

The Role And Authority Of Notary In Making A Financing Agreement In Sharia Banking

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Abstract: *Notary as a public official appointed by the government to assist the general public in making agreements that arise in the community. The role and authority of the Notary is related to the making of contracts relating to sharia banking, both financing contracts and other contracts which constitute sharia banking products. Sharia banking as a bank that uses sharia principles in conducting its business refers to the Alquran and Hadist. Sharia banks as financial intermediaries, namely collecting and distributing funds to the public with financing carried out in sharia principles. Financing agreements in sharia banking: murabahah financing contracts (financing the sale and purchase of goods with a profit), musyarakah (financing based on the principle of joint ventures), mudharabah (financing based on profit sharing principles), and ijarah financing contracts (financing of capital goods based on the leasing principle). The role and authority of a Notary in making a financing agreement in sharia banking is a general official authorized to make an authentic deed, concerning certain legal acts in particular, namely: murabahah, musyarakah, mudharabah and ijarah financing contracts. The notary official has the authority to make an authentic deed, especially the financing agreement in sharia banking. The role and authority of a Notary in making a financing agreement between an sharia bank and a customer is an authority arising from his position as a public official in Article 1 number (1) and Article 15 of Law No. 2/2014.*

Keywords: *The Role and Authority of Notary, Financing Agreement, Sharia Banking.*

Introduction

Notary is one of the important elements in every sharia banking transaction, especially in making financing agreements as authentic deeds (Ascarya, 2007: 53). In accordance with its authority in making the deed, the Notary has the right to make all the deeds needed by the parties as long as the authority to make the deed is not excluded to other parties (Andasmita, 1981: 14).

The role and authority of a Notary public in making a financing agreement in sharia banking is as a general official authorized to make an authentic deed, especially in making a financing agreement. In practice in the banking world, Notary is a partner and partner of sharia banking in making the deed of agreement for banking purposes, in this case concerning the making of the deed of Islamic financing agreement (Rahman, 2008: 143).

Authentic deed as the strongest evidence and has an important role in every legal relationship in society (Fatahna and Purwanto, 2003: 257). Authentic deeds clearly specify rights and obligations, and guarantee legal certainty (Djamil, 2012: 1-2). Because it is in the practice of sharia banking contracts made with customers as recipients of financing can be made with an authentic deed in front of the Notary (Amin, 2019: 10-11).

A contract in sharia banking regarding financing can be made by and with an authentic deed through a notary public as in general banking (Mahfuz, 2007: 4). Notary as an official authorized to make an authentic deed and has extensive knowledge in the field of law,

including regarding financing contracts in sharia banking, about the form and content of contracts made by sharia banking, because the making of the deed is the duty and authority of the Notary as stipulated in Law Number 30 of 2004 and Law Number 2 of 2014 (Sjaifurrachman, 2011: 7-8).

Seeing the position of the essential financing contract, the need for authentic deed in each financing agreement is an inevitable thing for both parties both sharia banking and customers, because the authentic deed of the financing contract serves as evidence that a legal act has been carried out regarding the making of the financing contract *murabahah*, *musyarakah*, *mudharabah* and *ijarah* in sharia banking (Widiyono, 2006: 59).

Literature Review

1. Notary Public

Notary as a public official is a translation of the term *openbare ambtenare* contained in Article 1 of the Notary Position Regulation (PJM) (Tobing, 1999: v), and Article 1868 of the Civil Code (Indonesia, 1995: 397). Article 1 PJM states (Tobing, 1999: 31):

“Notary is the only official who is authorized to make an authentic deed regarding all deeds, agreements and stipulations required by a general regulation or by the interested parties to be stated in an authentic deed, guarantee the certainty of the date, keep the deed and give a grosse, copy and excerpts, all as long as the making of the deed by a general rule is not also assigned or excluded to officials or others.”

Article 1868 of the Civil Code states:

“An authentic deed is a deed in the form determined by the law, made by or in front of the general authority in charge for it in the place where the deed was made.”

