



Existence of Religious Court in Indonesia as the Executor Mortgage Right of Islamic Bank Financing

Hj. Isti'anah; Nandang Kusnadi

Lecturer of Law Bachelor Program, Faculty of Law, Pakuan University, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v6i6.1364>

Abstract

Authority expansion of Religious Court in Indonesia in attending the case settlement of dispute in the field of Islamic economy stems from the development of government law politics and regulation policy of judiciary according to the needs of law from Muslim community. Since then, there have been many cases of Islamic banking dispute that have been submitted to the Religious Court, as well as execution of mortgage right which based on Islamic contracts. Meanwhile, the execution of mortgage right of Islamic banks financing in the Religious Courts is carried out in a long time, complicated, and not different from the execution of mortgage in District Court. It stems from the absence of clear rules which regulate the execution of Mortgage Right for Islamic financing in Religious Courts.

Keywords: *Religious Court; Execution; Mortgage Right; Islamic Bank*

Introduction

The development of the Islamic economy in Indonesia is increasingly becoming advance and spread equally in various regions. In order for the Islamic economy business to run smoothly, a legal instrument that can provide legal assurance for businessmen is required to fulfil achievements of various parties. It is because businessmen of Islamic economy have chosen to submit themselves to Islamic economic law (choice of law), as well as decide a forum to resolve Islamic economy disputes (choice of forum) that has been determined by the law.

In relation to the access of court, Muslims and businessmen who voluntarily submit to Islamic law have been facilitated by the state to settle disputes at the Religious Courts. In Article 49 of Law Number 3 Year 2006 concerning Religious Courts, it is stated that the Religious Courts have the duty and authority to examine, decide upon, and settle cases for Muslim communities at the first level, in the fields of marriage, inheritance, hibah (gift), wasiah (wills), waqaf (endowments), Zakat, infaq, shadaqoh, and Islamic economy (Setneg, 2006).

The expansion of the judicial authority (absolute competence) of the Religious Court stems from the development of government law politics and the policy of judiciary regulation in accordance with the

legal needs of the Muslim community. Since then, there have been many cases of Islamic banking disputes that have been submitted to the Religious Courts, as well as the execution of mortgage right which contracts are based on Islamic contracts.

In the practice, the execution of mortgage right on the financing of Islamic banks in the Religious Courts still does not have specific rules that regulates the procedure for execution. As long as there are no specific rules, the provisions of Article 54 of Law Number 7 Year 1989 concerning Religious Courts, reads "The procedural law applicable to the Courts in the Religious Courts is the Civil Procedure Law that applies to Courts in the General Courts, except those specifically regulated in this Law" (Setneg, 1989). Thus, the procedure for executing mortgage right for Islamic Banks financing in the Religious Courts is the same as the procedure for executing the mortgage right of Conventional Banks in the District Court.

The Islamic economic case is based on sharia principles, ideally the execution of Islamic economic cases is also in line with Islamic principles. Therefore, we need legal rules that are in accordance with Islamic principles, so that it can provide benefits to the stakeholders. This will generate public trust in the Religious Courts and, in general, will increase public trust in Islamic banking because the public receive legal certainty in doing Islamic transactions. The public will feel comfortable doing Islamic transactions because there is a guarantee that in the event of a dispute the settlement is carried out according to Islamic principles.

The Concept of Execution of Mortgage Right for Financing of Islamic Banking in Religious Court

The execution of mortgage right in the Religious Courts is not much different from the execution in general. The execution employs the Basic Code of Civil Procedure applied in the General Courts environment, which is the *Herziene Inlandsch Reglement* (HIR) because the Religious Court does not have a Procedural Law governing the execution of the mortgage right Islamic Economic case.

The legal basis for the execution of Islamic economic cases is only contained in the Supreme Court Regulation (PERMA) Number 14 Year 2016 concerning Procedures for Islamic Economic Case Settlement, in Article 13 paragraph (1) which reads "The implementation of sharia economic case decisions, mortgage rights and fiduciary based on the contract sharia is conducted by the Courts in the Religious Courts environment" (Setneg, 2016).

As for the procedures in executing mortgage right of Islamic economic case refers to the Securities Law, which is Law Number 4 Year 1996 concerning Mortgage Rights.

