COMPARATIVE STUDY OF GUARANTEE LAWS ACCORDING TO ISLAMIC LAW AND CIVIL LAW IN POSITIVE LAW IN INDONESIA

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ABSTRACT

The Law of Guarantee is the whole of the legal rules that govern the legal relationship between the giver and the recipient of the guarantee in relation to the imposition of collateral to obtain facilities / credit. In general, guarantees in Islamic law (fiqh) are divided into 2 (two), namely guarantees in the form of people (personal guarancy) and guarantees in the form of property. The first is often known as dlaman or kafalah. Whereas the second is known as rahn. The formulation of the problem is how is the comparison of guarantee law according to Islamic law and civil law in positive law in Indonesia. The research method is normative juridical. The results of his research are the existence of guarantees recognized in Islamic law. For guarantees provided by other parties for obligations / achievements that must be carried out by the guaranteed party (debtor) to the party entitled to fulfill the fulfillment of obligations / achievements (creditors) referred to as kafalah. While guarantees related to objects / assets that must be given by the debtor (the person in debt) to the creditor (the person in debt) are called rahn. In the legal system in Indonesia, guarantees are classified into guarantees that are born because they are determined by laws and guarantees born of agreements, general guarantees and special guarantees, collateral that is material and individual rights, collateral for movable objects (onroerende goederen) and objects immovable (onroerende zaken), guarantee by mastering the object and without mastering the object.
Keywords: Comparative Assurance, Islamic Law and Civil Law.

A. Introduction

In everyday life, individuals and legal entities need money to finance their businesses, but sometimes they do not have enough money. Therefore, sometimes they are forced to borrow from people or other legal entities who have sufficient funds.

The term "guarantee" comes from the word "guarantee" which means responsibility, so the term "guarantee" can be interpreted as dependents. A guarantee is something that is given to the creditor to give rise to the belief that the debtor will fulfill obligations that can be assessed by money arising from an engagement. The Law of Guarantee is the whole of the legal rules that govern the legal relationship between the giver and the recipient of the guarantee in

relation to the imposition of collateral to obtain facilities / credit. Borrowing and borrowing activities that occur in the community can be noted that generally it is often required to submit a loan guarantee by the borrower to the lender. Debt guarantees can be in the form of goods (objects) so that it is a guarantee of materiality and or in the form of a promise to cover debt so that it is an individual guarantee. Material guarantees provide material rights to guarantee holders. Guarantee law is a set of provisions that regulate or relate to borrowing in the context of debt (money loan) debt contained in various laws and regulations currently in effect. To prevent losses from creditors due to the inability of the debtor to repay the debt, the creditor will ask the debtor to guarantee the payment and order payment of the debts and prevent losses.

The term legal guarantee is a translation of security of law, zekerheidstelling, or zekerheidsrechten. The term legal guarantee includes both material and personal guarantees. Material guarantees include privileged debts, pledges, and mortgages. While individual guarantees, namely debt coverage (borgtocht). In connection with understanding, some experts formulate a general understanding of the law of guarantee. The elements contained in the formulation of the guarantee law, namely:

1. A series of legal provisions, whether they are based on written legal provisions and unwritten legal provisions. The written legal provisions for guarantees are legal provisions derived from laws and regulations, including jurisprudence, both in the form of original (original) regulations and derivative (derivative) regulations. The unwritten collateral legal provisions are legal provisions that arise and are maintained in the practice of carrying out debt collateral.
2. The provisions of the guarantee law regulate the legal relationship between the guarantee provider (debtor) and the collateral recipient (creditor). The giver of the guarantee is the party who owes a certain debt-debt relationship, which submits a certain material as collateral to the recipient of the guarantee (creditor).
3. There is a guarantee submitted by the debtor to the creditor.
4. The guarantee provided by the guarantee provider is intended as a guarantee (dependents) for the repayment of certain debts.

The guarantee function is as a means of protection for the security or certainty of debtor's debt repayment to creditors. Juridical guarantees have a function to cover debt. Therefore, guarantees in addition to other factors (character, ability, capital, guarantees and economic

conditions), can be used as a means of protection for creditors in the certainty or repayment of debtor debts or the implementation of an achievement by the debtor.