In Article 1 number (1) Law Number 2 of 2014, states: *“Notary is a public official who has the authority to make an authentic deed and has other authorities as referred to in this law or based on other laws.”* Noting the description of the provisions of Article 1 Law Number 2 of 2014, it can be explained that the Notary is:

- a. General official.
- b. Authorized to make a deed.
- c. Authentic.
- d. Determined by law.

The task of the Notary is to maintain legal relations between the parties in written form and certain format, so that it is an authentic deed. He is a strong document maker in a legal process (Tan Thong Kie, 2007: 159). Thereby *openbare ambtenaren* is an official who has the duty to be related to the public interest, so that it is appropriate if the *openbare ambtenaren* is defined as a public official. Especially with regard to *openbare ambtenaren*, which translates as general official, which is defined as an official assigned with the task of making an authentic deed that serves the public interest, and such qualifications are given to a Notary (Adjie, 2009: 27).

2. Contract

In Islamic law, freedom of agreement in a contract, is a right that is owned by every human being, where those who promise to ful-fill their promises (Azhari, 2015: 177).

In the Alquran Surah Al-Maidah: 1, Allah Swt, reads:

يٰۤاَيُّهَا الَّذِيْنَ ءَامَنُوْا اَوْفُوْا بِالْعُقُوْدِ اٰحٰلَتْ لَكُمْ بِهِيْمَةٍ
الْاَنْعَمَ اِلَّا مَا يُتْلٰى عَلَيْكُمْ غَيْرَ مُجْلِى الصَّيْدِ وَاَنْتُمْ حُرْمٌ اِنَّ


It means: “*O you who believe, ful-fill the covenants. It is permissible for you cattle, except for those that will be read to you. (that way) by not justifying hunting when you are doing the pilgrimage. Verily Allah establishes the laws according to His will.*” (Q. S. Al-Maidah: 1).

There-fore, based on the word of Allah Swt, it is clear that Islamic law has stipulated that every human being is required to ful-fill all of his agreements or promises (Mas’adi, 2002: 75). As the definition of a contract is an agreement, the terms relating to the agreement in the Alquran are at least 2 (two) terms, namely *al-aqdu* (contract) and *al-ahdu* (promise) (Dewi, et. Al, 2006: 45).

The term *al-aqdu*, or what is known in Indonesian literature as the contract, its meaning and essence can be equated with the *verbinten* term in the Civil Code. The term *verbinten* which in Belanda means to enter into an agreement (Miru, 2012: 5-6). While the term contract in Indonesian is derived from Arabic, namely: “... *from the root word 'aqada, which means to bind, conclude, and combine.*” (Ali and Muhdlor, 1998: 1305). The word ‘*aqada* as a verb turns into a noun, and is called with the pronunciation of *al -aqdu*. Whereas ‘*Al-aqdu* means agreement, agreement, or contract.” (Ali and Muhdlor, 1998: 1305).

According to Fathurrahman Djamil (2001: 75), that the term *al-aqdu* can also be equated with the term *verbinten* in the Civil Code. While the term *al-ahdu* can be equated with the term agreement or *overeenkomst*, which is a statement from someone to do something or not do something that is not related to others (Zaman, et. A, 2001: 247).

The word *al-ahdu* is contained in Surah Ali Imran: 76:

 بَلَىٰ مَنْ أَوْفَىٰ بِعَهْدِهِ وَاتَّقَىٰ فَإِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ

It means: “*(not so) actually who keeps their promises (made) and pious, then surely Allah likes those who fear Allah.*” (Q. S. Ali Imran: 76).

In the legal dictionary, what is meant by the word contract is an agreement (Simorangkir, et. Al, 1987: 6). However, when viewed from Islamic law, agreements are often referred to as contracts. A contract is an act intentionally made by two or more people based on the agreement of each party (Ash Shiddieqi, 1997: 28-29).

