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DISPUTE RESOLUTION OF SHARIA GOLD PAWN IN INDONESIA

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Abstract

Among the Islamic economic products that are present in the community are pawn products. But of course, sharia pawning must still be tested in its efforts to prosper the community. This research tries to find answers related to the question of the execution of collateral objects carried out by the Sharia Bank or Sharia Pawnshop against the customer's gold when the gold price is falling which can cause losses to the customer. In addition to experiencing losses due to the sale of their gold whose value becomes lower, they also have to pay pawn deposit fees and other costs. For this reason, legal protection for customers is needed to prevent and overcome these problems. The suggestion that researchers recommend is that it is necessary to make regulations, pawn system standards and the socialisation of Islamic pawn products, at least this is assisted by the government. In the event of a dispute, it is necessary to prioritise mediation that refers to the teachings of Islamic law.

Keywords: Dispute Resolution, Auction, Gold Pawn.

INTRODUCTION

The need for fresh funds in society continues to increase as the needs of life increase and inflation occurs. For people who have sufficient income, this condition is not too much of a problem. But for people with middle to lower living standards, the need for a source of funds that can be relied upon at any time becomes a necessity (Indriasari 2014). This is because not everyone can easily provide loans / debts to other parties just like that. The presence of financial institutions that can provide solutions to fulfil funds quickly and easily is a breath of fresh air for people who need it (Lubis 2022).

One of the financial institutions that has benefited the community so far for urgent funding needs is a pawnshop. In some big cities, this pawnshop is also a fairly popular financial institution, especially before special moments such as holidays or when the new school year takes place. It can be said that the community is easier with

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the existence of financial institutions that can disburse the funds they need in a relatively very fast time, with collateral in the form of valuables they own. The motto of the pawnshop, which reads "solving problems without problems", has created an image as a financial institution that is very friendly to the community (Siregar 2022).

For some of the general public, the presence of pawnshops is indeed a solution, but for the community, especially the Muslim community, there are several practices carried out by pawnshops related to interest that are not in accordance with Sharia. For example, there is a pawn interest that is paid every 15 days. The interest payment must be made on time, because if there is a delay in payment, the pawn interest will increase to double the obligation. For people who have limited funds, this interest is certainly burdensome and there is a clear tendency to harm one party. In the end, if the customer does not have enough money to redeem the goods and interest, he must let the goods be auctioned (Indriasari 2014).

Pawn in the Islamic perspective is called the term Ar-Rahn, according to the language means *al-tsubut* and *al-habs*, namely an agreement to hold something as collateral or debt coverage (Jansen, Lukman, and Yulawati 2021). Islamic pawn (rahn) is one of the alternative financings in the form of lending money to people in need based on Islamic Sharia principles and avoiding the practice of usury or adding a certain amount of money or percentage of the principal debt at the time of paying the debt. Rahn is holding one of the borrower's assets as collateral for the loan he receives. The purpose of the *Rahn* contract is to provide a guarantee of repayment to the Bank in providing financing. In simple terms, *Rahn* is a guarantee of debt or pawn (Lestari and Hanifuddin 2021).

The emergence of Islamic pawn practices is due to the correction of the pawn system that has been in effect since the Dutch era. The foundation for the operationalization of sharia pawn is the Fatwa of the National Sharia Council Number

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25/DSN-MUI/III/2022 dated 26 June 2002 concerning *Rahn* (Subagiyo 2014). One form of financial service that the community needs is a loan by pawning goods as collateral for debt. Then Fatwa number 26/DSN-MUI/III/2002 concerning gold *Rahn*, namely that one form of service that is a necessity for the community is *Rahn*, which is holding goods as collateral for debt. People in general have commonly used gold as a valuable item that is stored and made the object of *rahn* as debt collateral to get a loan of money. For the *rahn* to be carried out by sharia principles, the National Sharia Council considers it necessary to establish a fatwa to serve as a guideline. Fatwa Number: 68/DSNMUI/III/2008 concerning *rahn* easily which states that the creditor has the right to easily execute collateral goods that are still controlled by the borrower in the event of default so that it is carried out by sharia principles. The National Sharia Council considers it necessary to stipulate a fatwa to be used as a guideline (Purwandi, Agustri and Destiana 2019). The DSN fatwa states that loans by pledging goods as collateral for debt in the form of *Rahn* are allowed with the following conditions:

- a. Murtahin (receiver of goods) has the right to hold Marhun (goods) until all debts of rahin (the one who gives the goods) are repaid.
- b. Marhun and its benefits remain the property of rahin. In principle, the marhun may not be utilized by the murtahin except with the permission of the rahin, without reducing the value of the marhun and its utilisation is merely a substitute for the cost of maintaining its maintenance.
- c. The maintenance and storage of marhun is the obligation of rahin, but can also be carried out by murtahin, while the cost and maintenance of storage remains the obligation of rahin.
- d. The amount of administrative costs and storage of marhun may not be determined based on the loan amount.