The guarantee function is to convince the bank or creditor that the debtor has the ability to pay off the credit given to him as agreed. Financing guarantees in the form of character, capability, capital, and business prospects of the debtor are immaterial guarantees that function as first way out. With this immaterial guarantee, it can be expected that the debtor can manage his company well so as to obtain business revenue in order to pay off the financing as agreed. Financing guarantees in the form of material collateral (material) function as a second way out. As a second way out, the execution of the sale / execution of collateral can only be done if the debtor fails to fulfill its obligations through first way out.[1]

The basic assessment of a guarantee is based on several things, namely:

a Market Value

is an estimate of the amount of money that can be obtained from a sale and purchase transaction or the exchange of a property on the date of valuation between the buyer who is interested in buying and the seller who is interested in selling in a bond-free transaction whose offer is carried out appropriately where both parties know and act heartily. careful without coercion.

b. New value (reproduction)

is a new or middle value new replacement is an estimate of the amount of money spent on procuring construction / replacement of new property which includes costs, labor wages and other related costs.

c. Fair Value (Depreciated Replacement cost)

is an estimate of the amount of money obtained from the calculation of new reproductive costs less depreciation costs that occur due to physical damage, economic and functional deterioration.

d. Insurance Value

is the estimated value of the amount of money obtained from the calculation of the cost of a new replacement from the parts of the property that need to be insured less depreciation due to physical deficiencies.

e. Liquidation Value

[1] Faturrahman Djamil, *Penyelesaian Pembiayaan Bermasalah di Bank Syariah* (Jakarta: Sinar Grafika, 2000), 44.

is an estimate of the amount of money obtained from a property sale and purchase transaction in a limited time market where the seller is forced to sell.

f. Book value

is the value of assets recorded in bookkeeping which is reduced by accumulated depreciation or return on asset values.

The collateral position for financing has special characteristics. Not all property or property can be used as collateral for financing, but must meet the MASTS element, namely:[2]

a Marketability is the existence of a market that is wide enough for collateral so that it does not break the price

b. Ascertainably of value, the guarantee must have a certain price standard.

c. Stability of value, which is a property that is used as a stable guarantee in price or not decreases in value.

d. Transferability is a collateral that is easily transferred both physically and juridically.

e. Secured, the items that are guaranteed can be held in formal juridical binding in accordance with the laws and regulations that apply in the event of default.

B. Problem Formulation

What is the Comparison of Guarantee Law According to Islamic Law and Civil Law in positive law in Indonesia?

C. Discussion

1. Law of Guarantee in accordance with Islamic Law

The agreement or credit contract requires a guarantee. This is absolutely imposed by financial institutions, especially banks, to carry out the principle of prudence. Guarantees can be in the form of collateral or collateral (material security), usually for new credit card customers, the bank will ask for collateral (collateral), but for customers who have been trusted by the bank, the bank will only ask for a person's good name (individual guarantee, for example kafalah).

Sharia banks in Indonesia in general provide murabahah financing and other financing contracts, determine the requirements required and procedures that must be taken by buyers that are almost the same as the credit terms and procedures as usually set by conventional banks. General terms and conditions for murabahah financing are: General, not only for Muslims; must be lawful, in accordance with the Civil Code; meet 5 C, namely: Character;

[2] Budi Untung, *Kredit Perbankan Di Indonesi*a (Yogyakarta: Andi, 2000), hal.58.

Collateral; Capital (capital); Condition of Economy (business prospect); Capability. Islamic Banks apply it rahn and rahn tafijily as assessor guarantee agreement for murabahah agreement. For example in home loan financing (KPR), Islamic banks will make the credit house as collateral for customers for banks with a rahn tafjily contract.

Collateral or better known as collateral is property owned by a debtor or third party that is bound as a payment instrument in the event of default against a third party.

