

PAWNING GOLD IN ISLAMIC BANKS FROM THE PERSPECTIVE OF ISLAMIC LAW AS THE LIVING LAW IN INDONESIA

Andi Fariana¹
Mega Putri Amelia²
Ralang Hartati³

^{1, 2}Perbanas Institute

³Universitas Tama Jagakarsa
(e-mail:andi.fariana@perbanas.id)

Abstract: *There are three areas of law that live and grow (the living law) in Indonesia, which are Customary Law, Islamic Law, and Western Law. These three areas of law are the main material for the national legal system. Islamic law which is based on the Qur'an and hadith has perfectly regulated all aspects of life including muamalah matters, and one part of muamalah activity is pawning. The rapid development of Islamic Banks is a challenge to itself to make the actors in this industry need to innovate in creating banking products, but of course, it must be in accordance with Islamic principles. This research was conducted by tracing the various legal bases for the application of gold pawning to Islamic banks and the practice model so that this research was carried out in a normative juridical manner using a statute approach and comparative law studies as well as complementing it with the results of interviews regarding the practice of gold pawning on Islamic banks. The results of the study shows that the values of Islamic law, which are the living law after going through legal politics, have been transformed into and become part of the national legal system. Therefore, their practice is in accordance with sharia principles.*

Keywords: *Islamic Law, The Living Law, Gold Pawning, Sharia Bank*

Introduction

The growth of Sharia Banking in 2023 is predicted to be higher than the average growth of other national banks, including the growth of third party funds (TPF) that is predicted to grow about 11.46%, which is bigger than the projected national banks TPF, that is 9.6%, (Rahma Harbani, 2023). This is only one of the indicators that shows Sharia Banking continues to grow. And along with that, business people in this industry are required to continue to create innovation so that the competition can be won. However, any form of innovation must be in accordance with the standard values applied by Islam, that is guided by the Al-Quran, Hadith and other sources of law that exist within the corridors of Islamic law.

One of the products of Sharia Banking that is categorized an innovation is gold pawning, and it is assumed that gold pawning is triggered by the increase of gold prices which tends to increase every year. The basic concept of this investment originates from the habit of the Indonesian people to buy gold and then they keep it as an asset. The gold can be resold at any

time with the hope of getting a profit from the sale. Gold is an asset that is easily owned by everyone (Nawawi, 2017) because of its convenient and simple transaction. If a person needs cash, he/she can easily pawn the gold to a pawnshop or a Sharia bank. After the debt is paid off, the gold that is used as collateral can become his/her property again. The variation of institution to be chosen as the place to do the pawning are interesting, however recently there has been a tendency in society preferring to pawn their gold jewelery at a Sharia Bank (M. Ayu Ramadhana Sari, 2017). Gold pawning products at Sharia Banks can be relatively new. One of the pioneers of gold pawning through Sharia Banks is Bank Syariah Mandiri, which began providing gold pawning products in 2009. This gold pawning business contributed to an increase in fee-based income (FBI) for Bank Syariah Mandiri in 2020, which has increased by 18.33%, the analysis results show that for every 1% addition from the value of gold pawning fee-based income, profitability increases by 126% (Anastasya Aqilla Susanto, 2022). However, the problem is whether Islamic law as the living law has been transformed into the national legal system so that there is a regulation that becomes the legal protection for the permissibility of pawning gold by Sharia Banks? because in general, Indonesian people assume that pawning can only be done at pawnshops. In addition, if pawning gold can be done at a Sharia bank, what is the procedure?

Literature Review

Anastasya Aqilla et al in their research at Bank Syariah Mandiri found out that there was a significant effect of gold pawning fee-based income on the profitability of Mandiri Sharia Banks. Her research corroborates the research conducted by Iwan Setiawan on the application of gold pawning in Sharia banks, which in general these two studies shows that the practice of gold pawning in Sharia banks is quite promising and has standard procedures. But these studies does not clearly reveal the importance of laws and regulations which become the legal protection for the practice of pawning gold in Sharia banks, and this study is trying to raise this matter because gold pawning is part of the values of Islamic law that live and grow in Indonesian society (*the living law*).

