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Exploration of Islamic Economic Principles on Collateral in Legislation in Indonesia

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Abstract: This research aims to examine and analyse the regulatory concept and legal position of guarantees in statutory regulations and also seeks to explore the Harmonization of Sharia Economic Principles regarding Guarantees in statutory provisions. Analytical descriptive methods were used in this research, and a juridical-normative approach was used with qualitative research data types. Primary, secondary and tertiary data sources were obtained from several relevant literature. This research indicates that the concept of regulation and the legal position of guarantees in statutory provisions is contained in legislation that is made and ratified in writing. Conceptually, the legal regulation of guarantees can be divided into three, namely, the first concept of legal regulation of guarantees, which originates in Book II of the Civil Code, the second is the law of guarantees, which is regulated outside Book II of the Civil Code, the third is the legal regulation of guarantees according to law. sharia economics. Guarantee law acts as a subsidiary or complementary agreement. In connection with the harmonisation of Sharia economic principles, guarantees in statutory regulations can be understood through various principles of Sharia economic law reflected in legislation. These principles consist of the principle of worship (*al-tauḥīd*), the principle of justice (*al-'adl*), the principle of *'amar ma'rūf nahi munkar*, the principle of freedom (*al-ḥurriyyah*), the principle of equality (*al-musāwah*), the principle of helping each other (*al-ta'āwun*), and the principle of tolerance (*al-tasāmuḥ*), which is substantially contained in the legislation.

Keywords: guarantees; legislation, Sharia economic principles.

1. Introduction

The financial institutional sector, encompassing both banking and non-banking sectors, plays a vital role in exploring and enhancing the potential of national capital. The activities carried out by Islamic banks essentially mirror those of conventional banks, with the primary function being to gather and distribute funds based on the principle of trust. This is implemented by prioritising prudence and good faith among all parties involved.[1]

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[1] Abdul Ghofur Anshori, *Perbankan Syariah di Indonesia* (Yogyakarta: UGM PRESS, 2018).

Generally, banks may approve financing applications made by customers if they are accompanied by collateral.[2] This aligns with the provisions outlined in Article 1, Point 26 of Law No. 21 of 2008 on Islamic Banking. The existence of collateral objects in Islamic banking financing aims to protect the bank as the capital owner (creditor) should the customer (debtor) fail to repay the funding. In the event of a default by the customer, the bank may execute the collateral, whether in the form of mortgage rights or other types of guarantees.[3] However, the regulations regarding collateral in Islamic banks still follow the provisions applicable in conventional banking, which is considered less appropriate, as the fundamental financing principles in Islamic banking differ from the credit principles employed in conventional banks. For instance, in a *muḍārabah* financing contract, the basic principle of its implementation differs from that of a credit-based financing arrangement.

According to Fatwa DSN-MUI No. 07/DSN-MUI/IV/2000 concerning *Muḍārabah* Financing, it is explained in point 7 that "in principle, there is no collateral in *muḍārabah* financing; however, to prevent possible deviations by the *muḍārib*, an Islamic Financial Institution may request collateral from the *muḍārib* or a third party. The collateral can only be liquidated if the *muḍārib* is proven to have violated the terms agreed upon in the contract."[4]

Currently, Islamic banking requires collateral for prospective customers in *muḍārabah* financing agreements. This requirement serves as the basis for building trust with the Islamic bank to disburse the financing. However, according to Islamic economic principles, collateral is not a mandatory component in a financing contract.[5] The issues arising from this study are related to the regulation and legal status of collateral in Islamic banking financing and how Islamic economic principles are reflected in the legal framework governing collateral.

Previous studies relevant to this topic include research by Ifa Latifa Fitriani (2017), which concluded that the collateral standards in Article 8 of Law No. 10 of 1998 are not explained on a fundamental level. The collateral obligation in Islamic banking does

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[2] Veithzal Rivai dan Andria Permata Veithzal, *Islamic Financial Management: Teori, konsep dan aplikasi panduan praktis untuk lembaga keuangan, nasabah, praktisi, dan mahasiswa* (Jakarta: Rajawali Press, 2008).

[3] M Fauzan Rusyidi Nst dan Mustafa Khamal Rokan, "Strategi Penyelesaian Eksekusi Hak Tanggungan Terhadap Benda Jaminan Dalam Pembiayaan Murabahah Pada Perbankan Syariah (Studi Kasus: PT Bank Syariah Indonesia Area Medan Kota)," *Ekonomi Bisnis Manajemen dan Akuntansi (EBMA)* 3, no. 1 (2022): 350–58, https://jurnal.ulb.ac.id/index.php/ebma/article/view/2819.

[4] Faridatuz Zakiyah dan Luqman Nur Hisam, "Jaminan dalam Pembiayaan Mudharabah (Studi Kasus Perbankan Syariah di Indonesia)," *TAWAZUN: Journal of Sharia Economic Law* 1, no. 2 (30 September 2018): 199, https://doi.org/10.21043/tawazun.v1i2.5092.

