NOTARIES LIABILITY IN THE IMPLEMENTATION OF SHARIA COMPLIANCE IN FINANCING CONTRACTS IN THE FORM OF NOTARIAL VIEWED FROM THE INDONESIAN CONSUMER PROTECTION LAW

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ABSTRACT

To provide security guarantees to Muslims as majority, Indonesian government have built a sharia banking system. In the implementation of banking transactions, especially those using collateral, they must use a notarial deed. The purpose of this research is to find out the liability of the notary in terms of the financing deed, there are still elements prohibited by the Shari'a such as usury, and whether or not they can be prosecuted civilly based on consumer protection law. The method used is a normative juridical approach, with analytical descriptive specifications, using library data sources, and legal analysis. The results of this study are The liability of a notary in making a sharia deed that still contains elements are prohibited by sharia is to correct the error with the appropriate procedures required by laws and regulations with the consequence that the deed is no longer an authentic deed but it becomes a private deed. And, in carrying out the notary profession, a notary causing harmful can be prosecuted on the basis of an unlawful act or based on consumer protection law, cause notary including in the category of service provider business actor which is carried out openly and can be accessed by all legal subjects.

Keywords: Notary Liability, Islamic Banking, Consumer Protection.

INTRODUCTION

Indonesia is my most beautiful and unique country full of colours and flavours that stretches from the north from the west of Rondo Island, Sabang, Aceh, Sekatung Island, Riau Islands, North East of Batu Bawaikang Island, Sangihe Islands Regency, North Sulawesi, to the south of Dana Island, Regency Kupang, East Nusa Tenggara; in the east of Bepondi Island, Biak Numfor Regency, Papua borders Palau, and so on. Besides having thousands of islands - many of which are still by title region names and have not been reported to the United Nations, so we will difficult to find the name of the outer most islands which are mentioned in Presidential Regulation Number 78 of 2005. Indonesia also has thousands of tribes with their customs - some of them still apply local community law/customary law (Adat Law), thousands of which there are 1158 regional languages outside national language-Indonesian, according to the 2010 Central Bureau of Statistics-CBS-BPS census, with order the 3rd largest speakers are Javanese, Malay, and Sundanese.

From the variety of ethnic groups and languages that are so many, it is not always equal or linearly proportional to the adherents of religion and belief. Based on from the recognized

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religions in Indonesia, namely Islam, Christianity, Protestantism, Hinduism, Buddhism, and Confucianism, the adherents of Islam constitute the majority, which is around 87% of the total population of Indonesia, amounting to 265 million; Protestant 6.96%, Catholic 2 0.91%, Hindu 1.69%, Buddhist 0.72%, Confucianism 0.05%, others 0.13%, and the residue pf them did not answer. From these data, it is clear that Muslims are the majority, namely 87% (out of 265 million) or more than 200 million Muslims. If it is broken down into a family structure with 1 father-1 mother-2 children, there will be 50 million families. Of the 50 million Muslim families, if 20% of the population adheres to their religion, it means that there are 40 million people, or 5 million families (with this calculation, the entire population of Indonesia means there are 67 million families).

For Muslims, especially those who are obedient - hopefully we will be in the pious people, there is a will to live a perfectly (kaffah) life, namely to carry out the Shari'a in full- as long as possible, including in daily transaction (muamalah), includes transactions using banking services. The form of muamalah is an agreement in the field of property. Agreements in Islam are basically simple, that is, they do not require a certain process and form, although in certain cases they need to be written (not written). Command of Al Qur'an, "*O you who believe, if you do not do mu'amalah in cash for a specified time, then you should write it down. And let a writer among you write it down correctly*" (Fauzan, 2015).

Thus, the type of agreement in Islamic law the same with the Civil Code, and British law namely basically consensual. In just a few agreements must be written, or written with a deed, both an authentic deed or under hand deed. In the development, many agreements must be made in written form, whether deed or not; both authentic deed or under hand deed. This is caused by economic traffic does not only occur between parties who know each other and meet each other face to face, not only in small amounts but in large amounts, not only in cash but in large quantities not in cash; can occur or may occur frequently, contracts are executed by parties who do not know each other at all; or there is a possibility to avoid forgetting, or there is also a possibility that the level of trust between each other is decreasing.