Method

This normative legal research is carried out using an analytical descriptive approach, which describing it in a systematic, factual and accurate manner, that begins by tracing the applicable laws and regulations (statute approach). Furthermore, a legal comparison is made between Islamic law and positive law so that it is included in the comparative study of law category Observations and interviews were also carried out at one of the Sharia Banks to support the research, specifically to collect information regarding the procedure for pawning gold if it was carried out at a Sharia Bank.

Result and Discussion

Pawning is the act of two parties who carry out a debt agreement, one party as the person giving the debt and the other party as the person who owes it by pawning the jewelery as collateral. After the item is mortgaged, the collateral item is temporarily controlled by the person giving the loan (the pawnbroker). It is regulated within the Civil Code (KUHPerdara) Book II, Chapter 20, Articles 1150 to 1161. Article 1151 stated that pawning is a right that is obtained by a creditor for a movable object, which is handed over to him by a debtor or by another person on his behalf, and which gives power to the other creditor with his power to the creditor to take payment of the goods with the priority over other debtors. With the exception of the costs of auctioning the item and the costs incurred to salvage it after the item was mortgaged, which costs must take

precedence. This notion of pawning is the general description in the perspective of civil law which is stated very clearly in the Civil Code (KUHPer) and is still valid today. In addition to pawning in the perspective of civil law, there is also pawning in the perspective of customary law, but pawning in customary law is different from pawning in western law because the object of pawning in western law is a movable object while pawning in customary law is a fixed object such as land (agriculture). Land in the perspective of customary law is considered as the most valuable item that can determine the dignity or stature of a person in society so that transaction related to land ownership can only be done if the situation is urgent. This is the spirit of land pawning in customary law that becomes the primary concern and the basis for regulating land pawning in Article 7 of Undang Undang No. 56/prp/1960, to anticipate things that are very detrimental to landowners due to land pawning practices (Nur Ridwan Ali Sasongko, 2014).

In Islamic law, mortgage has its own characteristics. Pawn originated from the word *rahn* which means fixed and continuous or interpreted as making assets as collateral for debts and absolute for assets used as collateral. Another interpretation of pawning is making the value of an item that is a property to be a guarantee of debt, from the view of Islamic law (Abdurahman Misno, 2017). So it is very clear that there is debt and then followed by the provision of collateral for the debt and the collateral is in the form of movable objects. As it is stated In the Al-Qur'an Surah Al-Baqarah verse 283 as follows:

وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهْنَ مَقْبُوضَةٌ ۗ فَإِنْ أَمِنَ بَعْضُكُم بَعْضًا فَلْيُؤَدِّ الَّذِي اؤْتُمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ ۗ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثِمٌ قَلْبُهُ ۗ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

“If you are on a trip (and conduct mu'amalah not in cash) while you do not get a person as a writer, then there should be a collateral item held (by the debtor). However, if some of you believe some of the others, then let those who are trusted fulfill their trust (their debts) and let them fear Allah and thou shall not conceal your testimony. Whoever hides it, then surely he is a sinner and Allah is All-Knowing of what you do.” This verse implies that pawn activities can be carried out anywhere and at any time as long as both parties have fulfilled the terms and conditions of pawning in accordance with Islamic law. Apart from the Quran, the Hadith also states:

عَنْ عَائِشَةَ قَالَتْ اشْتَرَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مِنْ يَهُودِيٍّ طَعَامًا وَرَهْنَهُ دِرْعًا مِنْ حَدِيدٍ

From Aisyah ra, the Prophet SAW bought food from a Jew with installments and as his collateral, he handed over his armor (HR. agreed by Bukhari & Muslim). This hadith suggests that *rahn* or pawning has occurred since the time of Prophethood and can be done not only against fellow Muslims and the collateral is a movable object.

It is clear that pawning or known as *rahn* is a part of Islamic law and thus if Islamic law is one of *the living laws* in Indonesia aside from customary law and western law, then *rahn* is also an economic activity that lives and grows in society. When *rahn* was later discussed and became part of the national legal system, legal politics possesses the important role as a catalyst in the formation of the national legal system (Andi Fariana, 2021). Or it can be said that it is through legal politics that the values of Islamic law, in this case the rules regarding *rahn*, are transformed into the national legal system and enforced. And thus become a part of business activities in society, especially for those that are in need, allowing their gold to change hands through a mechanism known as pawning or *rahn*.