[5] Wira Purwadi, Agung Subayu Koni, dan Radjab Djamali, "Penerapan Jaminan pada Bank Syariah dalam Pembiyaan Mudharabah," *Al-'Aqdu: Journal of Islamic Economics Law* 2, no. 1 (2022): 37, https://doi.org/10.30984/ajiel.v2i1.1990.

not align with the understanding of conventional banking. This is related to Islamic principles regarding *Raḥn* and *Kafālah*, the principles of *ushul fiqh*, and *al-'urf*. Furthermore, Islamic banks consider decentralised funds, i.e., public funds that must be spent carefully by evaluating risks, moral hazards, and the need for collateral, as one of the reasons for granting loans.[6]

Saifur Rozi[7] found that immovable property collateral, specifically land in Indonesia, does not meet the Islamic contractual standards free from elements of usury, gambling, uncertainty, haram, or oppression, and is not synchronised with the existing legal provisions. This collateral is still bound by a standard contract regulated by the Minister of Agrarian Affairs/Head of the National Land Agency Regulation No. 3 of 1996, which governs SKMHT, APHT, land mortgage certificates, and land rights certificates. Therefore, a revision of the Mortgage Law (UUHT) is necessary to address the issue of land collateral in line with Islamic principles. Bambang Setyabudi[8] showed that the legal protection regulations for debtors and third parties in credit agreements with fiduciary collateral objects have yet to reflect the principle of fairness. This is evident in the transfer, pledge, leasing, or profit-sharing of goods as fiduciary collateral. As a result, a regulatory reconstruction is necessary for the legal protection of debtors and third parties. Sudirman[9] demonstrated that implementing Islamic principles in the Deed of Granting Mortgage Rights (APHT) is part of sharia compliance. This is based on the objectives of Islamic law, particularly *maqāṣid al-sharīʿah*, with an emphasis on *hifẓ al-māl* (the protection of wealth). The application of *Raḥn Tasjīlī* on collateral objects, such as land rights in Islamic financing, still refers to the Mortgage Law, as there is no specific regulation concerning Sharia-compliant collateral, including Sharia mortgage rights.

The urgency of this study lies in the effort to trace legal certainty and fairness in the practice of economics in Indonesia, particularly regarding the reflection of Islamic economic principles in the regulation of collateral in Islamic banking. This research differs significantly from previous studies, focusing on analysing collateral's regulation and legal status in the legislative framework and the Islamic economic principles related to collateral in the prevailing regulations.

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[6] Ifa Latifa Fitriani, "Jaminan Dan Agunan Dalam Pembiayaan Bank Syariah Dan Kredit Bank Konvensional," *Jurnal Hukum & Pembangunan* 47, no. 1 (2017): 134, https://doi.org/10.21143/jhp.vol47.no1.138.

[7] Maslihan Saifurrozi, "Konsep Jaminan Hak Tanggungan Dalam Ekonomi Yang Sesuai Prinsip Syariah" (Disertasi Doktor, Yogyakarta, Universitas islam Indonesia, 2021), https://dspace.uii.ac.id/handle/123456789/47703.

[8] Bambang Setyabudi, "Rekonstruksi Regulasi Perlindungan Hukum Bagi Debitur Dan Pihak Ketiga Dalam Perjanjian Kredit Dengan Objek Jaminan Fidusia Berbasis Keadilan" (Disertasi Doktor, Semarang, Universitas Islam Sultan Agung, 2022), https://repository.unissula.ac.id/30929/.

[9] Sudirman, "Prinsip Kepatuhan Syariah Dalam Pembebanan Hak Tanggungan Pada Pembiayaan Bank Syariah" (Disertasi Doktor, Surabaya, Universitas Airlangga, 2022), (Surabaya), https://all.fh.unair.ac.id/index.php?p=show_detail&id=22735.

2. Methods

This study is classified as normative legal research, which examines law based on concepts established as rules or norms within society and serves as a framework for human behaviour.[10] This research's legal analysis focuses on the regulations governing financial institutions, particularly those related to the law of collateral in the Islamic banking system. Additionally, the research is supported by a comparative legal method, which contrasts the principles of collateral law in the conventional banking system with those in Islamic banking law.

3. Results and Discussion

3.1 Position and Legal Regulation of Collateral in Legislation

The legal regulation of collateral generally refers to Article 33 of the 1945 Constitution of the Republic of Indonesia. This is based on the role of collateral law as a pillar supporting the national economic system, which is grounded in the principle of economic democracy, particularly in its implementation within banking and non-banking financial institutions. The regulation encompasses systems based on conventional and Islamic principles, emphasising the values of mutuality and justice that must be achieved by the parties involved.[11]

Collateral law is the legal provision governing various forms of a creditor's claim against a debtor.[12] According to Hartono Hadisoeprapto, as cited by Siti Ismijatie et al., collateral is a provision made by the debtor to the creditor to assure that the debtor will fulfil their obligations. This collateral can be valued in monetary terms derived from an agreement.[13] In line with this view, Sri Soedewi Masjchoen Sofwan asserts that collateral law is a set of rules that provides the legal construction necessary to provide credit facilities, with collateral in the form of the purchased goods securing the loan.[14]

Thus, collateral law can be understood as a set of rules governing the relationship between the creditor, as the recipient of the collateral, and the debtor, where the collateral serves as a supplementary or ancillary agreement (*assecoir*). Its function is to assure the creditor that the loan or financing extended to the debtor will be repaid if

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[10] Muhaimin, *Metode Penelitian Hukum* (Mataram: Universitas Mataram, 2020), https://eprints.unram.ac.id/20305/.

[11] Aldira Maradita, "Karakteristik Good Corporate Governance Pada Bank Syariah Dan Bank Konvensional," *Yuridika* 29, no. 2 (2014), https://doi.org/10.20473/ydk.v29i2.366.

[12] J. Satrio, *Hukum Jaminan, Hak Jaminan Kebendaan, Hak Tanggungan Buku 2* (Bandung: Cipta Aditya Bakti, 1998).

