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Authority of the Notary in Making Murabahah Deeds

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ABSTRACT

The background of this research is that there are notaries who still make sharia contracts without paying attention to or in accordance with sharia principles, especially for non-Muslim notaries. The purpose of this study is to provide an understanding of the authority of a notary in making a murabaha contract deed in Islamic banks. This research, which uses normative legal research methods with a statute legal approach and conceptual approach, resulted in the following findings: first, with regard to the legal requirements of the agreement in making a murabaha contract deed by taking into account sharia principles; and second, with regard to the professional code of ethics of a notary.

INTRODUCTION

Contracts are essential in every transaction, including akad in Sharia business. For an agreement to have legal force, it must be recorded before a notary (Aidil, 2011). In this regard, every industry, including Sharia business, always requires a notary as a public official who does authentic deeds by their duties as stipulated in the Law of the Republic of Indonesia Number 30 of 2004 concerning the Position of Notary as amended by Law Number 2 of 2014. they concern Amendments to Law Number 30 of 2004 concerning the Position of Notary (after this referred to as UUJN) (Aidil, 2011). Notaries by the state are authorized to carry out some of the state's duties in private law (Aidil, 2011). In guaranteeing certainty, order, and legal protection, authentic written evidence regarding actions, agreements, stipulations, and legal events made by or before a notary is needed (Aidil, 2011). The importance of role of a notary in Sharia business is related to making an agreement or deed, where for a contract to have legal force, it must be recorded before a notary. Related to this, every business, including the Sharia business, always needs a notary as an official who does authentic deeds by their duties regulated in UUJN (Aidil, 2011), including in the Islamic Banking sector.

Banks, as financial institutions, utilize notary legal services in every business agreement, such as financing and credit agreements, including additional contracts regarding collateral binding (Yusup, 2018). Generally, conventional banks involve a notary in making a deed of understanding compared to Islamic banks. However, currently, Islamic banks as a subsystem of the national banking system are regulated by a clause in Law Number 21 of 2008 concerning Islamic Banking (after this referred to as the Islamic Banking Law) also use notary legal services in all of their business activities, especially those related with a deed of the financing agreement,

one of which is a murabahah akad (Yusup, 2018). Islamic bank products use the principles and principles of Sharia economic law; in other words, all recording business agreements outlined in the notarial deed must also refer to Sharia economic norms (Aidil, 2011). In this regard, the Notary who formulates a Sharia financing contract is expected to pay attention to the pillars and conditions for the validity of the agreement as determined by Islamic law, the clauses listed in each article of the Sharia akad can be seen whether the legal construction is in accordance or not by sharia contract law. Notaries in formulating Islamic banking contract deeds must pay attention to matters regulated in the UUJN and the importance of understanding the field of Islamic banking as stated in Article 2 of the Islamic Banking Law, which essentially states that Islamic banks carry out their economic activities based on Sharia principles (Efendi, dkk, 2019). There are no specific regulations regarding the form of a Sharia deed or clauses for a Sharia akad deed in UUJN. In practice, contracts between banks and customers still refer to positive law and notarized financing contracts. The form of a Sharia deed notarized to be called an authentic deed must comply with the applicable laws and regulations. Therefore a notary in formulating the form of a Sharia akad deed must pay attention to the conditions in Article 38 UUJN (Efendi, dkk, 2019).

In practice, many notaries make Sharia contracts that are not following Sharia principles, and this happens to notaries who are not Muslims at all and only accept orders from Sharia banks who don't even know anything about the pillars and terms of the validity of a contract based on sharia (Aidil, 2011). Based on this, of course, there is a need for legal certainty regarding the authority of a notary in making a murabahah akad deed and regarding the form of doing a murabahah deed, especially for non-Muslim notaries. Bearing in mind that in making a Sharia

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banking deed, a notary must have in-depth knowledge of Sharia principles because an act of Sharia banking is not the same as a deed in general because a deed of Sharia banking will be valid if it fulfills the pillars and conditions of the contract in Islamic law. Based on the background description above, one problem becomes a legal issue in writing this scientific paper: what is the authority of a Notary in making a murabahah akad deed in an Islamic Bank?

