically and intended for certain creditors as well. Because of the essence of the materials regulated are physical objects, the provisions of this special warranty are grouped into one arrangement in the Law of Things regulated in the second book of the Civil Code[21]

However, the warrant that is general in nature has not given the creditors a sense of security that is originally aimed. Creditors require a guarantee that is specifically in a form of collateral for its receivables and applies only to the creditor himself. The existence of this special guarantee arises because of the agreement held between creditors and debtors which can be in the form of material warrants or individual warrant, that is, there are certain people who are able to pay or fulfill achievements when the debtor does not fulfill its obligations or is in default. In banking practice, warrant are institutionalized as special guarantees that are material in nature, namely mortgages, pledges, and fiduciaries, while guarantees is a *borgtocht* (guarantement agreement).

Civil law recognizes warrants that are material rights and individual rights. Material guarantees are guarantees in the form of absolute rights to an object, which has the characteristics of having a direct bond with certain objects from the debtor, can be defended against anyone, always follows the object (*droit de suite*) and can transferred, the form of the guarantee institutions are, mortgage and fiduciary, warranty that are

[19] Syamsul Anwar, *Hukum Perjanjian Syariah*, (Jakarta: PT. Raja Grafindo Persada, 2007), pg. 77.

[20] Djuhaendah Hasan,1996. *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal*, Citra Aditya Bakti, Bandung. pg. 25

[21] Isnaeni, 1996.*Hipotik Pesawat Udara di Indonesia*, Dharma Muda, Surabaya, pg. 34

individual emphasizes the bond between certain individuals which are the parties involved, can only be defended against certain debtors, against the assets of the debtor in general (*borgtocht*).

Collateral is essentially an asset that are loaned or distributed to other parties. In banking institutions the nature of the function the main warranty is more intended to protect public funds managed by the bank while protecting the continuity of the banking business, while on the other hand the borrower's customer funds or the debtor is required to commit to be responsible for returning debt.

There are several main functions of collateral which include[22]: 1) To maintain bank assets in the form of credit, because by submitting collateral to the bank, the bank has the right to receive repayment of proceeds from the sale of collateral if the customer defaults; 2) Ensure that the financing of the business runs smoothly by handing over assets from the owner (the debtor); 3) As a bank warranty, the debtor will be morally responsible for for the business project; 4) Encouraging debtors to repay debts so as not to lose the assets that have been put as a warrant.

Guarantees for granting credit or financing based on *Sharia* principles is in the ability of debtor to pay off their obligations in accordance with what was agreed, is an important factor that must be considered by the party that acted as a creditor whether it is a bank or a non-bank financial institution. To obtain the trust in the bond, before giving a loan, the creditor engage a careful assessment of the character, ability, capital, collateral, and business prospects of debtor customers, which in the banking world is known as 5C (the five C for credit) which is the abbreviation for the factors of character, capital, capacity, collateral, and conditions of the economy.

In addition, the basic principles have also been emphasized in Article 2 of the elucidation of the *sharia* banking regulation, in which explains that when business activities are based on *sharia* principles, among others, are business activities that does not contain elements:

a. *Riba,* namely the addition of income obtained illegally, in exchange of similar goods that are not of the same quality, quantity, and time of delivery (*fadhl*), or in lending and borrowing transactions that require the recipient to return excessive funds received off the loan due to the continued period (*nasi'ah*);
b. *Maisir*, namely transactions that depend on an uncertain condition and chance;
c. *gharar*, namely transactions whose object is unclear, not owned, not known existence, or cannot be submitted at the time the transaction is made unless regulated outside *sharia*;

[22] Agus Yudha Hernoko,1998. *Lembaga Jaminan hak Tanggungan Sebagai Penunjang Kegiatan Perkreditan Perbankan Nasional*, Thesis, Universitas Airlangga,Surabaya. pg. 66

d. *haram*, namely transactions whose object is prohibited in *sharia*; or

e. *zalim,* namely transactions that cause injustice to other parties.

CONCLUSION

According to Article 26 of the Compilation of Sharia Economic Law (KHES), the contract is not legal if it conflicts with: Islamic law, laws and regulations, general orde and/or, decency. Referring to the above provisions of the *at-taba'i* contract (accessoire), then the application of guarantee institutions known in civil law is not necessarily applied to *sharia* guarantee institutions since they are not in accordance with *sharia* principles.

Sharia warrants are guarantees based on the principles of Islamic law. The main thing about *sharia* warrants is that in principle *sharia* warrants are non-interest warrant. Which means that thre are no additional fees that must be paid. *Sharia* warrants in principle is a warrant system known as *al-rahn* and has existed since the time of Rasulullah SAW, the warrant given by Rasulullah is the first warrant in Islam, which can be interpreted as the Messenger introducing this guarantee to be used as a source of Islamic law. Then the implementation of the warrant insitution known in Civil law is not necessarily means that it can be applied to *sharia* warrant institutions since it is not in accordance with *sharia* principles.

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