[13] Siti Ismijatie Jenie, Prihati Yuniarlin, dan Dewi Nurul Musjtari, *Pengantar Hukum Jaminan Di Indonesia* (Yogyakarta: LP3M UMY, 2019), https://repository.umy.ac.id/handle/123456789/34371.

[14] Sri Soedewi Masjchoen Sofwan, *Beberapa Masalah Pelaksanaan Lembaga Jaminan Khususnya Fidusia di dalam Praktek dan Pelaksanaannya di Indonesia* (Yogyakarta: Fakultas Hukum UGM, 1980).

the debtor defaults. As an ancillary agreement (*assecoir*), a collateral agreement is supposed to support the primary contract. However, in practice, the collateral agreement can play a decisive role in the existence of the primary contract. In some cases, the primary contract cannot be executed without the collateral agreement, as the collateral agreement often depends on the primary contract, such as a financing or credit agreement.

Viewed from its functions, collateral has two prominent roles in a financing contract. First, it serves to settle the debt if the debtor defaults. Second, it provides the basis for determining the amount of financing, where the collateral will function as a guarantee for the repayment of the loan or financing.[15]

Based on its regulatory sources, collateral law can be categorised into three main concepts: first, collateral law derived from Book II of the Indonesian Civil Code (KUHPerdata); second, collateral law regulated outside Book II of the Civil Code; and third, collateral law regulated under Islamic economic law.

3.1.1 Legal Framework of Guarantees under the Civil Code

The provisions concerning guarantees in the Indonesian Civil Code (KUHPerdata) can be examined by regulating different types of guarantees, namely property guarantees and personal guarantees.[16] Property guarantees, which subsequently serve as collateral objects, are regulated in Book II of the Civil Code, specifically in Article 1131. This article stipulates that all assets the debtor owns, whether movable or immovable and those existing or future, may be used as collateral in a personal agreement involving the debtor.[17]

Further regulations are outlined in Article 509 of the Civil Code regarding collateral objects, specifically movable property. This article affirms that movable property refers to items that can be transferred or relocated. Thus, the key characteristic of movable property is its mobility, which allows it to be moved from one place to another.[18] Furthermore, movable collateral, such as land or real estate, is regulated explicitly in Articles 1150 through 1160 of the Civil Code, which governs pledges. Meanwhile, regulations regarding immovable property, such as land or real estate, are covered in Articles 507 and 616 of the Civil Code. The transfer of ownership of immovable

[15] Dewi Sulastri dan Sarip Muslim, "Penerapan Jaminan Hak Milik Pada Perbankan Syariah Dalam Perspektif Hukum Islam," *Al-Muamalat: Jurnal Ekonomi Syariah* 5, no. 2 (2018), https://doi.org/10.15575/am.v5i2.5165.

[16] Salim H. S, *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: Rajawali Pers, 2014).

[17] Nanda Dwi Rizkia dan Hardi Fardiansyah, *Perkembangan Hukum Jaminan di Indonesia* (Bandung: Widina Bhakti Persada Bandung, 2022), 165.

[18] A. Ziliwu dkk., "Tinjauan Yuridis Non Fungible Token (NFT) Dari Aspek Hukum Benda Dan Hak Kekayaan Intelektual," *Jurnal Rectum: Tinjauan Yuridis Penanganan Tindak Pidana* 5, no. 1 (2023).

property is regulated in Article 508, which requires that the transfer be recorded in an authentic deed and registered to obtain valid legal force.[19]

Concerning personal guarantees, Article 1820 of the Civil Code defines a personal guarantee as an agreement in which a third party, for the benefit of the creditor, agrees to fulfil the debtor's obligations in case of default. In personal guarantee systems, the creditor has the right to demand the fulfilment of debts not only from the principal debtor but also from the guarantor or even from other debtors who share responsibility. This occurs when the creditor has a guarantor, known as a *borg* in legal terms, who is legally responsible for the debtor's debt and agrees to settle the debt if necessary.[20]

This view of personal guarantees is also supported by Soebakti's perspective in the research by Siahaan and Gusmarani. This research suggests that a personal guarantee is an agreement between a creditor and a third party, where the third party guarantees the debtor's obligations. In some cases, the third party may be involved without the debtor's direct participation in the agreement.[21]

3.1.2 Regulation of Guarantees Outside the Civil Code

Several specific laws regulate guarantee law outside Book II of the Civil Code. One such regulation is Law No. 5 of 1960 on Basic Agrarian Regulations (UUPA), particularly Article 16(1), which governs land rights as collateral. Furthermore, Law No. 4 of 1996 concerning Mortgage Rights (UUHT) regulates mortgage rights on land and related objects. Guarantee regulations are found in Law No. 10 of 1998, amending Law No. 7 of 1992 concerning Banking, which provides the legal basis for banking practices in implementing a guarantee system for debtors.

Guarantees are also regulated in Law No. 42 of 1999 concerning Fiduciary Guarantees (UUJF), which establishes provisions for the transfer of ownership of an object by trust to the creditor as collateral for the debtor's debt while the object remains under the debtor's possession. Moreover, Law No. 21 of 2008 on Islamic Banking governs the guarantee system in banking transactions based on Sharia principles.