"If you are on a journey (and not in cash), while you don't get a writer, then there should be dependents held (by the debtor). But if some of you trust some of the others, then let those who are trusted fulfill their message (debt) and let them fear Allah the Lord; and don't you (witnesses) Conceal testimony. and whoever hides it, then verily he is a sinner of his heart; and Allah knows best what you do. (Q.S Al-Baqarah: 283).[3]

Guarantee in a broader sense is not only the assets that are covered, but other things such as the ability of business life managed by the debtor. For this type of guarantee, it is necessary to have analytical skills from the finance officer to analyze circle live business debtors and increase confidence in the ability of the debtor to return the financing that has been given based on sharia principles.[4]

In general, guarantees in Islamic law (fiqh) are divided into 2 (two); collateral in the form of people (personal guarancy) and collateral in the form of property. The first is often known as dlaman or kafalah. Whereas the second is known as rahn.

a Kafalah

Etymologically, kafalah means al-dhamanah, hamalah, and zaamah, all three terms have the same meaning, namely guaranteeing or bearing. Whereas according to kafalah terminology is defined as: "the guarantee given by the kafiil (guarantor) to a third party for the obligation / achievement that must be fulfilled by the second party (the insured)".

In Islamic Law, the Kafalah contract is considered valid if it meets the terms and conditions, namely:

1. Kafiil (the person who guarantees);
2. It is meaningful (people who are indebted / entitled to guarantee);
3. Makful ‘anhu (the person who owes / is guaranteed);
4. Madmun bih or more good (guaranteed debt / obligation);
5. Lafadz iqab qabul.

[3] Depag, *Al-Qur’an Tajwid dan Terjemah* (Surabaya: Fajar Mulya,1998),hal.49

[4] Rachmadi Usman, *Aspek-Aspek Hukum Perbankan di Indonesia* (Jakarta: Gramedia Pustaka Utama, 2003),hal. 281

Kafalah is a guarantee given by the guarantor (kafiil) to a third party to fulfill the obligations of the second party or that is borne (makful'anhu). According to the Indonesian bank, kafalah is a contract giving a guarantee (makful 'alaih) that is given by one party to another party, where the guarantor is responsible for repayment of a debt that is the right of the recipient of the guarantee (makful).

Kafalah is divided into 2 (two) parts, namely kafalah with soul (kafalah bi al-nafs) and kafalah with wealth (kafalah bi al-maal). Kafalah with the soul is also known as Kafalah bi al-Wajhi, namely the willingness of the guarantor (al-Kafil, al-Dhamin or al-Za'im) to present the person he is responsible to whom he promised dependents (Makfullah).

The second Kafalah is kafalah wealth, which is an obligation that must be fulfilled by dhamin or kafil with payment (fulfillment) in the form of property. There are three kinds of treasure kafalah, namely: first, kafalah bi al-Dayn, namely the obligation to pay debts that are borne by other people, second, kafalah with the surrender of objects, namely the obligation to submit certain objects in the hands of others, such as returning goods those who are ghashab and submit the goods sold to the buyer, third, forgive them with 'disgrace, the meaning is a guarantee that if the goods sold turn out to contain defects, because the time is too long or because of other things, the guarantor (the carrier) is willing to give guarantee to the seller to fulfill the buyer's interest (replace the defective item).

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b. Rahn.

Etymologically, the word al-rahn means permanent, eternal, and guarantee. Alrahn contracts in positive legal terms are called collateral / collateral items. Whereas according to the term ar-rahn is the property that is used as the owner as a binding debt guarantee.

Whereas rahn according to language means al-tsubut and al-habs, namely determination and detention. There is also someone who explains that rahn is confined or entangled.[5]

In terms of that, making goods that have the value of property according to Islamic teachings as collateral for debt, so that the person concerned can take out the receivables or take part of the benefits of the goods. According to the National Sharia Board, Rahn is holding goods as collateral for debt. According to Bank Indonesia, Rahn is a contract to deliver goods / assets from customers to the bank as collateral for part or all of the debt.