In the practice of *murahaba* banking contract, the main securities which become the guide for the bank in fund disbursement for customer is the belief of bank for customer capability to pay off the financing according to the agreement (Otoritas Jasa Keuangan [OJK], 2019, p. 45). Securities is secondary source repayment for *murahabah* financing, if the customer truly not able to fulfill the repayment obligation for the financing received. According to the fatwa of National Islamic Board Indonesia Ulema Council (DSN MUI) Number 04/DSN-MUI/IV/2000 concerning *Murabaha*, it is stated that (1) Securities in *murabaha* is allowed, so that customer will be serious with their order; (2) Bank could ask customers to provide securities that can be held (DSN MUI, 2000).

Similar for *mudharabah*, based on the fatwa of DSN MUI Number 7 of 2000 concerning *Mudharabah*, the Customer must also include a Securities. In principle, in *mudharabah* financing there are no guarantees, but so that *mudharib* does not make any deviations, the Bank can request for securities from the *mudharib* or third parties

Based on the fatwa of DSN MUI (2000), the Bank includes securities in mudharabah financing. Meanwhile, Imam Madzab has stated that the *Mudaraba* contract is invalid if *Shahibul mal* requests a collateral from the *mudharib* because the mudharabah contract concept is built on trust. However, in this case, DSN issued a fatwa to allow Securities Law on *Mudaraba* contracts.

Securities Law in Mudarabah financing is allowed because of the factors that can be taken into considerations to conduct *istinbat*, decision making of Islamic law based on existing Quranic or Sunnah arguments, in which securities is intended to avoid aberration of businessman, to protect fund investor, and to avoid financing risks.

In both murabaha or mudaraba financing, customer usually include securities in form of object such as land/buildings, which then will be charged with mortgage right and moving object such as vehicles which then will be charged with Fiducia. This study analyzed securities in form of private building and land which is bond with mortgage right.

The discussion on execution problems in relation with mortgage right cannot be separated from the statement “For Justice based on the Belief in the one and only God” which hold the same execution power with a Court Sentence that hold permanent legal power. Based on the discussion above, it can be seen that the purpose of a Mortgage Certificate which hold executorial right if the customer is stated to be default and really proven by the fact that the customer is unable to pay the debt until the due date. In this case, the Bank can request for mortgage execution to the Chief of Religious Court without having to go through lawsuit procedure, which is time-consuming, costly, complicated in process, and risky.

Through Mortgage Certificate which hold executorial right or the spirit of “For Justice based on Belief in one and only God” is a fast and low-cost shortcut to settle loans problems with stalled repayment. Therefore, it is expected that through ease and certainty in conducting execution of mortgage object, assurance for creditor/bank can be realized.

Absolute competence of Religious Court as one of the judicial authorities undergo strategic change as a response to the development of law and legal needs from the community, especially in relation to Islamic economic (Mertokusumo, 2002, p. 78). The authority of Religious Court in solving Islamic Economic disputes begin to be regulated along with the development of Islamic economic in Indonesia. Law Number 7 Year 1989 concerning Religious Court have not regulated the authority of Religious Court in solving Islamic economic disputes. Islamic Financial Institutions began to emerge from 1990 in Indonesia and keep on growing. Accordingly, there is a need of regulations for institutions that are given an authority to settle Islamic economy disputes.

Afterwards, the government published Law Number 3 Year 2006 which change on Law Number 7 Year 1989 concerning Religious Court which firmly regulates authority of Religious Court to settle Islamic economic disputes. The decision about absolute competence of Religious Court to settle Islamic Economic disputes is stated in Article 49 and Article 50 of the Law Number 3 Year 2006. Suyuti (2008) stated that the Law Number 3 Year 2006 brought an important reform around the scope of Religious Court. This Law was born from the social demand in the middle of transaction market based on the practice of Islamic Economic.

Seen from philosophical aspect, the absolute authority of Religious court shows that the development of legal needs muslim community, especially the awareness to conduct Islamic laws, is increasing. This means that pluralism law needs to be accepted as plural realities in the society.

Article 49 of Law Number 3 Year 2006 state that Religious Courtis in charge and have the authority to investigate, decide, and settle dispute at the first-class level between muslim in the field of

marriage, inheritance, will, gift, zakat, infaq, sadaqah, and Islamic economic (Setneg, 2006). The explanation of Article 49 of Law Number 3 Year 2006 is that the settlement of of dispute is not limited in the field of Islamic banking, but also in another field of Islamic economic. According to Chidir Ali (2005), the meaning of “between muslim” include person or legal entity which voluntarily submit to Islamic law over the matter that become the authority of Religious Court according to the provision of this Article.