In banking traffic, both conventional banking and Islamic banking, the role of a notary becomes very important because in a banking contract a notary deed becomes an obligation, especially those related to guarantees. In this banking, the parties involved in the transaction are not only debtors and creditors, but also a notary. Therefore banks, users/consumers, and notaries need to apply sharia principles in make agreements between parties who wish to use sharia banking. The question is, how is the liability of the notary in terms of the financing deed, there are still elements that are prohibited by the Shari'a such as usury? And, can the notary be sued civilly under consumer protection law? This is the main question that will be the focus of this paper.

METHOD

1. This research use approach a normative juridical approach because it will discuss the principles and legal theories related to the notary's liability in providing services to his clients (party).
2. The specification of this research is analytical descriptive, which describes the notary's liability to clients/users viewed from consumer protection law. The description is accompanied by legal analysis to produce conclusions about the legal liability of a notary related to consumer protection law

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3. The source of data in this study is qualitative data which includes primary and secondary legal sources. The primary source of law means the law itself, while the secondary source of law is the interpretation or explanation of the primary legal source (Elias & Levinkind, 2001). Data collection techniques are carried out through library research, inventorying and classifying sources that are important and closely related to the research theme.
4. Technical analysis uses legal analysis techniques in the form of interpretation, especially language interpretation and systematic interpretation without ignoring other legal analysis methods deemed necessary.

DISCUSSION, ANALYSIS AND RESULT

Business Actors and Consumers

The first question in discussing the liability of a notary is, can a notary be considered a business actor? In Indonesian consumer law, it is stated that business actors are those who carry out activities in the economic field. Provide goods and services openly for public consumption. It is clearly stated that a business actor is a person or an entity, either a legal entity or not a legal entity or more simply called a legal subject who provides goods and services openly that can be accessed by all parties.

Thus, business actors in the Indonesian CPA must meet:

1. Every individual or business entity with a legal entity or not a legal entity, either individually or business entity
2. Organizing business activities.
3. In various fields of economics.

The first element by using the word every which means everyone or anyone, whether individuals, business entities, whether legal entities, or not legal entities without limiting them to certain types of work and professions. So this gives understanding to whoever he is, as long as he is recognized as a legal subject who has legal authority.

The second element is conducting business activities. The definition of carrying out business activities means that there is a movement to carry out activities that qualify as business. Thus, as long as there is a movement with the aim of effort then it is included in this sense. Whoever he is doing activities with the purpose of doing business regardless of the type of activity, and then he is a business actor. This includes physical work, thought, or profession

Various fields of economics mean not limited to one field but contain a very broad meaning as long as it is in contact with economics. The meaning of the economy is simply the human effort to meet the needs of his life. From this understanding, as long as a person carries out activities with the aim of fulfilling his life needs, he is included as a business actor.

So a business actor gives an understanding of every legal subject who carries out activities to try to fulfil his life needs or livelihood, then he is a business actor.

A notary is a person who carries out activities. The activities they carry out are not without purpose but have a purpose to fulfil their life needs. In other words, they run a business in the economic field. Thus, a person who runs a business in the economic field is a business actor. Therefore, notaries are included in business actors. The condition of "*running this business*" is clearer because a notary who carries out his profession is entitled to receive

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compensation. The usual reward today is nothing but money. This strongly supports the statement that, the activity of a notary in dealing with his clients is to run a business for his life (livelihood). Sociologically, this fact is the same as other professions such as lawyers, teachers, doctors, etc. Actually, there are other conditions that need to be added that the activity is "*in the field of civil law*" because for professions that are in a realm controlled by public law, such as the State Civil Apparatus (ASN), it applies state administrative law. So it's a different legal realm so it doesn't fall into the mile of consumer protection law.

The second point in the consumer-producer relationship is who is the consumer in Indonesian protection law? This question has been answered by the provisions of Article 1 number 2 of the CPA which reads "*Consumers*" are every person who uses goods and/or services available in the community, both for the benefit of themselves, their families, other people, and other living creatures and not for trading.