LITERATURE REVIEW

Notary comes from the word *nota* literary, which means written marks or characters used in writing or describing the sentences conveyed by sources. The sign or character in question is a sign used in shorthand (Tobing, 1980). In essence, the position of a notary is a public official who serves the community's needs regarding authentic evidence that can provide certainty of civil relations. Notaries began to apply in Indonesia in the early 17th century with the existence of the *oost Ind. Compagnie* in Indonesia (Tobing, 1980). The authority of a notary exercised in terms of carrying out his position as a notary in doing authentic deeds is an authority obtained by attribution, which is normatively regulated through UUJN. The authority of a notary as a public official includes four things, namely: 1) The Notary must be authorized as far as the deed made is concerned; 2) The Notary must be authorized insofar as it concerns the people for whose benefit the deed is drawn up; 3) The Notary must be authorized insofar as it relates to the place where the deed was drawn up; 4) The Notary must be authorized as long as it is related to the time of doing the deed (Tobing, 1980).

According to murabahah, it is a sale and purchase carried out by someone based on the seller's purchase price plus profit on the condition that both parties must know (Umam, 2007, p. 116). According to the language, murabahah is an act of mutual benefit between the two parties, namely the first party as the one who asks for the purchase and the second party who buys it (Umam, 2007, p. 116). In channelling funds in the form of financing based on a Murabaha contract, the following conditions apply: a.) The bank acts as a party providing funds to purchase goods related to murabahah transaction activities with customers as the purchasers of goods; b.) Goods are objects of sale and purchase of which the quantity, quality, acquisition price, and specifications are known; c.) Banks are required to explain to customers the characteristics of financing products based on Murabaha contracts, as well as the rights and obligations of customers as stipulated in BI regulations regarding transparency of information on bank products and the use of customer personal data; d.) Banks are required to analyze financing applications based on murabahah contracts from customers, which include personal aspects in the form of analysis of character or business aspects, including analysis of business capacity (capacity), finance (capital), and business prospects (condition); e.) Banks

can finance part or all of the purchase price of goods whose qualifications have been agreed upon; f.) Banks must provide funds to realize the supply of goods ordered by customers; g.) The margin agreement is determined only once at the beginning of financing on a murabahah basis and does not change during the financing period; h.) Banks and customers are required to put the agreement in the form of a written agreement in the form of a financing contract on a murabahah basis, and i.) The period of financing the price of goods by the customer to the bank is determined based on the agreement between the bank and the customer (Umam, 2007).

MATERIALS AND METHODS

The research method in writing scientific papers uses the normative legal research method, which focuses on applying rules or norms in practical strategies. This normative legal study studies formal legal principles such as laws, procedures, and literature with theoretical concepts (Efendi, dkk, 2019). In practice, this method is used by the author to examine the authority of a notary in making murabahah contracts, especially those in Islamic banks; where to answer this study, the author uses 2 (two) approaches, namely the statute legal approach analyzing various laws and regulations, laws relating to the authority of a notary in making a murabahah deed, and a conceptual approach by analyzing several books or legal journals that discuss the authority of a notary in doing a deed.

RESULTS AND DISCUSSION

Legal Basis for Notary Authority in Making Deeds

Authority comes from the word *authority* in Dutch, "bevoegdheid" which juridically means the ability granted by laws and regulations to cause legal consequences (Indrohato, 1994). In administrative law, authority can be obtained through attribution, delegation, and mandate. The authority obtained by attribution is the granting of new authority to a position based on laws and regulations. The authority obtained through commission is the delegation of existing authority based on statutory regulations. The authority accepted to employ a mandate is given because the competent person cannot (Adjie, 2008). Related to this, authority is also often equated with the term power because the power the Executive, Legislature, and Judiciary possesses is formal (Setiardja, 1990). Authority is the power to decide to order or delegate responsibility to others. According to Prajudi Atmosudirdjo, authority is the power to take all actions in the field of public law, while the power to take action in private law is called rights (Atmosudirdjo, 1998). Another definition of authority is the right of an individual to perform specific actions with certain limitations where other individuals recognize these actions (Irianty, 2010). Based on some of the definitions of authority above, authority is a person's right to carry out certain activities or actions, where law, superiors, or other people can grant the right (authority).