Article 50 of Law Number 3 Year 2006 stated that in the moment of dispute of ownership or other dispute in the case refered in Article 49 Law Number 3 Year 2006, specific for the object of dispute must be ruled first by the Court in the scope of General Judicature. This means that if there is a sipute of ownership as referred in Article 1 which the legal subject is among muslims, the object of dispute is ruled, first, by the District Court then after there is deviation from Disctric Court, it will be put on trial in Religious Court.

The provisions of Article 50 of Law Number 3 Year 2006 along with its explanation shows that the principle of Islamic personality related to religion embraced by the disputing parties is put forward in the civil disputes concerning property rights in order to determine the absolute authority of the judiciary which handle the dispute. If the parties involved in the dispute are Muslim, the Religious Court has the authority to resolve the dispute. This provision has strong relevance twith resolution of Islamic economic disputes related to material security.

The effectiveness of law in legal action or reality can be identified if someone states that a rule of law has been successfully implemented or successfully achieved its purpose. In order to see both statements then it usually starts with the question whether the rule of law has been implemented, and whether the effect is effective in regulating particular attitude or behavior so that it fits its purpose.

According to Soekanto (2008, p. 8), the of a law is determined by five factors, which are: (1) the legal factor itself (the Law); (2) The law enforcement factor (parties forming or implementing the law); (3) Factors of facilities that support law enforcement; (4) Community factors (environment in which the law applies and is applied); and (5) Cultural factors (works, inventions and tastes that are based on human initiative in living relationships).

Meanwhile, according to Lawrence M. Friedman in his theory of three elements law system, there are three elements of the legal system that determine “the functioning” or “functioning of a law”, these are substance, structure, and legal culture. These three elements of the system are interrelated with one another. Good legal structure and will run well if supported by good legal substance, and vice versa. These two elements will work well if followed by a good legal culture from the community.

When viewed substantially, the legal system is directed at the definition about the provisions which govern human behavior, which are regulations, norms and patterns of community behavior in a system. Thus, the substance of law, essentially includes legal regulations, both written and unwritten. In the case of the mortgage execution of Islamic Bank financing at the Religious Courts, can be stated as follows: Religious Courts have the duty and authority to examine, decide upon, and settle certain cases between people who are Muslim in the field of Islamic economics. The legal basis is Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning Religious Courts.

Then followed by the Constitutional Court Decision Number 93 of 2012 which canceled the explanation of Article 55 paragraph (2) letter d of Law Number 21 of 2008 concerning Islamic Banking, therefore the authority of the Religious Courts in examining and adjudicating Islamic economic matters is certain and uncontested, and with the decision of the Constitutional Court, eliminates the choice of forum regarding resolution of dispute through litigation. Furthermore, the authority to execute mortgage

over Islamic Bank financing is regulated in the Supreme Court Regulation Number 14 of 2016 concerning Procedures for Islamic Economic Case Settlement, established on December 22, 2016 (Mahkamah Konstitusi, 2016). With the existence of this legal basis, the implementation of the execution of mortgage on Islamic Bank financing is under the authority of the Religious Court.

After the execution of mortgage on Islamic Bank Financing became the authority of Religious Court, there is an increase if request on execution of mortgage on Islamic Bank financing submitted to the religious Court.

The legal basis for conducting the execution of mortgage in the Religious Courts uses the legal basis for execution used in the General Court based on HIR (*Het Herziene Inlandsche Recthsvordering Reglement*) and Law Number 4 of 1996 concerning Mortgage Rights. This becomes a serious problem, because the object that is executed is the problem of Islamic banking, but the law used is based on non-Islamic law, whether this legal basis is still effectively applied, and is in accordance with the principle of simple, fast and low cost, to provide justice as well as legal certainty to related parties.

The legal system review in terms of structure, is more directed at institutions, how the institution carries out its functions, and how law enforcement officers carry out their duties. In other words, it is the structural system that determines whether or not the law can be implemented properly.

In Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning the Religious Courts, it is explained that the Religious Courts are the first-class Courts having an organizational structure, and those related with carrying out the execution of mortgage rights are the Chairperson, Registrar, and Substitute Registrar (Setneg, 2006).

Effectiveness Legal Certainty Security towards Settlement of Execution on Mortgage over Islamic Bank Financing in Religious Court

Seen from the structure, the Chairperson as a judge in the Religious Court has mastered Islamic economic problems, because based on the Republic of Indonesia Supreme Court Regulation Number 5 of 2016 concerning Islamic Economic Judge Certification, which was established on April 19, 2016, judges handling Islamic economic cases must be certified judges (Mahkamah Agung, 2016). Currently, Religious Court has several certified judges as Islamic economic judges. However, the Registrar and Bailiff have not received certification, therefore, it is necessary to provide guidance and special training on Islamic economics for the Registrar and Bailiff in relation with their duties to carry out the execution of Mortgage over Islamic Bank financing.