Based on the definition derived from the Maliki school of Islamic scholars, the object of guarantee can take the form of material, or benefits, both of which are assets according to the

[5] Hendi Suhendi, *Fiqih Muamalah* (Jakarta: Rajawali Perss, 2010),hal. 105

jumhur ulama. Objects that are used as collateral items (collateral) do not have to be submitted in an actual manner, but may also be legally handed over, such as making the rice fields as collateral (collateral), so that the surrender is the guarantee letter (paddy certificate).

In contrast to the definition above, according to the scholars of Shafi'iyah and Hanabilah, ar-rahn is: Making material (goods) as collateral for debt, which can be used as a debt payer if the debtor cannot pay the debt.

This definition implies that goods that may be used as collateral are only material; does not include benefits as stated by the Maliki school of scholars. The collateral may be sold if the debt cannot be repaid in the time agreed by both parties. Rahn is considered valid according to Islamic law, if it has fulfilled the pillars and the following conditions:

a. Legal acting skills,

b. shigat (pronunciation).

c. al-marhum bihi (debt)

d. al-marhun (goods used as collateral).

In addition to the above conditions, the ulama fiqh agreed to declare that the rah-rahn was only considered perfect if the goods that were kept legally were in the hands of the creditor, and the money needed was received by the borrower. If the collateral is in the form of immovable property, such as a house and land, it is enough that the land guarantee letter or house documents are held by the debt provider. The last condition (perfection of ar-rahn) by the ulamas is called qabdh al-marhun (collateral goods are controlled by law). This requirement is important because Allah in Surat al-Baqarah, 2: 283 states "fa rihanun magbudhah" (the guarantee item is controlled [legally]).

If the collateral has been controlled by the lender, then the contract is binding on both parties. Therefore, the debt is related to collateral, so that if the debt cannot be repaid, the collateral can be sold and the debt paid. If there is an excess in the sale of the collateral, it must be returned to the owner.

From the description of the two concepts of guarantee above, the existence of guarantees is recognized in Islamic law. For guarantees provided by other parties for obligations / achievements that must be carried out by the guaranteed party (debtor) to the party entitled to fulfill the fulfillment of obligations / achievements (creditors) referred to as kafalah. While guarantees related to objects / assets that must be given by the debtor (the person in debt) to the creditor (the person in debt) are called rahn.

The concept of binding collateral in Islamic law (fiqh) is found in the discussion about rahn which is a form of material guarantee in Islamic law as described above. An interesting thing

that needs to be re-emphasized about the issue of rahn in relation to collateral binding are the following issues:

First, that the rahn contract is an accessoir (follow-up, additional),

Second, the mastery of the object of rahn (al-qabdh, possession) is not in the form of physical mastery but in the form of proof of ownership, and Third, the legal consequences of the rahn contract?

Some of the legal consequences that arise after the complete rahn contract, it turns out there are similarities between the concept of binding guarantees through guarantee institutions in the Indonesian legal system with the concept of rahn. Therefore, for sharia financial institutions, such as sharia banking including Syari'ah microfinance institutions such as BMT, which implements a guarantee binding system in the provision of credit or financing to its customers, of course, can implement a guarantee system that is currently already exists and applies in this country.

1. Guarantee Law According to Civil Law

In general, the types of guarantee institutions known in the Indonesian legal system are grouped into:

a. According to the way it happened, that is the guarantee that was born because of the law and agreement;

b. According to its nature, namely collateral that is material and individual in nature;

c. According to the authority to master it, which is the guarantee that controls the object and without mastering the object,

d. According to the form of the group, the guarantee is classified as a general guarantee and a special guarantee.

Scope in the Guarantee Law.[6]

a. General and Special Guarantees

A general guarantee is a guarantee from the editor that occurs by the operation of law and is a mandatory rule; each debtor's movable or immovable property becomes liable to the creditor. The legal basis is Article 1131 of the Civil Code.[7] If a debtor is in default, then through this general obligation the creditor can ask the court to confiscate and auction off all assets of the debtor - unless the property has other preferential rights. Special guarantee is any contractual debt guarantee, which is issued from a particular agreement.