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e. Sale of marhun:

- 1) When due, murtahin must warn rahin to immediately pay off the debt.
- 2) If rahin still does not pay off his debts, then the marhun is forcibly sold/executed.
- 3) The proceeds from the sale of marhun are used to pay off debts, unpaid maintenance and storage costs, and sales costs.
- 4) The excess proceeds from the sale belong to the rahin and the shortfall becomes the rahin's obligation.

Auction sale and purchase in Islamic law aim to provide convenience and benefit and avoid harm or loss in transactions. Debt and credit agreements in written form followed by the submission of collateral should make it easier for creditors to take repayment. The following is the definition of debt and credit conveyed by Prof. R. Subekti, S.H, namely: "Debt and credit agreements are identical to lending and borrowing agreements". Article 1754 of the Civil Code states: "Borrowing and use is an agreement, which determines the first party to hand over several goods that can be used up to the second party on the condition that the second party will return similar goods to the first party in the same amount and condition." The same amount of the same type of quality, this provision gives the understanding that the party receiving the loan bears the risk of the borrowed goods as well as in the event of increase or deterioration of the goods.

Article 1759 of the Civil Code states that "The guarantor cannot demand back the loaned goods before the time specified in the agreement has elapsed". However, in practice, although the period has been stated with certainty in an agreement, it is not uncommon for the agreed period to be inconsistent with what the parties have agreed. This is where the concern arises of the person who gives the receivable

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(creditor)

Auction is an effort to sell in public against collateral that is due until the auction date is not redeemed by the debtor / customer. The auction can be in the form of offering certain goods to bidders who initially open the auction at a low price, then increasingly rising until finally given to prospective buyers at the highest price (rising price) (Saputra 2002). In addition, an auction can also be an offer of goods that initially opens the auction at the highest price, then progressively goes down until it is finally given to a prospective buyer with the highest bid agreed upon by the seller of the down auction. In conventional pawnshops in general, the process adheres to an ascending auction system, where the goods are due to the bidder who dares to buy at the highest price (Azali n.d.).

Auctions as an effort to execute collateral are also carried out at Pegadaian Syariah. The auction is the last resort step taken by Pegadaian Syariah if there are debtors or customers who are unable to pay the credit instalments agreed upon by the debtor/customer so that this will make legal issues so that dispute resolution with prevention is needed (Sohibi 2023). The problem arises when the customer cannot redeem the gold to pay the overdue debt, the auction or sale of the customer's collateral object will be carried out. If the execution of the collateral object occurs when the price of gold drops, the customer will experience a loss. Fluctuations in the price of gold result in risk if it decreases suddenly at the time of execution of the customer's collateral object by the Bank. Customers whose gold is sold when the price of gold is down will lose potential profits and losses from pawn fees that have been paid. The execution of collateral objects carried out by the Sharia Bank or Sharia Pegadaian against the customer's gold when the gold price is falling, can cause losses to the customer. In addition to experiencing losses due to the sale of their gold which has a lower value, they also have to pay pawn deposit fees and other costs (Alrian 2015).

RESEARCH METHOD

Research is a process, which is a series of steps carried out in a planned and systematic manner to obtain problem solving or answers to certain questions (Rajarif, Abdul, and Rizkan 2022). A study cannot be said to be research if it does not have a research method because the purpose of research is to reveal the truth systematically, methodologically and consistently (Rahimah and Koto 2022). According to Sugiyono, research methods are scientific ways to obtain valid data with the aim of discovering, developing and proving certain knowledge so that in turn it can be used to understand, solve and anticipate problems. The type of research in this study is normative law, namely legal research that places the law as a building system of norms. The system of norms in question is about the principles of norms, rules of legislation, court decisions, agreements and doctrines (teachings). The approach used in this research is the statute approach. This research is descriptive, to obtain a comprehensive and systematic overview and describe the existing circumstances or facts. The data collection technique used in this research is library research.