From the above definition, the consumer elements are:

1. Each person.
2. Users of goods and/or services available in the community.
3. For the benefit of one, family, other people, or other living beings do not for trading.

The elements above show, that the understanding of consumers is more limited than the understanding of business actors because consumers only include "*everyone*". So the legal subject is limited, namely people. This is different from business actors which include people and business entities. This means that consumers are narrower than business actors, or business actors are broader than consumers.

The second element is the user of goods or services available in the community. This element is very broad, namely that each user of goods or services is not limited to a particular specialty; and services or goods are available in the community. Available contains general understanding. Access to these goods or services can be done by anyone who needs them. In addition, this understanding of available must be emphasized on another aspect, namely legal. With this additional aspect, consumers who are protected by law are consumers who use legal goods or services, not prohibited by law. Therefore, users of goods or services who consciously use illegal goods or services cannot be protected by consumer protection law; for example, drug consumers, prostitution consumers (male or female), and gambling consumers are not protection by law.

The third element is for self-interest and the fourth element is not to be traded refers to the condition that consumers are users, not traders or to trade; this refers to consumers who protected by law, consumers are final consumers, not intermediate consumers. Thus, who leasers, intermediate traders, middle traders, and retail traders or the like are not included in the definition of consumers as referred to in the consumer protection law.

Legal Liability (aanspraakelijkheid-Dutch)

Legal liability is a juridical term which in English is equated with legal liability and in Dutch it is equated with "*aansprakheidkelijkheid*". Legal liability means that a person must bear liability (Algra et al., 1983). This means that a person is required to always be prepared to face

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the risks of every action, behaviour, and words. Legal liability is different from social liability and ethical liability. The difference mainly lies in whether or not it can be brought to court or, more concretely, can sue to court. Social and ethics liability are relations in the social and ethical fields which in the Indonesian legal system, adopting a positivist or legalistic system, are outside the jurisdiction of the law or the authority of the court.

In law, liability can be in the form of civil liability, criminal liability, state administrative liability, and expertise or professional liability. Civil liability is a civil liability with sanctions in the form of return, repair or compensation; Criminal liability means that an action must be accounted for because it enters the realm of criminal law such as fraud, false information, theft, murder, etc. In traffic of property law, liability is imposed on those who gain or cause harm to other parties in a legal relationship. Therefore, legal liability can sometimes affect parties who do not have a direct relationship as in consumer protection law. In consumer law, shariansibility is not solely directed to business actors who produce goods or objects, but can be applied to business actors who provide services to the community. This is often referred to as professional liability or expertise liability (Suriaatmadja, 2016; Suriaatmadja, 2018)

Nature of Contracts and Prohibitions in Sharia Contracts

In Islam, as mentioned earlier, Islam adheres to a simple contract. This is in accordance with the words of the Prophet "*You know better about your worldly affairs*". This hadith gives an understanding that humans have the freedom to take care of their worldly needs as long as they do not violate the prohibition of sharia. Drawn further, this is consistent with the teachings of Islam that Islam will not burden humans; will not give more burden than the human being able to bear it. In addition, if the hadith is connected with an agreement, this means that, in Islam, we are given the freedom to make any agreement as long as it is in accordance with the guidance and there are no prohibitions in the syara. Humans are given the freedom to do anything and with anyone. Restrictions are only given in the form of no usury, no dholim, no maisyir, and no gharar.

The principle of freedom of contract in the Islamic Agreement is Mabda' Hurriyah at Ta'aqud. This principle is a basic principle in Islamic contract law in the sense that the parties are free to make an agreement (Freedom of Making Contract) orally or in writing. Free in determining the object of the agreement and free to determine with whom to make the agreement and free to determine how to determine the resolution of a dispute if problems occur in the future (Gemala, 2018).