Guarantees are also regulated in Law No. 9 of 2011, amending Law No. 9 of 2006 concerning Warehouse Receipt Systems, which regulates guarantees on goods stored in warehouses using the warehouse receipt system. In addition, various provisions issued

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[19] Muhammad Fauzi Bachmid, "Hak Kebendaan Dan Pembebanan Lembaga Jaminan Dalam Perspektif Hukum Perdata (KUH Perdata)," *LEX ADMINISTRATUM* 10, no. 1 (19 Januari 2022), https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/38317.

[20] Salim H. S, *Perkembangan Hukum Jaminan di Indonesia*.

[21] Clara Fransiska Olivia Siahaan dan Rica Gusmarani, "Penggunaan Jaminan Perorangan Dalam Praktik Penyelesaian Kredit Bermasalah," *Jurnal Notarius* 2, no. 2 (2023), https://jurnal.umsu.ac.id/index.php/notarius/article/view/17048.

by the Financial Services Authority (OJK), which supervises the financial services sector, also include regulations on guarantees within the financial industry.

3.1.3 Regulation of Guarantees in Islamic Economic Law

The regulation of guarantees in Islamic economic law is governed by various laws and fatwas, which serve as the legal foundation for banking and financial practices under Sharia law. The primary regulation concerning Islamic guarantees is found in Law No. 21 of 2008 on Islamic Banking, later amended by Law No. 4 of 2023 on the Development and Strengthening of the Financial Sector. Furthermore, the regulation of Islamic guarantees is also reflected in the Compilation of Islamic Economic Law and various Fatwas issued by the National Sharia Council of the Indonesian Ulema Council (DSN-MUI).

Several fatwas related to guarantees in Islamic economics include Fatwa DSN-MUI No. 7/DSN-MUI/2000 on *Muḍārabah* financing, which regulates profit-sharing business agreements. Furthermore, Fatwa DSN-MUI No. 25/DSN-MUI/III/2002 on *Raḥn* regulates pledges in the Islamic economic system. Further developments regarding Islamic guarantees are found in Fatwa DSN-MUI No. 68/DSN-MUI/III/2008 on *Raḥn Tajsīlī*, which expands on the concept of pledge in Islamic finance. Fatwa DSN-MUI No. 11/DSN-MUI/IV/2000 on *Kafālah* addresses the concept of guarantee in Islamic transactions, while Fatwa DSN-MUI No. 74/DSN-MUI/I/2009 specifically regulates Islamic guarantees.

The three main concepts of guarantee regulation, whether within the Civil Code, outside the Civil Code, or within Islamic economic law, form the basis for Sharia-compliant banking institutions to draft financing agreements accompanied by guarantee clauses. In legal terms, guarantee regulations in the Civil Code and other laws are considered *lex generalis* or general provisions. In contrast, guarantees in Islamic economic law are regarded as *lex specialis* or specific provisions. However, despite the existing legal foundation for Islamic guarantees, there remains a lack of detailed regulatory specifications regarding Islamic guarantees. Therefore, more specific regulations on guarantees within the Islamic economic system are needed to provide more precise legal certainty.

3.2 The Principles of Islamic Economics Regarding Collateral in Legislation

The Law on Islamic Banking employs "collateral" to refer to guarantees, as outlined in Article 1, Paragraph (26). Generally, the forms of collateral in Islamic and conventional banking share similarities, including individual and material collateral. However, there is a fundamental distinction in their roles. In Islamic banking, collateral is not the primary factor in financing. According to the Fatwa of the National Sharia Board (DSN-

MUI) No. 7/DSN-MUI/2000 concerning *Muḍārabah* financing, collateral in Islamic banking, especially in *Muḍārabah* financing, is merely a tool to ensure that the funds provided are used following the agreement made in the contract.

Referring to Fatwa DSN-MUI No. 07/DSN-MUI/IV/2000 regarding *Muḍārabah* (*Qirāḍ*) financing, Point 7, in principle, *Muḍārabah* financing does not require collateral. However, as a precautionary measure to prevent any contract violation (default), Islamic Financial Institutions may request collateral from the *Muḍārib* (fund manager) or a third party. This collateral can only be claimed if the *Muḍārib* is proven to have breached the agreed terms.

The concept of collateral in Islamic Financial Institutions, when linked to Islamic jurisprudence (*fiqh mu'āmalah*), falls within the framework of *rahn* (collateral), covering both movable and immovable property. In contrast, personal guarantees fall under the concepts of *kafālah* or *ḍamān*. Legally, the *rahn* contract refers to the pledge of an asset as collateral for a debt, where the asset may be used to settle all or part of the debt. *Al-Rahn* is a guaranteed contract concerning specific assets, which differs from the *al-kafālah* contract, where the responsibility for the guarantee lies with the *kāfil* (guarantor), not the debtor's assets.[22]

Etymologically, the word الرهان (*al-rihān*), the singular form of رهن(*rahn*), refers to the item used as collateral. Scholars agree that *al-rahn* is permissible whether one is travelling or staying put, contrary to the views of *Mujāhid* and the *Ẓāhiriyyah* scholars.[23] The permissibility of *rahn* is confirmed in the Qur'anic verse:

وَاِنْ كُنْتُمْ عَلٰى سَفَرٍ وَّلَمْ تَجِدُوْا كَاتِبًا فَرِهٰنٌ مَّقْبُوْضَةٌ ۗفَاِنْ اَمِنَ بَعْضُكُمْ بَعْضًا فَلْيُؤَدِّ الَّذِى اؤْتُمِنَ
اَمَانَتَهٗ وَلْيَتَّقِ اللّٰهَ رَبَّهٗ ۗوَلَا تَكْتُمُوا الشَّهَادَةَ ۗوَمَنْ يَّكْتُمْهَا فَاِنَّهٗٓ اٰثِمٌ قَلْبُهٗ ۗوَاللّٰهُ بِمَا تَعْمَلُوْنَ عَلِيْم