In connection with the explanation above, discussing the

authority of a Notary in doing a deed, as the theory of authority, which consists of 3 (three) sources, attribution, delegation, and mandate, the authority that is the right of a Notary to do a deed is an attribution authority, namely the granting of authority that new to a position based on a statutory regulation or the rule of law, in which case the Notary obtains a source of authority from Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (after this referred to as UUJN). Based on the UUJN, a Notary as a public official has the authority to do deeds within the scope of civil law as stipulated in Article 15 paragraphs (1), (2), and (3) UUJN, with a vast range of authority of a Notary in the civil field. Notaries are given the authority to do authentic deeds regarding all actions and agreements stipulated by laws and regulations and desired by interested parties to be stated in authentic acts. Not only in terms of positive Indonesian law, but Islamic law also regulates the authority of a Notary in doing authentic deeds that are implicitly contained in the QS. Al-Baqarah Verse 282, whose translation is as follows:

“O you who have believed! When you contract a debt for a specified term, write it down. And let a scribe write (it) between you in justice.” (Departemen Agama RI, 2002)

The provisions above show that the Qur'an has expressly regulated that every transaction is ordered to be written or recorded, and this is implemented by a Notary in making an authentic deed.

Discussing authentic deeds, in Article 1868 of the Civil Code, it is explained that an authentic deed is a deed drawn up in a form determined by law by or before an authorized public official, where the public official referred to in this case is a Notary (See Article 1 UUJN). Furthermore, Article 1870 of the Civil Code emphasizes that an authentic deed provides perfect evidence of what is contained in it, meaning that when a dispute occurs, the authentic deed drawn up by a Notary is strong evidence that cannot be denied the truth.

In connection with the explanation above, knowing and understanding that not all deeds can be called authentic deeds is necessary. A deed can be said to be an authentic deed if it fulfills the following conditions (Koesoemawati & Rijan, 2009):

a. The form of the deed follows the law. The authentic deed has its pattern. Related to that, if someone is going to do a deed before a notary, they cannot make their format.

b. An authentic deed is made before a public official appointed by the state. The notary is a public official with the authority to do authentic deeds. Notaries are set by the state through the Minister of Law and Human Rights, as explained in Article 2 UUJN.

c. An authentic deed is done by an authorized official or a notary with the right. Notaries on leave or having problems are not allowed to do authentic deeds. A notary whose license is suspended or does not yet have a permit cannot do an authentic deed.

Based on the description above, the role of a Notary

in doing a deed is essential, so the law also gives this authority to a Notary. Notaries are given the authority to make deeds from agreements made by the parties, both deeds to business, such as sale and purchase transactions, leases, or acts in the private sphere, such as deeds of grants, inheritance, etc. It is not surprising that in the world of Sharia business, notaries have an essential role, one of which is Islamic banking.

Deed of Murabah Akad in an Islamic Bank as One of the Deeds Made by a Notary

Every transaction in Sharia business is indeed inseparable from the name of the agreement or what is also known as the akad. The akad is used in binding agreements between the Islamic Bank and the Customer regarding raising and channeling funds at Islamic Banks. In this regard, the akad must be made before a Notary for a compact or akad to have legal force, so every business, including Islamic banking, always requires the role of a Notary.

The development of Sharia banking, which until now has become a necessity, makes transactions through various Sharia contracts also increasingly in demand by the public, one of which is murabahah akad. Related to this, the increasing public interest must, of course, be balanced with the existence of legal protection for the parties, both Islamic Banks and customers, and the form of protection that can be carried out is through the making of a murabahah akad deed made before a Notary. The UUJN does not explicitly explain the types of deeds or agreements that are the authority of a Notary. Still, it is implicitly said that a Notary is given the power to do authentic deeds regarding all actions, agreements, and stipulations required by laws and regulations or desired by interested parties (parties) to be stated in an authentic deed. This means that a Notary may make any deed originating from an agreement as long as it does not violate the provisions of the law, including deeds developing from a contract or murabahah akad.

According to Muhammad Syafi'i Antonio, a murabahah akad is a sale and purchase agreement at the original price plus a profit agreed upon by both parties (Antonio, 2001, p. 101). Muhammad also stated that murabahah is a contract of sale and purchase of goods for the cost of the goods plus the agreed profit margin (Muhammad, 2014). Based on the sale and purchase agreement, the Bank buys and sells the ordered goods to the Customer. The Bank's selling price is the supplier's purchase price plus the agreed profit. The Bank must honestly notify the cost of goods to the Customer along with the costs involved. This concept is in line with the opinion of Irma Devita Purnamasari and Suswinarno, who provide the idea of murabahah, namely, the Bank buys goods from producers, then resells them to the Customer plus the profit agreed upon by the Bank and the Customer (Purnamasari & Suswinarno, 2011).