The last is legal culture. When viewed from the legal culture, it has more tendency attitudes and trust of the community as the result of values adopted by the community and the ideas or expectations of the community towards the law and legal system. In this case, legal culture is a depiction of people's attitudes and behavior towards the law, as well as the entirety of factors that determine how the legal system obtains an appropriate place and can be accepted by citizens within the community's framework of culture. The higher the legal awareness of the community, hence the better legal culture will be created and can change the current mindset of the community. In other words, the level of community compliance with the law is one of the indicators that law is functioning.

The legal culture of the execution of mortgage in the Religious Courts is developed through a religious and cultural approach. The Bailiff and the Religious Courts not only carry out executions normatively but also through the approaches that incorporate the values of the religious approach

regarding the obligation to pay debts for those in debts. This approach can support the effectiveness of mortgage execution of Islamic Banks financing in the Religious Courts.

The settlement of Islamic Economic dispute is a type of law enforcement efforts (genus) in Indonesia. Therefore, studies on the resolution of Islamic economic disputes in Indonesia are closely related to aspects of the structure, substance and legal culture of the community in the field of Islamic economics. In the aspect of legal structure, the competence of human resources administering judicial power within the Religious Courts, including judges and other clerical officials, is crucial for the implementation of law enforcement in the field of Islamic economics. In the aspect of legal substance, the availability of legal regulations both formally and materially in the field of Islamic economics is related to the realization of the values of certainty, justice, and legal benefits in the field of Islamic economics. Likewise, in the aspect of legal culture, the level of public trust in the Religious Courts is very significant for the effectiveness and efficiency of law enforcement in the field of Islamic economics (Suadi, 2017, pp. 329-330).

The three aspects mentioned above are positively correlated with the effectiveness of law enforcement in the field of Islamic economic and the acceleration of Islamic economic growth in Indonesia. In relation to this, it is necessary to disclose the readiness of the Religious Courts, both in enhancing the competence of human resources and the rule of law (formal and material) so that the roles, that have been given by the law, can be carried out properly in accordance with community expectations.

The role of the Religious Courts in resolving Islamic economic disputes must at least be realized in two ways. First, it provides justice for the parties to the dispute so that they feel satisfied with the decisions made. Secondly, it provides a positive contribution to the development of Islamic economics in Indonesia. In this regard, it cannot be denied that Islamic banking is reluctant to bring their dispute to the Religious Courts because they are often defeated in the final decision. This criticism, of course, must be addressed properly by examining a number of decisions of the Religious Courts in Islamic economic matters submitted to the Religious Courts to find out the cause of this (Suadi & Candra, 2017, p. 331).

As is known that Islamic economics has become the absolute authority of the Religious Court. There is no more dualism. Therefore, Religious Court judges must be able to resolve Islamic economic disputes. Based on the principle of *ius curia novit* where the judge is deemed to know their law, the judge must not refuse to examine the case under the pretext that the law is unclear or not very clear.

In providing justice for the litigants, judges of the Religious Courts are not only required to understand Islamic aspects but also have to understand the politics of economic law because Islamic economic is part of national legal politics in general. At this level, the developing Islamic economic practices are still in the stage of synchronization (adjustment) between conventional economic practices and Islamic-based economic practices. At this adjustment stage, of course, several factors, both external and internal, must be taken into account that cause practices in Islamic banking are not fully in accordance with the Islamic law concepts (Suadi & Candra, 2017, p. 331).

Islamic economic law deals with two important aspects. First, the business aspect, the second aspect is Islamic law. In the business aspect, it is absolutely understood that Islamic economic issue is an important part of the economic activities of the nation and state. At this level, the judges of the Religious Courts in resolving Islamic economic disputes, in addition to having to master the Islamic aspects of Islamic economic activities, must also understand aspects of business.

If the judges of the Religious Court have no understanding about economic politics in the business world, they will tend to judge things only as "black and white", all contracts will be tested

using conventional concept of muamalah fiqh, even though some contracts that are practiced in Islamic banking currently have several products that constitute some modifications from the concept of conventional muamalah fiqh are mixed with the concept of business in the modern world through the epistemological approach of al-maslahah al-mursalah. In this context, judges, in upholding the law, also need to consider the impact of their decisions on the growth and development of the Islamic economy as a preservation of the interests of the greater Islamic community.