> "And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken. And if one of you entrusts another, then let him who is entrusted discharge his trust [faithfully] and let him fear Allāh, his Lord. And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allāh is Knowing of what you do." (Al-Baqarah: 283)

This verse indicates that if a person travels and cannot find a scribe to record a debt agreement, an asset can be used as collateral to secure the transaction. If both parties trust one another, the debtor must fulfil the agreed terms with reverence to Allah.[24]

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[22] Wahbah Al-Zuhaili, *Fiqih Islam Wa Adillatuhu Juz 6*, vol. VII (Damsyiq: Dar Al-Fikr, 1989), 729.

[23] Al-Zuhaili, *Fiqih Islam Wa Adillatuhu Juz 6*.

[24] Hamdan Firmansyah, "Perbandingan aspek hukum dan pelaksanaan gadai emas pada Pegadaian Syariah dan Perbankan Syariah di Indonesia" (Disertasi Doktor, Bandung, UIN Sunan Gunung Djati Bandung, 2021), https://digilib.uinsgd.ac.id/44867/.

The tafsir of Ibn Kathir explains that, in non-cash transactions during travel, the debtor may offer an item as collateral if no scribe is available. However, when there is mutual trust between the creditor and the debtor, the debtor must honour the obligation according to the agreed terms.[25]

In Ṣaḥīḥ al-Bukhārī, there is a hadith from 'Āishah (RA) stating:

عن عائشة رضي الله عنها أن النبي صلى الله عليه وسلم اشترى طعاما من يهودي الي احل فرهنه درعه

> *"A'ishah (RA) reported that the Prophet (PBUH) bought food from a Jew and pledged his armor as collateral."* (HR. al-Bukhārī)

This act of the Prophet (PBUH) pledging his armor became the first known practice of *rahn* in Islam. Based on the Qur'anic verse and this hadith, Islamic jurists unanimously agree that the *rahn* contract is permissible as it maintains social and economic relationships and aligns with the objectives of Islamic law (*maqāṣid al-syarī'ah*).

The permissibility of collateral in Islamic banking does not imply that Islam adopts the creditor-debtor relationship found in conventional banking. Instead, the use of collateral in Islamic banking stems from recognising moral hazard risks and is based on the aforementioned legal texts.[26]

Concerning the principles of Islamic economic law in collateral regulations, an analysis of Islamic principles in Indonesian regulations, such as Law No. 5 of 1960 on Agrarian Principles, Law No. 4 of 1996 on Mortgage Rights, Law No. 42 of 1999 on Fiduciary Guarantees, Law No. 9 of 2006 on Warehouse Receipts, Law No. 10 of 1998 on Banking, and Law No. 21 of 2008 on Islamic Banking, is essential. In practice, the principles of Islamic economic law should guide the implementation of collateral provisions in Indonesia.

Several key principles in Islamic economic law serve as guidelines for implementing collateral regulations. These include the principle of worship (*al-tauḥīd*), the principle of commanding good and forbidding wrong (*amar ma'rūf nahi munkar*), the principle of justice (*al-'adl*), the principle of freedom (*al-ḥurriyyah*), the principle of equality (*al-musāwah*), the principle of mutual assistance (*al-ta'āwun*), the principle of social insurance (*takāful*), and the principle of tolerance (*al-tasāmuḥ*).[27]

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[25] Sumiati Sumiati, Ahmad Damiri, dan Ending Solehudin, "Rahn (Gadai) Dalam Perspektif Tafsir Dan Hadits Serta Implementasinya Pada Lembaga Pegadaian Syariah," *Eksisbank (Ekonomi Syariah Dan Bisnis Perbankan)* 6, no. 1 (2022): 125–39, https://journal.sties-purwakarta.ac.id/index.php/EKSISBANK/ article/view/757.

[26] Fitriani, "Jaminan Dan Agunan Dalam Pembiayaan Bank Syariah Dan Kredit Bank Konvensional."

[27] Juhaya S. Praja, *Filsafat Hukum Islam* (Bandung: LPPM Unisba, 1995).

These principles of Islamic economic law within Indonesian legislation are reflected in the substance of each regulation in force. Based on the universal values of Islam, each legal provision can be examined from an Islamic law perspective. However, this study limits the discussion to regulations related to collateral. The discussion of Islamic economic law principles related to collateral cannot be separated from the foundational principles of Islamic law (*al-mabda'*), which serve as the philosophical guide for developing Islamic law. This is elaborated as follows:[28]

3.2.1 The Principle of Tawhid

The principle of Tawhid asserts that all human beings are subject to the same law, specifically the law of Tawhid, encapsulated in the phrase *lā ilāha illā Allāh* ("there is no god but Allah"). In the context of legislative provisions regarding guarantees, the principle of Tawhid is reflected in various regulations. First, Tawhid is evident in several laws related to guarantees, such as Law No. 5 of 1960 on Land Rights, Law No. 4 of 1996 on Mortgage Rights, Law No. 42 of 1999 on Fiduciary Guarantees, and Law No. 9 of 2006 on Warehouse Receipt Systems. All these regulations begin with the phrase "With the Grace of Almighty God," which signifies that the validity of these laws is accompanied by Allah's grace and guidance, as the One True God. Moreover, this phrasing aligns with the divine values that form the foundation of Indonesia's state philosophy, as embodied in the first principle of Pancasila: "Belief in the One and Only God."[29]