RESULTS, DISCUSSION AND ANALYSIS

A. Concept of Pawn

Pawn is a collateral institution that is often used by the Indonesian people. There are several concepts of pawn given by legal experts, but the concept of pawn is not explained in detail in Article 1150 of the Civil Code "A right obtained by a debtor or a movable object that is handed over to him by a debtor or another person on his behalf, and which authorises the debtor to take repayment of the goods first from the debtors to take repayment of the goods first from other debtors; with the exception of the cost of auctioning the goods and the costs that have been incurred to save after the goods have been pawned, which costs must take precedence".

According to Munir Fuady, a pawn is an accesoir property right granted by the

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pawn giver (debtor) to the pawn holder (creditor) as security for the payment of debt (Munir 2013). Pawn according to Islam is regulated through article 20 of the Compilation of Sharia Economic Law (KHES) and Fatwa of the National Sharia Council of the Indonesian Ulema Council (DSN-MUI) Number 25/DSNMUI/III/2002 concerning Rahn. Rahn / pawn according to KHES is the control of goods belonging to the borrower by the lender as collateral. (Khoirul Hidayah and Dwi Fidhayanti, 2022). Based on the explanation of the Civil Code, it can be explained that a pawn is a property right over a movable object arising from a debt and credit agreement, the movable object is controlled by the debtor as security for the debtor's debt. Based on the explanation above, there are several elements of a pawn (Hidayah, Khoirul, and Dwi 2022):

1. The object of pawn is a movable object
2. The pledge must be controlled by the creditor
3. There is a physical delivery of the pawn object (levering) from the debtor to the creditor
4. The pledge gives preference rights to the creditor to obtain repayment in advance of the creditor's receivables (droit de preference)
5. The pledge authorises the creditor to execute its own repayment by way of foreclosure
6. Has an accesoir nature, a pawn is born because of the existence of receivables, if the receivables are hapis then the pawn is also removed.

The guarantee agreement has legal consequences, among others:

1. The existence depends on the main agreement
2. Its removal depends on the main agreement

3.If the principal agreement is cancelled, then the insuring agreement is also cancelled

4.If the principal agreement is cancelled, then the insuring agreement is also cancelled

5.Shifted with the transfer of the main agreement.

B. Legal Protection of Sharia Gold Pawn Customers During the Execution of Collateral Objects

In doing a gold pawn at an Islamic bank, what needs to be known is the fluctuation of gold prices, which often changes every year. This is very important in relation to the profits and losses that will be obtained by customers in making gold pawns at Islamic banks (Izzati 2021). If there is a decrease in the price of gold when the collateral object in the form of gold owned by the customer is executed by the Bank, a large loss will be experienced by the customer. Islamic Bank customers suffer losses due to the sale of collateral objects by the Bank when the price of gold is down and are required to pay gold pawn fees and rental fees for gold storage at Islamic Banks (Purba et al. 2023).

Legal protection of Islamic gold pawn customers in Islamic banks in the event of a decrease in gold prices is generally divided into 2 (two), namely:

a.Preventive legal protection

Preventive legal protection in this study is legal protection provided by law to prevent losses to gold pawn customers at Islamic Banks in the event of a decrease in the price of gold at the time of execution of the collateral object. In Indonesia, there is no specific law that provides protection to customers related to sharia gold pawning at the time of the decline in gold prices.

b.Repressive legal protection

In conducting a legal relationship between one party and another party, disputes often occur. Disputes can occur if there is a loss to one party caused by the other party. Losses can be caused if one party violates the rules in the agreement or does not fulfil the previously agreed achievements. In the event of a dispute between a customer and an Islamic Bank, a dispute occurs if the dispute between the customer and the Bank cannot be resolved through an internal resolution mechanism and requires the assistance of a third party to resolve the dispute. Dispute resolution can be carried out in public courts or outside public courts.

C. Sharia Pawn Auction Process

The stages of the Sharia Pawn Auction Process in general are the sale of goods carried out in public including through electronic media by means of oral offers at increasing prices or decreasing prices and or by offering prices in writing which are preceded by efforts to gather enthusiasts. The auction can be in the form of offering certain goods to bidders who initially open the auction at a low price, then increasingly rising until finally given to prospective buyers at the highest price, as the Dutch-style auction and called (rising auction) which is usually done in Conventional Pawnshops. This auction is still a matter of debate whether it is sharia-compliant or not. The implementation of the auction carried out by the Sharia Pawnshop if the pawn giver / customer cannot fulfil his obligations at the specified maturity after being given a warning to fulfil his obligations (Sohibi 2011).