In Indonesia's positive law, murabahah is also regulated in Article 20 paragraph (6) of Supreme Court Regulation Number 2 of 2008 concerning the Dissemination of the

Compilation of Sharia Economic Law (KHES), which states that murabahah is the most profitable financing contract carried out by sahib al-mal with parties which requires a buying and selling transaction by adding the agreed profit (See the provisions of Article 20 paragraph (6) KHES). There is also a rule in the DSN-MUI fatwa No. 04/IV/2000 Concerning Murabahah Financing. In practice, the murabahah akad is one of the contracts that are in great demand because several factors distinguish it from other agreements, namely; First, the clarity of the buyer (customer) where Islamic banks do not need to provide goods without a clear buyer; Second, the clarity of the benefits obtained by Islamic Banks, because Islamic Banks can ensure the benefits derived from these goods; and Third, murabahah financing is more easily practiced by Islamic Banks at this time (Hakim, 2017). In its implementation, there are several conditions of murabahah, including:

a.) The initial price must be understood by both parties (seller and buyer). Regarding the murabahah akad, the seller must transparently convey the first purchase price of the goods he will sell to the buyer. The buyer has the right to know the purchase price of the goods. This requirement also applies to buying and selling the same type, such as al-isyrak, at-tauliyah, and al-wadhiyah;

b.) The amount of profit must be known and agreed upon by both parties. The seller is obliged to convey the desired profit, and the buyer has the right to know and even agree on the profit to be obtained by the seller. If one of the two parties disagrees with the seller's profit, then the murabahah akad does not occur;

c.) The introductory price can be known in units, regarding what is meant by teams here: one dirham, one dinar, one hundred thousand rupiahs, one kilogram, one quintal, and so on. Related to murabahah and in buying and selling other desired trusts is the transparency between the cost price and the possibility of profit to be obtained. Regarding the items to be transacted, the unit is unknown; it will be challenging to determine the profit to be accepted so that murabahah does not occur;

d.) Murabahah akad are not mixed with ribawi arrangements. Excess is not called profit in a Murabaha transaction but is still said to be usury because it changes from the original measure;

e.) The first contract in murabahah must be valid. If the first purchase is not made authentically, then the murabahah transaction is considered canceled. (Afandi, 2009)

Notary Authority in Making Deeds of Murabahah Akad in Islamic Banks

The existence of a Notary is needed by Islamic Banks, one of which is when doing deeds originating from agreements or murabahah akad, to provide legal certainty guarantees for the parties, both Islamic Banks and Customers, if one day there is a dispute or dispute. In this regard, as in doing authentic deeds in general, before an agreement is declared authentic, the Notary must pay

attention and ensure in advance whether the deal is valid and can be accounted for by the parties.

Discussing the terms of the validity of the agreement, in Article 1320 of the Civil Code, it has been stated that a deal can be said to be valid if it fulfills several conditions, namely the agreement of those who bind themselves, the ability to agree, a particular matter, and lawful causes. In addition to these provisions, bearing in mind that a murabahah akad is a type of agreement or contract in Islamic economic law, the Notary also needs to pay attention to the terms of the validity of the deal from the point of view of Islamic law. In contract law according to Islamic law, as stated by Sayid Sabiq in Chairman Pasaribu and Suhrawardi K. Lubis, who explained that in general, the conditions for the validity of an agreement include (Pasaribu & Lubis, 2004).

Does not violate the principles of Sharia

This first condition means that the agreement entered into by the parties is not an act that is against the law or an act that is against the principles of shari'ah in Islam (Pasaribu & Lubis, 2004). If the act violates the principles of Shari'ah, then the agreement is invalid. Related to this, the invalidity of an agreement results in the deal being null and void by law. In connection with this first condition, if it is connected with a mudharabah contract transaction, this contract is a form of buying and selling, which is permissible and even recommended in Islam. This is as stated in Q.S. An-Nisaa Verse 29, whose translation is:

"O you who have believed! Do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful."

Murabahah was even commonly carried out by Rasulullah SAW and his companions, namely an agreement or contract of sale and purchase of goods by stating the acquisition price and profit (margin) agreed upon by the seller and the buyer (Karim, 2004).

It must be equally pleased, and there is a choice

This second condition means that the contract or agreement made by the parties must be based on the deal, willingness, and pleasure of both parties, where each party wants the contract to be made without any coercion from any party (Pasaribu & Lubis, 2004). Related to this, the Notary must ensure that the murabahah akad created by the parties follows the wishes and desires of the parties without coercion from any party.