Second, the principle of Tawhid is also reflected in the provisions concerning the writing of mortgage rights certificates and fiduciary guarantees, as stipulated in Article 14 of Law No. 4 of 1996 on Mortgage Rights and Article 15 of Law No. 42 of 1999 on Fiduciary Guarantees. These provisions explicitly require that the certificates include the phrase "For Justice Based on the One and Only God." The inclusion of this phrase signifies that the ownership of the collateral held by the debtor is not only recognised in the horizontal relationship between humans and the state or the issuing institution but also in the vertical, divine relationship. Therefore, the recognition of ownership in these certificates carries significant philosophical meaning, where the fulfilment of the rights and obligations of the parties in the agreement is not only accountable to humans but also to Allah Swt.

Third, the principle of Tawhid can also be examined through the presence of Law No. 21 of 2008 on Sharia Banking, which affirms that Muslims in Indonesia strive to implement the commands of Allah by establishing an economic system based on Sharia

[28] Ahsanuddin Jauhari, *Filsafat Hukum Islam 1* (Bandung: Liventurindo, 2020).

[29] Rasji, *Pengujian Peraturan Kebijakan di Indonesia: Problematika, Praktik, dan Bangunan Hukum* (Yogyakarta: Penerbit ANDI, 2023).

law, thereby avoiding usury. As is well known, conventional banking uses an interest-based system, which is widely recognised as a form of usury. However, usury is explicitly prohibited in the Qur'an, as stated in the verse:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَأْكُلُوا الرِّبٰوٓا اَضْعَافًا مُّضٰعَفَةً ۖ وَّاتَّقُوا اللّٰهَ لَعَلَّكُمْ تُفْلِحُوْنَ

"O you who have believed, do not consume usury, doubled and multiplied, but fear Allāh that you may be successful." (QS. Āli 'Imrān [3]: 130).

The prohibition of usury in this verse is absolute and highlights its unlawfulness, as emphasised in the *uṣūl al-fiqh* principle:

في النهي للتحريم الأصل

"The basic principle of prohibition is that it is haram."

Thus, the principle of Tawhid in the regulation of guarantees is evident in the laws of Indonesia. This is reflected in the clauses "With the Grace of Almighty God," which underpins various regulations, and the clause "For Justice Based on the One and Only God" in mortgage and fiduciary guarantee certificates. These clauses confirm that the divine aspect forms the foundation of guarantee law in Indonesia.

3.2.2 The Principle of Justice (Al-'Adl)

Islam teaches that justice (*al-'adl*) and goodness (*iḥsān*) must always be maintained in societal life. The justice that must be upheld encompasses self-justice, individual justice, legal justice, social justice, and global justice.[30] This principle is highlighted in the verse:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُوْنُوْا قَوّٰمِيْنَ بِالْقِسْطِ شُهَدَاۤءَ لِلّٰهِ وَلَوْ عَلٰٓى اَنْفُسِكُمْ اَوِ الْوَالِدَيْنِ وَالْاَقْرَبِيْنَ ۚ اِنْ يَّكُنْ غَنِيًّا اَوْ فَقِيْرًا فَاللّٰهُ اَوْلٰى بِهِمَا ۗ فَلَا تَتَّبِعُوا الْهَوٰٓى اَنْ تَعْدِلُوْا ۚ وَاِنْ تَلْوٗٓا اَوْ تُعْرِضُوْا فَاِنَّ اللّٰهَ كَانَ بِمَا تَعْمَلُوْنَ خَبِيْرًا

"O you who have believed, be persistently standing firm in justice, witnesses for Allāh, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allāh is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allāh is ever, of what you do, Aware.". (QS. al-Nisā' [4]: 135).

[30] Rohidin, *Pengantar Hukum Islam Dari Semenanjung Arabia Hingga Indonesia* (Yogyakarta: FH UII Press, 2018).

The principle of justice in guarantee law is reflected in the equitable allocation of rights and duties to the parties involved in guarantee agreements. One example of this is found in Article 2 of Law No. 4 of 1996 on Mortgage Rights, which states:

> "If the grantor of the Mortgage Rights is declared bankrupt, the holder of the Mortgage Rights remains entitled to exercise all rights it has under this Law."

This provision illustrates those creditors, as the holders of mortgage rights retain their authority to claim their rights even if the debtor faces bankruptcy. As such, creditors are protected from any loss due to the debtor's insolvency. This reflects applying the principle of justice in providing legal protection for creditors.

Justice is also reflected in Article 1155 of the Civil Code, which governs the rights and duties between the pledgor and the pledgee from when the pledge agreement is made. While this provision establishes the rights and responsibilities of both parties, it is often the case that the creditor benefits from the contract due to the use of standardised agreements prepared by the creditor, leaving the debtor with limited opportunities to negotiate. This scenario may potentially lead to injustice for the debtor.[31]

Furthermore, the principle of justice in guarantee law can also be found in Article 1133 of the Civil Code, which states: "The right of priority among creditors arises from a privileged right, pledge, and mortgage."

This provision demonstrates that creditors are granted priority rights in fulfilling their obligations according to the guarantee agreement. These preferential rights serve as a form of justice for creditors who provide loans with specific guarantees. With this provision, creditors have legal certainty in receiving their rights as agreed upon in the guarantee agreement.