[6] Munir Fuady, *Hukum Jaminan Utang,* (Jakarta: Erlangga, 2013) *,* hlm., 8-16

[7] Article 1131 of the Civil Code The nineteenth chapter on receivables that are privileged reads "all the things that are owed, both movable and immovable, both those that have been and those that will be in the future, are liable for all personal commitments."

b. Additional Principal Guarantees and Guarantees

Credit is given to the debtor based on the "trust" of the creditor of the debtor's ability to repay the debt later. In the law a principle is applied that the trust is seen as a principal guarantee of repayment of future debts. Contractual guarantees in the form of collateral for goods are only seen as an additional guarantee of the principal guarantee.

c. Material Guarantees and Individual Guarantees

Material guarantee is a guarantee that has a direct relationship with certain objects. Material guarantees can also be interpreted as collateral whose object is in the form of movable or immovable property specifically intended to guarantee debtor's debts to creditors if the debts cannot be repaid later on.[8]

A material guarantee can be held between the creditor and the debtor, but it can also be held between the creditor and a third party who guarantees the fulfillment of the obligations of the debtor.

Guarantees that are material in nature are the existence of certain objects that are used as collateral (zakelijk). The law does not restrict material that can be used as collateral only that the material that is guaranteed is the property of the party that provides the guarantee of the material.

The provision of material guarantees is always in the form of securing a part of a person's wealth, the guarantee provider, and providing it to fulfill the (payment) obligation (debt) of a debtor. This wealth can be in the form of the debtor's own wealth or third party wealth. The granting of this material guarantee to certain creditors, gives the debtor a privilege (privilege) against other creditors.

Material guarantees have "material" characteristics in the sense of giving the right to overtake certain objects and having inherent properties and following the object in question.[9]

The current material guarantee is:

1) Mortgage is a material right for immovable property that is used as collateral in the settlement of an engagement.
2) Underwriting rights; object to land rights and objects related to land with its legal basis, namely the Underwriting Right Act.

[8] Gatot Supramono, *Perjanjian Utang Piutang,* (Jakarta: Kencana, 2013), hlm.,59.
[9] Ibid, hal.49

3) Pawn is a right obtained by a debtor on a movable item that is surrendered to him by someone who owes or by someone else in his name and gives power to the debtor to take repayment of the item prioritized from other debtors.
4) Land Pawn; object to land with its legal basis, namely customary law and the Basic Agrarian Law.
5) Fiduciary; object to movable or immovable objects with the legal basis of the Fiduciary Law.

An individual guarantee is a guarantee that only has a direct relationship with the guarantor, not to certain objects. Individual guarantees can be classified into three groups, namely:

1) Personal guarantee (personal guarantee); who is the subject of his guarantee is a person in person.
2) Corporate guarantee; the subject of the guarantee is the company.
3) Bank guarantee (bank guarantee); warranty provided by a bank.

The term personal guarantee comes from the word borgtocht. There are also those who mention the term immaterial guarantee. Understanding individual guarantees can be seen from various opinions of experts. Sri Soedewi Masjchoen Sofwan, interpreting imateriil guarantees (individuals) are: "Guarantees that give rise to direct relationships to certain individuals, can only be maintained against debtors against certain debtors, against the debtor's assets in general.

Elements of individual guarantees, namely:

1) Having a direct relationship with a particular person.
2) Can only be maintained against certain debtors
3) And to debtor assets generally.

Individual Guarantee (persoonlijke zekerheid) Is a guarantee of someone from a third party acting to guarantee the fulfillment of the obligations of the debtor. In other words, individual guarantees are an agreement between a debtor (creditor) and a third person, which guarantees the obligations of the debtor.