Whereas the fiqh experts gave the definition of the contract agreement as “a relationship between the consent and the granted which was justified and in accordance with the will of the Shari’a which caused a legal effect on the object.” (Dewi, et. Al, 2006): 45-46). So the contract is one form of legal action or called a *tasharruf* (Dewi, et. Al, 2006: 48).

3. Sharia Banking

Sharia banking is known by other names, namely the bank without interest (*La Riba Bank*), Islamic Banking, and *Nirbunga* Bank. Sharia banking began to be initiated since the 1990-s. The sharia bank that was first established in Indonesia and purely sharia is Bank Muamalat Indonesia. The legal relationship between banks and customers is part of *muamalah* activities. In Islamic law *muamalah* in the broadest sense are the rules (law) of Allah Swt to regulate humans in relation to worldly affairs in social relations (Suhendi, 2002, 2).

Sharia banks are banks that operate in accordance with Islamic sharia principles, namely banks whose operating procedures refer to the provisions of the Alquran and Hadis. The meaning of a bank operating in accordance with the principles of Islamic sharia is a bank

that operates in compliance with Islamic sharia provisions, especially those concerning Islamic procedures. In the procedure, it is shunned by practices that are feared to contain elements of usury to be filled with investment activities on the basis of profit sharing and trade financing.

Banks whose operating procedures refer to the Alquran and Hadis are banks whose operating procedures follow the commands and prohibitions contained in the Alquran and Hadis. In accordance with the commands and prohibitions, those that are shunned are business practices carried out in the time of the Muhammad Saw or other forms of business which had existed before but were not prohibited by him (Perwataatmadja and Antonio, 1992: 2).

In operating an sharia bank so as not to deviate from the guidance of sharia, in each sharia bank only managers and bank leaders are appointed who more or less master the principles of Islamic *muamalah*, in addition a Sharia Supervisory Board (DPS) is formed to oversee bank operations from the sharia perspective.

Article 1 number 1 of Law Number 21 of 2008, states that sharia banking is everything that concerns about Sharia Banks and Sharia Business Units (UUS), covering institutions, business activities, as well as ways and processes in carrying out activities his effort.

Based on the explanation above, it can be concluded that sharia banking is a business entity that functions as a collector of the public and channeling funds to the public, the mechanism of business activities based on Islamic law as stipulated in the Alquran and Hadis. Sharia banks are allowed to issue new banking products, services and business activities, which were previously in conflict or in accordance with the provisions contained in the Alquran or Hadis.

Method

The method used in this research is analytical descriptive, which is collecting data that describes or describes what it is from the results of the research then compiled and poured in written form (*narrative*), interpreted and analyzed. This study aims to obtain an objective description of a situation in a complete and detailed situation regarding the role and authority of a notary in the making of a financing agreement in sharia banking.

The approach that will be used in this research is normative juridical research that is research that includes research on the principles of law, systematic law, vertical and horizontal legal synchronization (Soekanto and Mamudji, 1985: 37). In connection with this research, the researcher conducted an in-depth review of the laws and regulations relating to Notary and sharia banking.

This study uses library research, namely research on secondary data. Data collection in this study was obtained through tracing Notary and Islamic banking regulations, documents, and scientific literature and research experts who were relevant and related to the object of research including issues to be examined and obtained from secondary data (Soemitro, 1994: 97).

The data collection technique used in this study is to use literature review to study and collect data and information from the literature that has to do with this research including primary, secondary and tertiary legal materials. In this study a review of the notary law and Islamic banking is directly then linked to the theories in the literature.

The analysis used in this study is qualitative. This analysis means that the data obtained is presented descriptively in the form of correct, complete, systematic sentences, so as not to cause a variety of interpretations and then presented as a basis for drawing

conclusions (Soekanto, 1986: 68). A review of the law of notary office and Islamic banking is then analyzed directly on its substance using the principles and principles of Islamic law.