3.3 The Principle of *Amar Ma'rūf Nahi Munkar*

The principle of *al-amr bi al-ma'rūf wa al-nahy 'an al-munkar* embodies the command to do good, act truthfully, and engage in actions that align with the welfare of humanity, while being pleasing to Allah (Swt). The ultimate goal of this principle is the attainment of success (*al-falāḥ*), as well as the establishment of justice, unity, and equitable prosperity within society. Therefore, the principle of *amar ma'rūf* stresses the obligation of individuals to implement Islamic law in economic activities, whereas the principle of *nahi munkar* manifests in the prohibition of practices involving *riba*, *gharar*, *maisyir*, and other forms of unlawful transactions. The objective of this principle is to eliminate harm in economic activities, as emphasised by the Islamic legal maxim:

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[31] Siti Malikhatun Badriyah, R. Suharto, dan Marjo Marjo, "Reorientasi Usaha Pegadaian Swasta Sebagai Upaya Keseimbangan Hubungan Hukum Para Pihak Di Indonesia," *Jurnal IUS Kajian Hukum dan Keadilan* 7, no. 3 (30 November 2019): 534–48, https://doi.org/10.29303/ius.v7i3.691.

الضرريزال

"Damage must be removed."

This principle is reflected in various legal provisions aimed at preventing practices that may harm the parties involved in collateral transactions. One example is found in Article 35 of Law No. 42 of 1999 on Fiduciary Security, which addresses sanctions against individuals who intentionally falsify, alter, or omit information in fiduciary agreements. Suppose such actions lead to the invalidation of the fiduciary agreement. In that case, the offender is subject to criminal penalties, including imprisonment for a minimum of one year and a maximum of five years, along with fines ranging from Rp10,000,000.00 (ten million rupiah) to Rp100,000,000.00 (one hundred million rupiah).

Furthermore, the principle is reflected in Article 36 of the same law, which imposes sanctions on debtors who unlawfully transfer, pledge, or lease collateral objects without written consent from the fiduciary holder, as stated in Article 23 Paragraph (2). Violations of this provision may result in a maximum prison sentence of two years and a fine not exceeding Rp50,000,000.00 (fifty million rupiah).

These legal provisions demonstrate a clear prohibition of *munkar* actions, such as fraud and falsification, which can result in harm to others. Consequently, these regulations align with the Islamic principle of *nahi munkar*, which aims to prevent actions contrary to justice and the common good.

3.3.1 The Principle of Freedom (Al-Ḥurriyyah)

The principle of freedom (*al-ḥurriyyah*) asserts that the propagation of religion and Islamic law should not be carried out through coercion but through reasoning, demonstrative arguments, and persuasive statements. This principle grants individuals the right to determine their own way of life, but such freedom must remain within the boundaries set by Allah and His Messenger. As stated in the Quran:

لَا إِكْرَاهَ فِي الدِّينِ ۖ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ ۚ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِنْ بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انْفِصَامَ لَهَا ۗ وَاللَّهُ سَمِيعٌ عَلِيمٌ

> "There shall be no compulsion in [acceptance of] the religion. The right course has become distinct from the wrong. So whoever disbelieves in ṭāghūt[104] and believes in Allāh has grasped the most trustworthy handhold with no break in it. And Allāh is Hearing and Knowing." (QS. al-Baqarah [2]: 256).

In the context of *mu'āmalah* (transactions), the principle of freedom allows the parties to design agreements according to their needs, provided they do not contravene

public order and the essential provisions outlined in Islamic law. This is consistent with the Islamic legal maxim:

أن يدل الدليل على تحرمها إلا في المعاملة الإباحة الأصل

> "By default, all forms of transactions are permissible unless there is evidence prohibiting them."

This principle is reflected in Article 10 Paragraph (2) of Law No. 4 of 1996 on Mortgage Rights, which states that the granting of mortgage rights must be documented through a Mortgage Deed (*Akta Pemberian Hak Tanggungan*, APHT) by the Land Deed Official (*Pejabat Pembuat Akta Tanah*, PPAT). In drafting this deed, the parties are afforded the freedom to determine the terms of the agreement, as long as they do not contradict public order or the essential provisions set out in Article 11 Paragraph (1) of the same law.

3.3.2 The Principle of Equality (Al-Musāwah)

The principle of equality (*al-musāwah*) emphasises that the law should not discriminate against individuals based on their social status, wealth, position, or background. All individuals have equal rights and obligations in receiving legal treatment, including in Islamic economics.[32] As Allah (Swt) states in the Quran:

يٰٓاَيُّهَا النَّاسُ اِنَّا خَلَقْنٰكُمْ مِّنْ ذَكَرٍ وَّاُنْثٰى وَجَعَلْنٰكُمْ شُعُوْبًا وَّقَبَاۤىِٕلَ لِتَعَارَفُوْا ۚ اِنَّ اَكْرَمَكُمْ عِنْدَ اللّٰهِ اَتْقٰىكُمْ ۗاِنَّ اللّٰهَ عَلِيْمٌ خَبِيْرٌ

> “O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allāh is the most righteous of you. Indeed, Allāh is Knowing and Aware.” (QS. al-Ḥujurāt [49]: 13).

In the context of collateral law, the principle of equality is evident in Article 2 Paragraph (2) of Law No. 4 of 1996 on Mortgage Rights, which states that when a mortgage is imposed on multiple land rights, the parties may agree that the repayment of the secured debt will be made in equal instalments, following the value of each land right. This provision demonstrates that all parties holding collateral have an equal legal standing in receiving debt repayment from the debtor.