This is in accordance with the Civil Code Article 1155 paragraph (1), that the pawn holder has the right to sell by its own power the collateral object in public according to local customs and on applicable conditions. In addition, the auction that occurs at Pegadaian Syariah is the last effort made by Pegadaian Syariah to return the credit loan along with the capital rent that is not repaid until the specified maturity / time limit (Anshori and Ghofur 2011).

D. Dispute Resolution of Sharia Pawn Auction Proceeds

A dispute is a conflict between two or more parties that stems from different perceptions of an interest or property right that can have legal consequences for both parties (Chomzah and Achmad 2003). Various models of dispute resolution, both formal and informal, can be used as a reference to answer disputes that may arise as long as they bring justice and benefit. The form of dispute resolution used is always orientated towards how to win. Because victory is the main goal, the parties tend to try to use various means to obtain it, even through unlawful means. As a result, if one of the parties wins, it is not uncommon for the relationship between the disputing parties to become hostile. In its development, victory-orientated forms of settlement are no longer the main choice, even avoided as much as possible. Parties prioritise compromise in any dispute resolution that arises between them, in the hope that through compromise no party will feel defeated or disadvantaged (Moris and KEBUDAYAAN 2022).

Business dispute resolution is mostly carried out using litigation or dispute resolution through the trial process. The dispute resolution begins with the filing of a lawsuit to the district court and ends with a judge's decision. However, in addition to dispute resolution through the litigation process, there is also dispute resolution through non-litigation (Caniago 2022). Non-litigation settlement is a dispute resolution that is carried out using methods that exist outside the court or using alternative dispute resolution institutions. In Indonesia, there are two types of non-litigation settlement, namely Arbitration and Alternative Dispute Resolution in accordance with Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution (AAPS Law).

In language, Arbitration comes from the word *arbitrare* (Latin) which means the power to settle a case based on discretion. Arbitration is the voluntary submission

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of a dispute to a neutral third party, namely an individual or temporary (ad hoc) arbitration. Dispute resolution using an arbitration institution will result in an Arbitral Award (Ramdhany 2023). According to Law No. 30/1999, the arbitrator or arbitral tribunal must immediately render an arbitral award no later than 30 days from the completion of the dispute examination by the arbitrator. If there is an administrative error in the award, the parties within 14 days from the date of the award are given the right to request correction of the award. The arbitral award is final and directly binding on the parties. An arbitral award can be enforced after the award is registered by the arbitrator or his/her proxy with the registrar of the district court. Once registered, the president of the district court is given 30 days to give an order for the enforcement of the arbitral award (ARBITER and SIDANG n.d.).

In Indonesia, there are several arbitration institutions to resolve various business disputes, including BASYARNAS (National Sharia Arbitration Board) which handles problems that occur in the implementation of Sharia Banks, and BANI (Indonesian National Arbitration Board) which specifically resolves non-Islamic business disputes. The development of Muslim businesses based on sharia is increasingly showing progress, so the need for an institution that can resolve disputes that occur or may occur with peace and process quickly is a very urgent need (Umam 2016). The National Sharia Arbitration Board (BASYARNAS) is authorised to:

- 1.To resolve fairly and quickly muamalah (civil) disputes arising in the fields of trade, finance, industry, services and others which according to laws and regulations are fully controlled by the disputing parties, and the parties agree in writing to submit their settlement to BASYARNAS in accordance with BASYARNAS Procedures.
- 2.Provide binding opinions at the request of the parties in the absence of a dispute on issues relating to an agreement.

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The National Sharia Arbitration Board (BASYARNAS) has rules of procedure that contain provisions, among others: Request for arbitration, determination of arbitrators, examination, settlement, evidence and witnesses, expiration of examination, decision making, revision of decision, cancellation of decision, registration of decision, execution of decision, arbitration fees. Sharia arbitration awards are final and binding. The final and binding principle of sharia arbitration decisions is not only limited to decisions that are voluntarily implemented by the parties to the dispute, but also limited to the understanding of decisions that do not have appeal and cassation legal remedies as decisions of judicial institutions (Arifin 2016).