Result

1. Role and Authority of Notary as Acting Author of Financing Agreement

Economic activities, especially in financing activities in sharia banking can be made with an authentic proof which is one of the things that can be used as a perfect written proof, in this case an authentic deed (Sjahdeini, 1993: 47). The role and authority of the Notary in making a financing agreement in sharia banking is to provide an authentic nature of the financing agreement (Amin, 2018, 12-13).

A deed of financing agreement will obtain the authenticity of authenticity as in the notary deed if it has fulfilled the requirements as referred to in Article 1868 of the Civil Code. Provisions in Article 1868 of the Civil Code:

“An authentic deed is a deed which is in the form determined by the law, made by or in front of public officials in charge for that at the place where the deed was made.”

The authenticity of an authentic deed drawn up by a Notary Public is sourced from the provisions of Article 1 paragraph (1) Law Number 2 of 2014. Article 1868 Civil Code, namely: *“Notary is a public official authorized to make an authentic deed and has other authorities as referred to in this law or based on other laws.”* (Adjie, 2011: 5-8). Whereas the intended authority is contained in Article 15 paragraph (1) Law Number 2 of 2014, that is:

“The notary has the authority to make an authentic deed regarding all deeds, agreements and stipulations required by legislation or that is desired by the interested parties to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, giving grosse, copy and quotation deed, all of that as long as the drafting of the deed is not also assigned or excluded to other officials or other people determined by law.”

Apart from the authority mentioned above, in paragraph (2) it is stated that the Notary is authorized to:

1. To approve the signature and determine the certainty of the date of the letter under the hand by registering in a special book;
2. Book a letter under the hand by registering in a special book;
3. Make a copy of the original letter under the form of a copy containing the description as written and described in the relevant letter;
4. To validate the compatibility of the photocopy with the original letter;
5. Providing legal counseling in connection with the making of deed;
6. Making deed related to land affairs; or
7. Making the deed of minutes of auction.

The scope of the Notary's work can be seen in making the evidence desired by the parties for certain legal actions. The evidence is in the level of civil law, and the Notary makes a deed because there is a request from the parties facing, based on the evidence or statement or statement of the parties which are explained or shown before the Notary, and subsequently the Notary makes it outwardly, formally and materially in the form of a Notary deed, with due regard to the rule of law or the procedure for making a deed (Sjaifurrachman, 2011: 10).

Regarding the financing agreement made by a Notary as an authentic deed, there are a number of things that must be known, as follows:

1. Strength of Proof

In an authentic deed drawn up by a Notary, there are 3 (three) types of evidentiary powers, namely:

- a. Prove between the parties, namely the Islamic bank and the customer, that they have explained what was written in the financing agreement earlier (the strength of formal proof).
- b. Prove between the Islamic bank and the customer concerned, that truly the event mentioned in the financing agreement has occurred (the strength of material evidence or what is called the strength of binding evidence).
- c. Prove not only between the parties concerned but also against third parties, that on that date in the financing agreement the two parties have faced the public employee (Notary) and explained what was written in the financing agreement (the strength of proof of exit).

2. The Notary must be considered as a partner or partner in the implementation of a financing agreement. In this connection, Islamic banking will ask the concerned Notary to refer to the financing agreement model established by the Islamic bank (Kusumohamidjojo, 1998: 10).

There-fore, the use of Notary in sharia banking is not only the will of the parties to the contract, but as a person who has legal knowledge, because Islamic banking does not provide loans using the interest system, but rather provides equity participation based on the principle of profit sharing, the application must be in accordance with the harmony and the correct conditions, because if there is a discrepancy between the pillars and conditions, then it can fall into usury (Sjahdeini, 1999: 64).

Notaries who become Notary in sharia banking must understand deeply about sharia banking and the Notary must always update knowledge in accordance with developments in the law that develop in the community, especially knowing the regulations governing financing transactions that exist in the Alquran, Hadis and Ijma, so that the Notary is expected to play a role so that legal irregularities can be avoided (Adil, 2011: 5-6).