[32] Zaini Abdul Malik, “Prinsip Penjaminan Dan Transformasi Hukum Islam Dalam Undang-Undang Nomor 1 Tahun 2016 Tentang Penjaminan Untuk Penjaminan Risiko Usaha Mikro Kecil Menengah Di Indonesia” (Disertasi Doktor, Bandung, UIN Sunan Gunung Djati Bandung, 2022), https://digilib.uinsgd.ac.id/75301/.

3.3.3 The Principle of Cooperation (Al-Ta'āwun)

The principle of cooperation (*al-ta'āwun*) teaches the importance of solidarity and collaboration within society to achieve goodness and piety. This principle is reinforced by the Quranic verse:

وَتَعَاوَنُوْا عَلَى الْبِرِّ وَالتَّقْوٰى ۖ وَلَا تَعَاوَنُوْا عَلَى الْاِثْمِ وَالْعُدْوَانِ ۚ وَاتَّقُوا اللّٰهَ ۗ اِنَّ اللّٰهَ شَدِيْدُ الْعِقَابِ

> "And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allāh; indeed, Allāh is severe in penalty." (QS. al-Māidah [5]: 2).

In Islamic banking, the principle of cooperation is realised through the role of banks as financial intermediaries, connecting those with capital to those in need of funding. This interaction reflects the principle of cooperation in the Islamic financial system.[33] However, the effectiveness of applying this principle is contingent upon the intention of each party, as highlighted by the legal maxim:

الأمور بمقاصدها

> "Actions are judged by their intentions."

3.3.4 Tolerance (Al-Tasāmuḥ)

The principle of al-tasāmuḥ underscores the importance of harmonious and peaceful coexistence, both among Muslims and with non-Muslims. In Islam, tolerance does not imply overlooking violations of Islamic values; rather, it guarantees that the rights of Muslims and others are respected. Allah SWT states in the Qur'an:

لَا يَنْهٰىكُمُ اللّٰهُ عَنِ الَّذِيْنَ لَمْ يُقَاتِلُوْكُمْ فِى الدِّيْنِ وَلَمْ يُخْرِجُوْكُمْ مِّنْ دِيَارِكُمْ اَنْ تَبَرُّوْهُمْ وَتُقْسِطُوْٓا اِلَيْهِمْ ۗ اِنَّ اللّٰهَ يُحِبُّ الْمُقْسِطِيْنَ

> "Allāh does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allāh loves those who act justly." (QS. al-Mumtaḥanah [60]: 8).

اِنَّمَا يَنْهٰىكُمُ اللّٰهُ عَنِ الَّذِيْنَ قٰتَلُوْكُمْ فِى الدِّيْنِ وَاَخْرَجُوْكُمْ مِّنْ دِيَارِكُمْ وَظٰهَرُوْا عَلٰٓى اِخْرَاجِكُمْ اَنْ تَوَلَّوْهُمْ ۚ وَمَنْ يَّتَوَلَّهُمْ فَاُولٰۤىِٕكَ هُمُ الظّٰلِمُوْنَ

[33] H. Abdul Hamid, *Konsep Majelis Syura Menurut Al-Mawardi (364-450 H/974-1058 M) Dan Hubungannya Dengan Majelis Permusyawaratan Rakyat Dalam Hukum Tata Negara Indonesia Dewasa Ini* (Bandung, 2011).

> "Allāh only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion - [forbids] that you make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers." (QS. al-Mumtaḥanah [60]: 9)

The principle of tolerance (*al-tasāmuḥ*) is a guideline for every Muslim to act with tolerance, mutual respect, and appreciation for differences in faith and religion. This principle also affirms the right and freedom of every individual to choose their beliefs, as outlined in Qur'an al-Kafirun [109]: 1-6.

The legal foundations related to this principle of tolerance encompass human dignity (*al-fiṭrah*), unity (*al-ittiḥād*), Islamic personality (Islamic personality), the authority of faith (religiosa doctrine), consensus (*ijmā'*), and the freedom to make choices (*al-takwīr*). In the context of legal guarantees in banking financing, this principle highlights that the parties involved in contracts are not limited by religious affiliation. This is in line with legislative provisions which state that the primary requirement for the parties in a contract is legal competence, not their religious background.[34]

4. Conclusion

The legal framework governing collateral in Indonesia encompasses three main areas: statutory regulations under Book II of the Civil Code (KUHPdt), collateral laws outside the Civil Code—such as the Basic Agrarian Law, Mortgage Law, Fiduciary Guarantee Law, Warehouse Receipt System Law, and Banking Law—and Islamic economic law under Islamic Banking Law, the Compilation of Islamic Economic Law (KHES), and Fatwas from the Indonesian Ulema Council's Sharia Council (DSN MUI). Collateral law regulates the creditor-debtor relationship, serving as a supplementary agreement to secure repayment in case of default. While Islamic banking permits collateral, it diverges from conventional banking by emphasizing moral hazard mitigation rather than adopting a creditor-debtor framework. Islamic economic principles, including divine unity (*al-tauḥīd*), justice (*al-'adl*), freedom (*al-ḥurriyyah*), equality (*al-musāwah*), mutual cooperation (*al-ta'āwun*), and tolerance (*al-tasāmuḥ*), are embedded in collateral laws but require further regulatory refinement to optimize their implementation in Indonesia's legal system.

[34] Hamid, 319.

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