Apart from the arbitration process, non-litigation dispute resolution can also be done through alternative dispute resolution (ADR). Alternative dispute resolution is a form of out-of-court dispute resolution based on an agreement (consensus) made by the parties to the dispute either without or with the assistance of neutral third parties (Diah 2016). According to Law number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, in article 1 point 10, alternative dispute resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment.

Dispute resolution through ADR has advantages compared to dispute resolution through litigation, including the existence of voluntariness in the process because there is no element of coercion, fast procedures, non-judicial decisions, confidential procedures, flexibility in determining the terms of problem solving, time-saving and cost-effective, high possibility of implementing agreements and maintaining working relationships (RUSTAN 2013).

Alternative dispute resolution institutions are divided into several types,

including the following:

1. Consultation

Consultation is a "personal" action between a certain party, called a "client" and another party who is a "consultant", who gives the client their opinion to meet the client's needs and requirements. There is no formula that states the nature of "attachment" or "obligation" to fulfill and follow the opinions expressed by the consultant. This means that in consultation, as an alternative form of dispute resolution, the role of the consultant in resolving existing disputes or disputes is not dominant at all, the consultant only provides (legal) opinions, as requested by the client, after which the decision regarding the dispute will be taken by himself. Even though there is a loss, the consultant is also given the opportunity to formulate the form of dispute resolution desired by the disputing parties (Komarudin 2014).

2. Negotiation

By negotiation, we mean the process of bargaining or discussion to reach an agreement on a particular problem that occurs between the parties. Negotiations are carried out either because there is a dispute between the parties or simply because there has not been an agreement because the matter has never been discussed. Negotiations are carried out by negotiators starting from the simplest negotiations where the negotiators are the interested parties themselves, to providing special negotiators or using lawyers as negotiators (Parmitasari 2019).

3. Mediation

Mediation is intervention in a dispute by a third party (mediator) who is acceptable, impartial and neutral and helps the disputing parties reach a voluntary agreement on the disputed issue. According to Rachmadi Usman, mediation is a way of resolving disputes outside of court through negotiations involving a third party

(mediator) who is neutral and does not take sides with the disputing parties and whose presence is accepted by the disputing parties (Usman 2012). The mediator acts as a facilitator. This shows that the mediator's job is only to assist the disputing parties in resolving problems and does not have the authority to make decisions. The mediator's position is to help the parties reach an agreement that can only be decided by the parties to the dispute. The mediator does not have the authority to force, but is obliged to bring together the disputing parties. The mediator must be able to create conducive conditions that can guarantee the creation of a compromise between the disputing parties to obtain mutually beneficial results .

4. Concilitation

Settlement through conciliation is carried out through one or several people or bodies (conciliation commission) as mediators called conciliators by bringing together or providing facilities for disputing parties to resolve their disputes peacefully. The conciliator actively participates in providing solutions to disputed problems.

The difference between arbitration, mediation and conciliation is that arbitration settlement uses the assistance of a third party (arbitrator), where the parties state that they will comply with the decision taken by the arbitrator. Meanwhile, mediation also uses assistance from a third party (mediator), but the mediator is only tasked with bridging the parties without providing opinions regarding dispute resolution. Even though both use help from a third party (conciliator), conciliation is more formal than mediation. The conciliator can provide opinions to the parties regarding the disputed issue, but these opinions are not binding on the parties.

Each non-litigation and litigation dispute resolution has different characteristics or characteristics. Each method also has advantages and disadvantages. This can be adjusted by the parties by choosing a dispute resolution institution that is most

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effective in resolving disputes and is profitable for the parties (Hanif and Rifqani 2020).

CONCLUSION

In Indonesia, there is no special law that provides protection to customers regarding sharia gold pawning when gold prices fall. Therefore, a legal protection regulation is needed for customers to prevent and overcome this problem. Implementation of the Auction carried out by Pegadaian Syariah if the pawnbroker/customer is unable to fulfill his obligations on the specified due date after being given a warning to fulfill his obligations. This is in accordance with the Civil Code Article 1155 paragraph 1, that the pawn holder has the right to sell with his own authority the collateral object in public according to local customs and the applicable conditions. Apart from that, the auction that takes place at Pegadaian Syariah is the last effort made by Pegadaian Syariah to return its credit loans and capital leases which are not repaid by the specified maturity/time limit.

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