In order to carry out its role in the field of resolving Islamic economic dispute, in line with the demands of the community, the Religious Justice Institution of the Supreme Court of the Republic of Indonesia have improved the human resource preparation program in Islamic economic law. Various efforts continue to be made through activities, technical guidance of judges of the Religious Courts, education and certified training of Islamic economics, to legal discussions on the theme of Islamic economic law (Suadi & Candra, 2017, p. 333).

Based on the description above, it can be inferred that the Religious Courts have a very important role in the resolution of Islamic economic disputes through litigation, both in terms of historical, philosophical, juridical, psychological, and sociological, as well as carrying out executions on decisions of the National Islamic Arbitration Board (Basyarnas). In facing the new authority in the field of Islamic economic dispute resolution, strategic steps have been taken by the Religious Courts in the form of preparing human resources and the rule of law that aims to uphold Islamic economic law in Indonesia to function well, effectively and efficiently.

Terbitnya putusan Mahkamah Konstitusi Nomor 93/PUU-X/2012 telah memunculkan beberapa norma baru dan juga jaminan kepastian hukum sebagaimana yang diamanahkan oleh Pasal 28 ayat (1) Undang-Undang Dasar Negara Republik Indonesia (UUDNRI) 1945 terutama dalam hal penyelesaian sengketa perbankan syariah itu sendiri, hal ini setidaknya dapat dilihat dari beberapa catatan berikut (Suadi & Candra, 2017, pp. 51-53).

The issuance of the Constitutional Court ruling Number 93 of 2012 has raised several new norms and also guarantees of legal certainty as mandated by Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUDNRI), especially in the case of Islamic banking dispute resolution itself, this can at least be seen from the following notes (Suadi & Candra, 2017, pp. 51-53):

- a. Choice of forum for dispute resolution regulated in the explanation of Article 55 paragraph (2) of Law Number 21 of 2008 concerning Islamic Banking in some concrete cases has clearly led to legal uncertainty that could harm not only the customer but also the bank which in turn will cause overlapping authority to prosecute because there are two courts given the authority to settle Islamic banking disputes while in other laws (namely Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts) it is explicitly stated that the Religious Courts are given the authority to settle Islamic banking disputes including Islamic economic disputes, even though the law should provide certainty for customers and banks in resolving Islamic banking disputes as mandated by Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia.
- b. In principle, in Islamic banking disputes the litigants are given the freedom to determine the desired dispute resolution mechanism in accordance with sharia principles or Islamic law contained in a written agreement between the Islamic bank and other parties (customers) that contain the rights and obligations for each the parties. Furthermore, this written agreement is contained in the form of a contract and this provision has actually been regulated in Article 55 paragraph (1), paragraph (2) and paragraph (3) of Law Number 21 of 2008 concerning Islamic Banking and Article 49 letter (i) of

Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts which gives duties and authorities to the courts in the Religious Courts environment to resolve Islamic banking disputes. As long as this is not or has not been determined by legal forum in the contract contract, all Islamic banking disputes become the absolute authority of the court in the Religious Courts environment.

- c. Systematically the choice of forum in accordance with the contract is through the Religious Courts. Thus, the choice of a legal forum to resolve Islamic banking disputes must be clearly stated in the contract (agreement). The parties must agree to choose one of the legal forums in dispute resolution if the parties do not wish to settle their dispute through the Religious Courts because the agreement is an act for those who make it according to the provisions of Article 1338 of the Civil Code (the principle of *pactasuntservando*), but a contract must not contradict the Law, moreover, the Law which has established absolute power for a judicial body that binds the parties to the agreement. Therefore, clarity in the preparation of the agreement is a must.

On the basis development Islamic economic law development, as well as the emergence of many Islamic economic disputes, Regulation of the Supreme Court of the Republic of Indonesia Number 14 of 2016 concerning Procedures for Settling Islamic Economic Disputes. In this Supreme Court Regulations, it can be understood that the recognition to the authority of the Religious Court in adjudicating Islamic economic matters is increasingly strengthened and trusted (Mahkamah Agung, 2016).

In the Supreme Court Regulation of Republic of Indonesia (Perma) Number 14 of 2016 concerning Procedures for Settling Islamic Economic Disputes, it is not completely regulated regarding the concept of executing the rights of Islamic economic case liabilities, therefore the execution of mortgage rights carried out in the Religious Courts uses the legal basis of the *Herzien Inlandsch* Regulations (HIR) and *Rechtreglement voor de Buitengewesten* (RBG) and Law Number 4 of 1996 concerning Mortgage Rights.