Thus, the agreement on sharia banking regarding financing is made with an authentic deed by a notary as in general banking. The notary is authorized to make an authentic deed and has extensive knowledge in the legal field, including the financing agreement in sharia banking and also about the form and content of the contract made in sharia banking, because the making of the deed is a notary duty as mandated in Law Number 30 of 2004 and Law Number 2 of 2014.

2. The Role and Authority of Notary in the Making of Financing Agreement in Islamic Banking

The existence of a Notary deed as an authentic deed cannot be separated from the notary himself, in Article 1868 of the Civil Code it is stated that an authentic deed is a deed in the form determined by law and made by or in front of public officials in charge for that place where the deed was made. Based on the explanation of Article 1868 of the Civil Code, there are several elements of an authentic deed, (Notodisoerjo, 1993: 42):

1. The deed was made and formalized (*verleden*) in legal form.
2. The deed was made by or before a legal official.

3. The deed was made by an authorized official to make it in the place where the deed was made, so the deed must be made at the place of the authorized official.

When viewed in terms of the application of Islamic law, the use of a notary deed in Islamic banking is based on the Surah Al-Baqarah: 282, it means:

"O ye who believe.! If you are bermu'amalah not in cash for a specified time, you should write it. And let a writer among you write it correctly. And let the writer not be reluctant to write it as God taught it, they should write it, and let the person who owes it teach (what will be written it), and let him fear Allah the Lord, and let him not reduce the slightest of his debt. If the person who is in debt is a person whose mind is weak or weak (his condition) or he himself is not able to lead, then his guardian should teach him honestly. And witness with two witnesses of the men (among you). If there are no two men, then (it is permissible) a man and two women from witnesses that you are pleased with, so that if someone forgets then one reminds him. Do not be reluctant witnesses (provide information) when they are called; and do not be weary of writing that debt, whether small or large until the deadline to pay it. Such is it, it is fairer with Allah and more strengthens testimony and is closer to not (raising) your doubts. (Write your mu'amalah), except if mu'amalah is a cash trade that you run among you, then there is no sin for you, (if) you do not write it. And witness if you sell and buy; and don't let the writer and witness make it difficult for each other. If you do (that is), then surely it is a wickedness in yourself. And fear Allah; God teaches you; and Allah is All-Knowing everything." (Q. S. Al-Baqarah: 282).

Based on the content of the above paragraph, that in a non-cash agreement in this case is like a suspension sale and purchase carried out as in the financing agreement, it must be written by the author correctly, there are witnesses and parties who have the intention and must express or express their wishes in accordance by agreement in writing (Al-Maliki, 1999: 132).

The role and authority of the Notary in making a financing agreement in sharia banking is to provide an authentic nature of the deed. A deed obtains an authenticity stamp such as a Notary deed if it meets the requirements referred to in Article 1868 of the Civil Code (Notodisoerjo, 1993: 58). Although sharia banking products are based on Islamic law, these products are not only intended for muslim but also for non-muslim. Even the contract can be made Notary, both muslim and non-muslim, because in the law there is no distinction of Notary based on the beliefs held (Amin, 2018: 186).

In this context, the deed drawn up by a Notary may be classified into 2 (two) types of deeds, namely the deed of *partij* and the deed of relation or the official deed (Kohar, 1983: 64-65). The deed of *partij* is a deed in which the Notary only makes statements or wishes of the parties in the deed he made in an authentic deed, because in this case the Notary is not responsible for whether the data or information provided by the parties are true or not (Tobing, 1999: 51). The notary guarantees that the depositor correctly states as stated in the deed, but does not guarantee whether the claim stated by the registrant is untrue or truthful (Adjie. 2009: 128).

While the notary deed or official deed is a deed made by a Notary concerning what events were seen, witnessed, heard by the Notary, for which the Notary is fully responsible for the contents of the deed he made (Sumarningsih, 2001: 17). *Murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing deed are included in the official deed group, because in this case the Islamic banking and the customer faces the Notary with the intention of making a

financing deed, the parties facing the Notary provide information and supporting documents regarding the intent and purpose of the deed (Amin, 2018: 186).