It must be obvious

This third condition implies that what is agreed upon by the parties must be obvious and transparent regarding the contents of the agreement to avoid misunderstandings between the parties in the future (Pasaribu & Lubis, 2004, p. 59). In other words, the contents of a murabahah akad cannot contain elements of gharar. Concerning this condition, the Notary must ensure that the goods or products that are the object of the agreement must be

precise, starting from the description and origin of the goods that are used as the object of the contract, the price and profit margin set, the agreed period, and other things that can clarify the agreement.

When the three conditions mentioned above have been met, the murabahah akad can be valid and stated in a deed drawn up before a notary. The need for a Notary to pay attention to the legal terms of the agreement is also a factor in evaluating the quality of a Notary and the form of accountability of the Notary, considering that a Notary is someone whose statements are reliable and trustworthy, signatures and seals provide strong, impartial guarantees and evidence and advisors who are flawless. The deed made by a Notary also makes an agreement that can protect the parties from the emergence of disputes or conflicts in the future (Aidil, 2011).

After discussing the matters that a Notary must consider in terms of the agreement, several things must also be considered regarding the limitations in exercising his authority as a Notary. The matters referred to include, among others, the Notary is obliged to act trustworthy, honestly, thorough, independent, impartial, and protect the interests of the parties involved in legal actions (See Article 16 paragraph (1) UUJN). In Article 54 UUJN, Notaries are not allowed to provide Grosse, copies, or quotations, nor are they allowed to show or notify the contents of the deed other than those who have an interest in the act. If a Notary violates these provisions, then the Notary is deemed to have neglected the authority given to him and, of course, must be held accountable for his actions (Sjaifurrachman & Adjie, 2011).

Concerning the Notary's responsibility for the deed he made is at the beginning or head of the deed and the end of the act. At the beginning of the deed, it is the responsibility of the Notary because the beginning contains information on the day, date, and time at which the deed was done and also the name and position of the Notary who did the act. Shows the certainty of the time of doing the deed and shows whether the making of the deed is included in the area of the office of the Notary who made it. At the same time, the end of the act is the responsibility of the Notary because, at the end of the deed or the closing, it states the reading of the deed and where it was completed. In this regard, the Notary's accountability can be requested as long as the Notary is still authorized to carry out his position as a Notary. The Notary's responsibility arises from the obligations and authorities granted by law to him. These legally binding obligations and rules come into force from the time the Notary is sworn in as a Notary, in which this oath should be able to control all actions of the Notary in carrying out his position.

This is in line with Robert B. Seidman's theory about the working system of the law, where when a Notary performs his duties in the notary field, the Notary serves as the executor of the law. In contrast, when the Notary is liable, the Notary's position as the one subject to the law deals with the imposition of sanctions.

Based on the explanation above, it is understandable that a Notary must always adhere to the laws and regulations that apply in Indonesia when carrying out their duties. A Notary is also obliged to carry out his duties by the ethics mutually agreed upon in the form of a code of ethics. This code of ethics limits the actions or deeds of Notaries so that in carrying out their practice, they do not act arbitrarily. A person who has decided to serve as a Notary Public requires an excellent basic mentality and a mental attitude toward a Notary Public. The mental attitude of a Notary is one of the standards for creating a good Notary; that is what is commonly referred to as the ethics of the Notary profession (Koehn, 2000).

CONCLUSION

The authority of a Notary in making a murabahah akad deed in an Islamic Bank is a form of attribution authority, namely the granting of new authority to a position based on a statutory regulation or the rule of law, in which case the Notary obtains a source of authority from Law Number 2 of 2014 concerning Amendments Based on Law Number 30 of 2004 concerning the Position of Notary and in line with QS. Al-Baqarah Verse 282. In carrying out this authority, there are 2 (two) things that a Notary must pay attention to, namely: 1) About the Agreement or murabahah akad made by the parties, where a Notary must first pay attention to the legal requirements of a murabahah akad made by the parties, namely based on Article 1320 of the Civil Code and 3 (three) requirements for the validity of an agreement according to Islamic law; 2) About the Professional Code of Ethics for a Notary, where a Notary must pay attention to the provisions that a Notary may and may not do.

RECOMMENDATIONS

For Notaries, both Muslim and non-Muslim, in making murabahah akad, in addition to paying attention to the legal terms of the agreement from the perspective of positive Indonesian law, should also pay attention to and understand the terms of the validity of the contract from the perspective of Islamic law, especially matters relating to sharia principles.

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