As explained above, the settlement of the execution of mortgage rights in the Religious Court takes a very long time, which is between seven months to one year, this is due to various reasons, including if the parties are in different jurisdictions, the process of calling the parties through the assistance of a summons to the Religious Court where the parties reside, which of course requires the fastest time of one month for one summon, not to mention the confiscation of execution and emptying processes which sometimes encounter obstacles in the field in which the executed party does not want to leave the object to be executed.

Based on the Supreme Court Circular Letter Number 02 of 2014 dated March 13, 2014 concerning Settlement of Cases in the First-Class Courts and Appeals Level in four (4) Judicial Domain, the process of finishing cases in the first-class courts is no later than five (5) months, in the case, the process of execution of mortgage rights should also refer to the Supreme Court Circular Number 02 of 2014, so that it is in accordance with the principle of simple, fast and low cost, so that the parties will get justice as well as the benefits of the object of execution (Mahkamah Agung, 2014).

Researchers' findings in the research described above, the process of executing the mortgage of Islamic Bank financing is completed in a long time, due to constraints if the parties are in different jurisdictions, so the process of calling the parties through the assistance of a call to the Religious Court where the parties reside, which of course requires the fastest time of one month for one call, this can be done more quickly via electronic calls.

Article 13 paragraph (1) of PERMA Number 3 of 2018 concerning Case Administration in Electronic Courts, established on 29 March 2018, states that “on the basis of a judge's order, the bailiff or bailiff substitute sends a summoning letter to the parties electronically through the Court Information System” (Mahkamah Agung, 2018). Furthermore, Article 14 paragraph (1) PERMA Number 3 of 2018, emphasized tht “in the event that a subpoena is made to a party domiciled outside the jurisdiction of the Court, the summons can be sent electronically and the summons is sent to the Court in the jurisdiction where the party is domiciled” (Mahkamah Agung, 2018).

If the execution of mortgage right in the Religious Court can be completed within five months, except for justice and expediency, the parties will also get legal certainty, because in legal theory, legal certainty is the teaching of the ideals of the law itself. According to Gustav Radburg (as cited in Achmad Ali, 2010, p. 288), the doctrine of the ideals of law *idee des recht* mentions that there are three elements of the ideals of law that must exist proportionally, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*), and expediency (*zweckmasigkeit*).

According to theorization of Satjipto Rahardjo (2000), the purpose of law is to protect humans actively and passively. Actively intended as an effort to create a human condition of society in a natural process, while what is meant by passively is seeking prevention of arbitrary efforts and unfair use of rights (Manan, 2005). Furthermore, Rahardjo (2000) argues the law aims to integrate and coordinate various interests in society because in a traffic interest the protection of certain interests can only be done by restricting various interests on the other hand.

Theoretically, the basic function of law is to regulate the relationship between humans and between individuals and the state so that everything runs in order so there will be peace because of the upright certainty and justice in society which is an attainable legal goal.

In relation to this, Rahardjo (2000) states that law has limits on the ability to determine something. The principle of legal certainty is needed in the construction of a legal product. The law has the ability to control the object, namely the community, therefore the principle of legal certainty provides a solution about what should be done if a legal regulation faces obstacle in achieving its goals. Legal certainty here is defined as the certainty of a legal regulation adjusting its object.

In relation to the execution of the mortgage right over Islamic Bank financing, it is expected that the related parties, which are the Creditor (Islamic Bank) and Debtor (Customer), obtain Legal Certainty from the execution carried out in accordance with Islamic principles by referring to legal regulations in accordance with Islamic principles. The parties who have submitted themselves to the Islamic contract, should settle their dispute and execution also using Islamic law-compliant regulations, so that there is legal certainty for the parties concerned.

The concept of execution of mortgage over Islamic bank financing in the Religious Court, which is completed within five months, will make the Religious Courts an ideal place to seek justice for the parties as the primary means (*premium remedium*) of dispute resolution and the ultimate means (*ultimum remedium*) which can provide a sense of justice to all parties, because it can obtain legal certainty in the settlement of cases in the field of Islamic economics.

If the justice seeker community gets legal certainty, the community is satisfied with the service of the Religious Court, according to Ismail R. Al-Faruqi and Lois Lamy Al Faruqi (1998, p. 136), phenomenologically justice can be obtained by the community and all parties involved participate in upholding justice and feel the justice, because justice has been done.