The living law or law that live and grow in Indonesian society are customary law, western law, and Islamic law. *The living law* is not a law formulated by the state like the *ius constitutum* (currently applicable law -law that has been established or often referred to as positive law) nor it is *ius constituendum* (the law that will apply in the future or the law that is aspired to). *The living law* is not formulated by the state and Islamic law as one of *the living laws* lives in the minds and legal awareness of the society, it influences people's lives and even its influence can sometimes defeat the positive law, whose existence is formulated by the state. *The living law* is dynamic, one of the reasons is because of the existence of fatwa from the Indonesian Ulema Council (MUI) which oversees it (Yusril Ihza Mahendra, 2016). Even factually everywhere, *the living law* is accommodated in the national legal system with certain limitations (syofyan Hadi, 2017) so that it appears that *the living law* acts as the raw material for the national legal system, after going through some processes.

Fatwas from MUI are not considered as legal products, unlike positive law which has binding power for all citizens and will only have binding force if it has been transformed into statutory regulations. MUI Fatwa (in this case the DSN-National Sharia Council formed by MUI in 1998 based on the Decree of the MUI Leadership Council No. Kep-754/MUI/II/1999 with the duties and authority to ensure conformity between bank products, services and business activities with sharia principles) has made a positive contribution to the foundation of the national legal system, especially in the field of sharia economics (Andi Fariana, 2017) as well as regarding *rahn* in Sharia Banks. Banks that applies sharia principles in carrying out their activities are guided by sharia principles as stated in Article 1 number 13 of Undang Undang Nomor 10 of 1998 about amendments to Undang Undang Nomor 7 of 1992 about Banking and also specifically stated in Undang Undang Nomor 21 of 2008 about Sharia Banking Article 1 number 7, and in carrying out *rahn* activities which in this case is pawning with gold as the object so it is called gold pawning, guided by DSN-MUI Fatwa No. 25/DSN-MUI/III/2002 about *rahn* which states that it is permissible to borrow on pawned goods as collateral for debt in the form of *rahn*, and DSN Fatwa No. 26/DSN-MUI/III/2002 regarding gold *rahn* which revealed that the storage of goods (*marhûn*) is carried out based on an *ijârah* contract (Iwan Setiawan, 2016). The practice of pawning gold at Sharia Banks is indeed interesting because in practice it takes place based on the DSN-MUI fatwa. In general, Sharia Bank operations are guided by the existing Banking Law, but there are no laws and regulations that specifically regulate gold pawning in Sharia Banks in detail.

Technically, because sharia pawning activity can be categorized as financing or loans, the appropriate contracts are *qardh hasan* contracts (naturally administrative—imposition of administrative costs such as stamp duty, notary fees) and *ijarah* (savings service fees) which are socially consumptive and profit sharing contracts or *rahn* contracts, *mudharabah (musyarakah)* and *ba'I muqayyadah* which are commercially productive (opening or increasing the customer's business) or consumptive. In practice, the sharia pawn runs on two contracts/agreements, which are the *rahn* contract (holding the borrower's property as collateral for the loan received, the retaining party has the right to get the loan repaid in whole or in part from his receivables, and holding the collateral is a form of guarantee for repayment of debt), and *ijarah* contracts (contracts for the transfer of usufructuary rights over goods and services through the payment of rental wages without being followed by a transfer of ownership of the goods. In other words, the charging of rental wages for the storage of the movable property).