In connection with the explanation above, the role and authority of a Notary in making financing contracts in sharia banking is in terms of making contracts required for the implementation of *murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing (Adil, 2011: 105-106). The notary as an official is the official who is authorized to make an authentic deed specifically designated by the State, particularly in making financing agreements in sharia banking (Djamil, 2012: 27).

In sharia banking practices, *murabahah* financing contracts used by sharia banking are financing agreements made in the form of authentic deeds. Sharia banks will ask the Notary to make an authentic deed regarding the legal relationship between the sharia bank and the debtor. In accordance with the authority of the Notary in making an authentic deed, the Notary has the right to make all the deeds required by the parties as long as the authority to make the deed is not exempted from other parties, including the *murabahah* financing agreement.

Meanwhile, the *musyarakah* financing contract between sharia banking and customers, usually made in the form of an authentic deed by a Notary public official authorized to make authentic deeds. There-fore, the Notary is very much needed in the implementation of the *musyarakah* financing contract, because the Notary has the authority to take actions deemed necessary to guarantee the legality of the *musyarakah* financing contract.

In the implementation of *mudharabah* financing contracts, sharia banking uses a notarial deed, this is done to protect banks from financing provided to customers. In the *mudharabah* financing agreement, all provisions contained in the *mudharabah* financing are set forth with an authentic deed drawn up by a notary, while matters that have not been regulated in the deed are subject to positive law in force.

Unlike the *mudharabah* financing agreement above, the form of *ijarah* financing agreement that is commonly used in sharia banking is underhanded deed. The *ijarah* financing agreement made under the hand was known by two witnesses and then legalized by a Notary.

The role and authority of a Notary in making a financing agreement in sharia banking is a general official who is authorized to make an authentic deed, regarding certain legal acts, especially in making *murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing agreements. There-fore, in practice in sharia banking, the Notary is a partner of the bank in making deeds for the needs of sharia banking, in this case in the making of financing contracts in sharia banking.

The role and authority of a Notary in a financing agreement between sharia banking and customers is the role and authority arising from his position as a public official, as stipulated in Article 15 paragraph (1) and paragraph (3) of Law Number 2 of 2014, states:

1. Notary is authorized to make authentic deed regarding all deeds, agreements and stipulations required by statutory regulations and desired by the parties concerned to be stated in an authentic deed, guaranteeing certainty of the date of making the deed, keeping the deed, giving *grosse*, copy and citation deed, all of that as long as the drafting of the deed is not also assigned or excluded to other officials or other people determined by law.
2. In addition to the authority as referred to in paragraph (1) and paragraph (2), Notary Public shall have other authorities regulated in statutory regulations.”

The financing agreement as an authentic deed is a tool to prove that a legal act has been taken, so that if something goes against the law regarding the agreement contained in the financing agreement, it has strong legal protection, the financing agreement which is an authentic deed is needed to provide legal force if a the financing agreement is only made verbally or underhanded because the agreement is certainly not able to provide legal certainty and certainty of rights for the parties in the future.

When looking at the position of an essential financing agreement, the need for authentic deeds in each financing agreement is an inevitable thing for both parties, both sharia banking and customers, this is because the authentic deed of the financing contract serves as proof that it has been carried out a certain legal act concerning the making of *murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing contracts in sharia banking.

Conclusion

The role and authority of a Notary in making a financing agreement in sharia banking is a general official who has the authority to make an authentic deed, regarding certain legal actions, especially *murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing agreements. The Notary public official has the authority to make an authentic deed, in particular the making of an sharia banking financing contract. The role and authority of the Notary in making financing agreements between sharia banking and customers is the role and authority arising from his position as a public official in Article 1 number (1) and Article 15 of Law No. 2/2014.

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