In order to achieve this justice, in the short time, the Supreme Court should issue a Supreme Court Regulation (PERMA) concerning the Procedure for Execution of Islamic Mortgage Rights, which among others regulates the process of executing a mortgage right with a concept that can be completed within five months. This is hoped to be soon realized, because so far the execution of the mortgage rights over Islamic Bank still uses *Het Herziene Inlandsch Reglement* (HIR) rules for Java and Madura, and *Reglement Tot Regeling Van Rechtswezen In De Gewesten Buiten* (RBG) for outside Java and Madura, and Law Number 4 of 1996 concerning Mortgage Rights.

The legal basis for the execution of the mortgage right on Islamic economic cases no longer uses regulations that are inherited from the Dutch colonial. Ideally, there is an Islamic law compliance principle which is applied to the resolution of Islamic economic disputes. The characteristic of Islamic law compliance is that in a business transaction it is the *kaffah* (adherence) principle itself, which means that from the beginning of the contract signing to the end of the series of implementation it is obliged to submit to Islamic law, including the instrument for settling its dispute in the event of a Islamic economic dispute in the future (from beginning to the end, including choice of law and choice of forum) (Roro, 2017).

After the Supreme Court Regulation regarding the Procedure for Execution of Islamic Mortgage Rights issues, in the long run Islamic Economic Procedural Law should be issued to meet the expectations of parties who have submitted themselves to the sharia contract and want to settle disputes according to Islamic law and *kaffah* (adherence), according to the *maslaha mursala* theory, which aims to overcome difficulties as well as in the public interest, as the opinion of Umar Shihab (2003), the criteria of the *maslahah mursala* must meet four conditions, which are: (1) aiming at perfecting the objectives of sharia; (2) its use must be simple (balanced) and acceptable to reason (logical); (3) its use aims to overcome difficulties; and (4) its use for public purposes.

The use of *al-mashlahah* theory in this study is an appropriate use since it is based on the argument of rejecting *mudharat*, so that the issuance of PERMA in the short term, and the issuance of Islamic Economic Procedures in the long term can be a solution to complement the rules regarding the execution of mortgage right over Islamic Bank financing because if awaiting amendments to laws that are not in harmony or waiting for a material test of laws that are not in accordance with the absolute competence of each judicial domain, then it is not the benefit will be obtained but rather the *mafsadatan* will come, this is the task of the Supreme Court as a technical guide for the judiciary underneath.

This *Maslahah* theory if applied in positive law in Indonesia is similar as the theory of the purpose of law, which are Justice, Benefit and Certainty. The purpose of the law is the direction or target to be realized by using the law as a tool in achieving these goals in managing society. The purpose of the law so that it can be achieved there must be legal protection for related parties, namely Islamic Banks and Customers, and so that legal protection can be realized it requires regulations on the implementation of mortgage rights for fast Islamic bank financing in accordance with the principles of simple, fast, low cost judiciary, so that the Religious Courts as the executor of the execution of mortgage rights on Islamic Bank financing can provide legal certainty to the community that seek justice.

In terms of benefits according to Islamic principles which is providing convenience and relief to the Respondent's execution, it must be applied at the stage of execution of the mortgage right over Islamic Bank financing by providing an opportunity for discussion before the auction. While in terms of legal certainty, it can be done by stopping efforts to resist the execution of the execution Petitioner and the Respondent's execution. Because ideally, with the execution, it should have closed all legal efforts, except *derden verzet*, which is resistance from a third party who is in loss over the execution so that with this concept, justice will be achieved.

Conclusion

The implementation execution of mortgage right over Islamic Bank financing in the Religious Courts still does not have specific rules, but it still refers to the *Herzien Inlandsch Regulations* (HIR) and *Rechtreglement voor de Buitengewesten* (RBG) and Law Number 4 of 1996 concerning Mortgage Rights, so that the execution is similar to that is carried out in the District Court. The execution process is time-consuming due to the legal efforts given to the parties who are not satisfied with the execution process where they can file legal action against the execution that can lead to increase the length of time the execution, so it is not in accordance with the justice system quickly, effectively and efficiently. Ideally, with the execution, it should have closed all legal efforts, except *derden verzet*, which is resistance from a third party who was is loss over the execution, so that with this concept, justice and legal certainty would be achieved.