The formula to calculate the maintenance or storage cost in the standard operational procedure (SOP) of Islamic gold pawning financing is calculated from the maintenance costs determined by Sharia Banks multiplied by the weight of gold multiplied by the loan period. This calculation is implemented with the aim that the cost of maintaining the collateral can be carried out using an *ijârah* contract and the calculation of maintenance costs cannot be determined based on the loan amount. This regulation is contained in the DSN-MUI Fatwa Number 25/DSN-MUI/III/2002 regarding *rahn* (Iwan Setiawan, 2016). Sharia gold pawning can be described as granting physical possession rights over assets or in the form of valuables (such as gold) from people who want to pawn (*ar-rahn*) to those who will receive pawn (*al-Murtahin*) then it will be managed with the principle of *ar-Rahnu*, goods that will be guaranteed (*al-Marhun*) for borrowers or debts (*al-Marhumbih*) which is given to people who want to mortgage or commonly called customers. *Ar Rahnu* is interpreted as a contract for the delivery of goods pawned by the borrower to those who will provide loans as collateral for all debts of the borrower. Thus, this transaction is a combination or amalgamation of several transactions or contracts which constitute an inseparable series including providing loans using transactions or *qardh* contracts and entrusting collateral items based on transactions or *rahn* contracts while providing rental of a safe place (place for storing goods) on safekeeping through transactions called as *ijarah* agreements. In the Compilation of Sharia Economic Law (PERMA No. 2 of 2008) in Article 372 paragraph 1 and paragraph 2, it is stated that the pawn contract (*rahn*) consists of elements of the pawn recipient, the pawn giver, the pawn assets, the debt and the contract. The contract must be declared by the parties verbally or written or by gesture. The interpretation of "Akad" is a contract between two parties that is binding and mutually agreed, that is, each party related have to carry out their respective obligations that have been agreed upon in advance (Adi Warman Karim, 2009).

In addition to the form of the contract, it is also necessary to observe that Sharia Banks, when accepting gold pledges, stipulate conditions that gold can be in the form of jewelry and gold bars with the grade of 16-24 carats or dinar coins with the grade of 22 carats. The time span for pawning is usually limited to a maximum of 4 months, and can be extended automatically. The minimum age limit for pawning is 21 years old. The procedure for granting financing on the basis of a pledge of gold is as follows.

Procedure

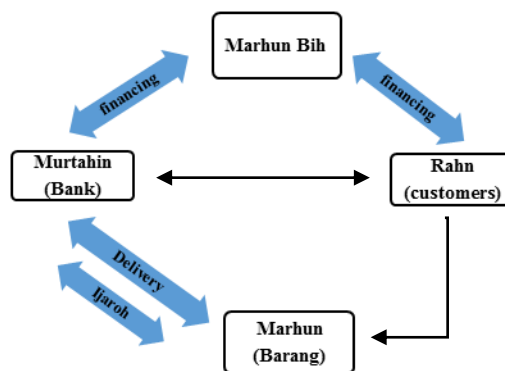


Figure 1: Scheme Of Sharia Gold Pawn Financing Procedures

In the process of accepting gold pledges, it is important for banks to establish a method for determining the carat and weight of gold. The method is a gold test method. The gold test process is conducted by comparing the changes that occur in the gold stroke and the test needle that is etched on the gold being tested. This test is also supported by a liquid solution to find out the result.

The tools used in this method include:

1. Gold testing needle. To find out if the gold is true based on the carat. This test needle also has the karat code printed on each needle that shows how many carats the gold is.



Figure 2: Gold Test Needle

2. Testing stone. to test whether the gold stroke and test needle are correct. By dripping the liquid test solution onto the part that has been rubbed based on the carat.



Figure 3: Gold Touchstone

3. Gold test liquid solution. A solution that consists of 2 solutions, nitric acid and hydrochloric acid. These 2 solutions are used to find out whether the gold is worth pawning or not



Figure 4: Gold Test Solution

4. Chemical measuring cup for measuring chemical mixtures.
5. Pipette drops and tissue paper.

In addition to the above method, another method was also found, in the form of weighing. This method was used to measure the mass of gold items and compared with the specific standard mass of gold. This method uses the following tools:

1. Scales (electronic or manual)
2. Measuring cup or vessel for water
3. Pure water
4. The gold scales container or straps



Figure 5: Gold Scales

Conclusion

Gold pawning in Sharia Banks is a form of pawn practice that has been carried out since the prophetic era, and its existence in Indonesia is a part of Islamic law which that serves as *the living law*. Gold Pawning is carried out with the principle of *qardh*, that provides financing or loans, and in the context of *rahn*, that means pawning gold. The practice of pawning gold in Sharia Banks is based on fatwa number 25/DSN-MUI/III/2002 and fatwa number 26/DSN-MUI/III/2002. The gold pawn is said to be a follow-up agreement (in the form of an *ijarah* contract) after there is a main agreement, a financing/loan agreement (in the form of a *qard* contract). In practice, there are no laws and regulations that specifically regulate gold pawning in Sharia Banks. So that it needs to be encouraged to immediately issue regulations in any form such as the Financial Services Authority Regulation (POJK). It could be a form of a law that is transformed from the DSN-MUI fatwa so that it has strong binding force, considering that the profit that the Sharia Bank banks receive from the practice of gold pawning is quite significant.