Guarantees in the form of people (individual guarantees) can lead to a collateral agreement (borgtocht), where there is a third person (borg) who bears the credit if the loan money is not returned by the borrower. Guarantee in the form of a person (individual guarantee) is a third party (borg) that guarantees payment if the debtor is unable to repay the loan to the bank (who lends).Article 1820 of the Civil Code states "underwriting is an agreement whereby a third party, in the interest of the debtor, binds himself to fulfill his commitment to the debt when this person does not fulfill it."Article 1831 of the Civil Code states "the guarantor is not

obliged to pay the debtor, other than if the debt is negligent, while the debtor must be confiscated and sold to repay the debt.

d. Regulative and Nonregulative Guarantee

Regulatory guarantee is a credit guarantee that the institution itself has been set explicitly and has received recognition from the applicable legislation. Guarantees belonging to the regulative guarantee include:

1) Mortgage; regulated in the Civil Code and the Law on Agrarian Affairs.
2) Credietverband; arranged in S. 1908-542 juncto S. 1937-190, then its existence was recognized temporarily by the Basic Agrarian Law No. 5 of 1960. Then with the issuance of the Underwriting Right Law No. 4 of 1996, this institution was declared invalid and covered with land rights.
3) Pawn; regulated in the Civil Code and in customary law.
4) Underwriting Right on Land; set in the Basic Agrarian Law and Law on Underwriting No. 4 of 1996.
5 Guarantee; regulated in the Civil Code third book.

Non-regulative guarantees are forms of collateral that are not specifically regulated in various laws and implemented in practice. There are nonregulative guarantees in the form of material such as transfer of trade bills, transfer of insurance bills, etc .; some are merely contractual, such as the power to sell and so on.

e. Conventional guarantee and non-conventional guarantee

A credit guarantee is said to be conventional if the legal institutions on guarantees have long been recognized in our legal system - both those that have been regulated in laws such as the Civil Code, customary law, or not regulated in legislation and not from customary law but have long been practiced , such as pledges, guarantees, mortgages, mortgage rights, land pledges, bank guarantees, personal guarantees and so on.

Non-conventional guarantees are forms of guarantees which, although they have been widely implemented but their existence in the guarantee legal system is still relatively new - so the links have not yet been arranged neatly. Included in non-conventional guarantees include transfer of claim rights, transfer of insurance claim claims, power to sell, guarantees to cover costs and so on.

f. Special Executorial Guarantee and Special Noneksekutorial Guarantee

Special executorial guarantee that is if the law provides certain ways for creditors to execute collateral when bad loans occur such as mortgages, mortgage rights, pledges, selling power, debt recognition deeds, transfer of debtor bills and so on.

A special non-unionorial guarantee is a credit guarantee that does not have specific methods of execution. If you want to be executed, then you must submit to the generally accepted execution, that is, through ordinary court with ordinary procedures. Included in this guarantee are personal guarantees and company guarantees.

g. Goods Handover Guarantee, Document Handover Guarantee and Constructive Ownership Guarantee

The guarantee of hand over goods is a credit guarantee that the collateral is physically handed over by the debtor to the creditor's authority, while the ownership of the object remains in the hands of the debtor. Usually along with the submission of the object, the document of ownership of the object is also submitted to the creditor. Examples of this type of credit guarantee are in the form of pawning shares or land pledges in the customary law version. The document delivery guarantee is a credit guarantee that is not physically surrendered to the creditor's authority but is still controlled even by the debtor. For example on mortgages or on mortgage rights.

The guarantee of constructive ownership is the ownership of the collateral that is handed over by the debtor to the creditor, but only constructively while the power and the right to enjoy the results of the collateral object remain with the debtor. Ownership documents must also be submitted without being renamed. Fiduciary guarantee is included in this type of credit guarantee.

D. Conclusion

The existence of guarantees is recognized in Islamic law. For guarantees provided by other parties for obligations / achievements that must be carried out by the guaranteed party (debtor) to the party entitled to fulfill the fulfillment of obligations / achievements (creditors) referred to as kafalah. While guarantees related to objects / assets that must be given by the debtor (the person in debt) to the creditor (the person in debt) are called rahn. In the legal system in Indonesia, guarantees are classified into guarantees that are born because they are determined by laws and guarantees born of agreements, general guarantees and special guarantees, collateral that is material and individual rights, collateral for movable objects (onroerende goederen) and objects immovable (onroerende zaken), guarantee by mastering the object and without mastering the object.

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