References

- Al-Faruqi, I. R. & Al-Faruqi, L. L. (1998). *Atlas Budaya Islam [Atlas of Islamic Culture]*. Bandung: Mizan.
- Ali, A. (2010). *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-Undang (legisprudence) [Revealing Legal Theory and Judicial Theory including Interpretation of the Law (Legisprudence)]*. Jakarta: Prenada Media.
- Ali, C. (2005). *Badan Hukum [Legal Entity]*. Bandung: Alumni.
- Dewan Syariah Nasional Majelis Ulama Indonesia. (2000). Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia Nomor 4 Tahun 2000 tentang Murabahah [Fatwa of the National Sharia Council of the Indonesian Ulema Council Number 4 of 2000 concerning Murabaha]. Jakarta: Dewan Syariah Nasional Majelis Ulama Indonesia.
- Mahkamah Agung Republik Indonesia. (2014). Surat Edaran Mahkamah Agung Republik Indonesia tentang Pemberlakuan Rumus Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2013 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan [Supreme Court Circular Letter Number 02 of 2014 concerning Enactment of the 2013 Supreme Court Chamber Plenary Meeting Formulas as Guidelines for Implementing Duties for Courts]. Jakarta: Mahkamah Agung Republik Indonesia.
- Mahkamah Agung Republik Indonesia. (2016). Peraturan Mahkamah Agung RI Nomor 14 Tahun 2016 tentang Tata Cara Penyelesaian Perkara Ekonomi Syariah [Regulation of the Supreme Court of the Republic of Indonesia Number 14 of 2016 concerning Procedures for Settling Islamic Economic Disputes]. Jakarta: Mahkamah Agung Republik Indonesia.
- Mahkamah Agung Republik Indonesia. (2018). Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2018 tentang Administrasi Perkara di Pengadilan Secara Elektronik [Republic of Indonesia Supreme Court Regulation Number 3 Year 2018 concerning Electronic Case Administration in Court]. Jakarta: Mahkamah Agung Republik Indonesia.
- Manan, A. (2005). *Aspek-aspek Pengubah Hukum [Legal Changing Aspects]*. Jakarta: Prenada Media.

- Mertokusumo, S. (2002). *Hukum Acara Perdata Indonesia Edisi Keenam [Indonesian Civil Procedure Law Sixth Edition]*. Yogyakarta: Liberty.
- Otoritas Jasa Keuangan. (2019). *Standar Produk Perbankan Syariah Murabahah [Murabahah Syariah Banking Product Standards]* (2019). Jakarta: Divisi Pengembangan Produk dan Edukasi Departemen Syariah Otoritas Jasa Keuangan.
- Rahardjo, S. (2000). *Ilmu Hukum [Legal Studies]*. Bandung: PT. Citra Aditya Bakti.
- Roro, S. R. (2017). *Karakteristik Sharia Compliance dalam penyelesaian Sengketa Ekonomi Syariah di Indonesia [Characteristics of Islamic Law Compliance in Islamic Economic Dispute Resolution in Indonesia]*. *Jurnal Hukum Ekonomi Islam*, Vol. 1, No. 1.
- Sekretariat Negara Republik Indonesia. (1996). *Undang-undang Nomor 4 tahun 1996 tentang Hak Tanggungan [Law Number 4 of 1996 concerning Mortgage Rights]*. Jakarta: Sekretariat Negara Republik Indonesia.
- Sekretariat Negara Republik Indonesia. (2006). *Undang-undang Nomor 3 Tahun 2006 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama [Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Courts]*. Jakarta: Sekretariat Negara Republik Indonesia.
- Shihab, U. (2003). *Kontekstualisasi al-Qur'an: Kajian Tematik atas Ayat-Ayat Hukum dalam Al-Qur'an [Al-Qur'an Contextualization: Thematic Study of Legal Verses in the Qur'an]*. Jakarta: Penamadani.
- Soekanto, S. (2008). *Faktor-Faktor yang Mempengaruhi Penegakan Hukum [Factors Affecting Law Enforcement]*. Jakarta: Raja Grafindo Persada.
- Suadi, A., & Candra, M. (2017). *Penyelesaian Sengketa Ekonomi Syariah Teori dan Praktik [Islamic Economic Dispute Resolution Theory and Practice]*. Jakarta: Kencana.
- Suyuti, W. (2008). *Kapita Selekta Perbankan Syariah Menyongsong Berlakunya UU No.3 tahun 2006 tentang Perubahan UU No.7 Tahun 1989 [Capita Selekta Sharia Banking Welcomes the Enactment of Law Number 3 of 2006 concerning Amendment of Law No.7 of 1989]*. Jakarta: Pusdiklat Teknis Peradilan Balitbang Diklat Kumdil MA-RI.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).