Bibliography

- Adi Warman Karim. (2009). *Bank Islam: Analisis Fiqih dan Keuangan*, Jakarta, IIT
- Anastasya Aqilla Susanto dkk. (2022). Pengaruh fee Based income Gadai Emas terhadap profitabilitas Bank Syariah Mandiri Kcp Cimahi Baros, *JIEI: Jurnal ilmiah Ekonomi Islam* 8(2)
- Djuwita, D., Purnamasari, D., Studi, P., Syariah, P., Iain, F., & Nurjati, S. (2017). Analisis manajemen risiko dalam prosedur pembiayaan gadai emas di BJB Syariah KCP Kuningan. *Al- Amwal, Volume 9, No. 1 Tahun 2017*, 9(1), 97–110.
- Fariana, A. (2017). Urgensi fatwa Mui dalam pembangunan Sistem Hukum ekonomi islam di Indonesia. *Indonesian Journal of Shariah and Justice*, 2(1), 67–91. <https://doi.org/10.46339/ijsj.v2i1.27>
- Fariana, A. (2021). Legal Politics as a Catalyst in Forming Sharia Economic Legal System in the Indonesia's New Order and Reforma Era, *Ijtihad, Jurnal Hukum Islam dan Kemanusiaan* Vol21. No. 2, pp. 197-211, ijtihad.iainsalatiga.ac.id
- Hutagulung, M. A. K., & Hutagalung, M. A. K. (2020). Analisa pembiayaan gadai emas Di Pt. Bank Syari'Ah Mandiri Kcp Setia Budi. *Jurnal Al-Qasd*, 1, 117.
- M. Ayu Ramadhana Sari. (2017). Analisis akuntansi pembiayaan gadai emas berdasarkan Psak 107 (Studi kasus pada bank syariah mandiri cabang Banda Aceh). *Jurnal Ilmiah Mahasiswa Ekonomi Akuntansi (JIMEKA)*, 2(3), 133. <https://www.neliti.com/publications/202247/analisis-akuntansi-pembiayaan-gadai-emas-berdasarkan-psak-107-studi-kasus-pada-b>
- Marice, K. (2021). Praktek gadai emas pada PT Bank Syariah Mandiri Ternate Rusandry. *Jurnal Ilmiah Wahana Pendidikan* <https://Jurnal.Unibrah.Ac.Id/Index.Php/JIWP>, 7(1), 1–7. <https://doi.org/10.5281/zenodo.4486297>
- Misno,Abdurrahman (2017). Gadai Dalam Syariat Islam, Ad Deenar, jurnal ekonomi dan bisnis islam, STAI Al Hidayah Bogor Vol 1, No. 01. <https://jurnal.staialhidajahbogar.ac.id>

Nawawi Fajar Ikhwan. (2017). Pelaksanaan gadai emas pada perbankan syariah (studi pada BNI syariah kota Semarang). *Diponegoro Law Journal*, 6, 1–13.

Nursyamsu. (2016). Gadai emas di Perbankan syariah. *Bilancia Jurnal Studi Ilmu Syariah Dan Hukum*, Vol. 10, 113–133.

Nur Ridwan Ali Sasongko. (2014). Gadai Tanah/Sawah Menurut Hukum Adat dari Masa Kemasa, *Jurnal Repertorium*, Vol 1. no. 2

Rahma Harbani. (2023). *Pertumbuhan perbankan syariah diprediksi di atas rata-rata bank konvensional*, detik.com, 14 Januari 2023

Setiawan, I. (2016). Penerapan gadai emas pada bank syariah perspektif hukum ekonomi islam. *Al-Daulah: Jurnal Hukum Dan Perundangan Islam*, 6(105), 213.

Syofyan Hadi. (2017). Hukum Positif dan The Living Law, *DIH: Jurnal Ilmu Hukum*, Vol. 13, No. 26

Yusril Ihza Mahendra. (2016), *Hukum Islam adalah The Living Law*, republika.co.id, 25 Desember 2016