According to Hamzah Ya'cub, 1992, Fiqh al-Muamalah, CV. Diponegoro, Bandung as cited by journaliainpontianak, the parties are free to make contracts and arrange the contracts themselves as long as they fulfill the following conditions (Khoiriyah & Santoso, 2017):

1. Not prohibited by sharia regulations (Law). It means that the contract entered into by the parties is not a conflicting act with the law / actions that are against Sharia law. Because a contract that is contrary to the provisions of syara' law is invalid, and by itself there is no obligation for each party to comply with or implement these provisions or in other words if the contents of the contract are against the law, the contract is entered into by itself. Null and void.
2. In accordance with applicable regulations.

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3. As long as the contract is executed in good faith. Contracts entered into by the parties in good faith must be based on the agreement of both parties, where each party is pleased ith the contents of the contract and is the free will of each party so that they have good faith to keep the contract.

Meanwhile, closest to banking, the prohibition of contract in Islamic law is usury. Riba in the sense of the word is excess. The prohibition of usury was directly revealed by Allah, trading was permitted and usury forbidden (Basri et al., 2018). So for usury there is no more bargaining because it is clear. The definition of usury according to the terms or syara is a contract that occurs with a certain exchange, it is not known whether or not it is the same according to the rules of syara, or late in receiving (Rasjid, 2010). There are 4 types of usury according to some scholars (ulama), namely:

1. Riba Fadku is exchanging two similar items with different ones.
2. Riba qardi is debt on condition that there is profit for those who give the debt.
3. Riba yad, separate from the place of contract before there is a weigh-in.
4. Riba Nasa, which requires that one of the two goods being exchanged is subject to postponement of delivery (Rasjid, 2010).

Authority, Obligations and Prohibitions for Notaries

The Law on Notary Positions regulates the Authorities, Obligations, and Prohibitions for Notaries. Notaries as public officials as deed makers, especially party deeds, should be given limits in their actions. However, the law on the position of notary does not regulate the liability to the parties who use its services, both civil and other liabilities. Thus, there is an illustration that this law does not want to regulate the legal burden for a notary in the event that something is detrimental to the parties who use the services of a notary.

The authority of a Notary as regulated in Article 15 of the Law on Notary Positions is basically the central point of a notary's authority is to make a deed, with one obligation in the field of legal development, namely carrying out legal confirmation. Legal education is important for the public to understand about notaries (Fredy & Helena, 2017).

In Article 15 paragraph (1) states that a Notary has the authority to make an authentic deed regarding all acts, agreements, and provisions required by laws and regulations and/or desired by the interested parties to be stated in an authentic deed. This editorial puts emphasis on 'what the interested parties want. One of the interested parties in a deed is the parties who made the deed or appears. Thus, there is a consequence that the notary must be able to capture the ideas of the parties that will be stated in the deed so that the wishes of the parties are truly formulated in the contents of the deed, or the contents of the deed are truly the w ill of the parties. This also applies in making a party deed whose agreement is sharia-based Notary obligations are regulated in Article 16 of the Law on Notary Positions (Amudy et al., 2020). Paragraph (1) can be divided into sections related to personality and related to professionalism. In letter a, for example, it is stated that a notary is obliged to act in a trustworthy, honest, thorough, independent, impartial, and safeguarding party's interests; and letter f, keep everything regarding the Deed he made and all information obtained for the making of the Deed in accordance with the oath/promise of office, unless the law provides otherwise. These are all more about personality and ethics, while others are more about work, namely making deeds, and

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storing them, issuing grosses deed, copies or quotes, binding, etc. However, from this article it can give birth to the notary's liability for the deed he made.

The prohibition for notaries is contained in Article 17 of the Law on Notary Positions. From this article, the most important point is letter i, namely that Notaries are prohibited from doing other work that is contrary to religious norms, decency, or propriety that can affect the honour and dignity of the Notary's position.

Paragraph (2) of Article 17 includes sanctions, all of which are more administrative in nature, namely in the form of written warnings temporary dismissal, honourable discharge; or dishonourable discharge. Dismissal with or without respect may have different consequences for the notary. Other sanctions can be found in Article 51 which regulates the correction of typographical errors or typos. The Notary has the authority to correct typographical errors and/or typos contained in the Minutes of Deed that has been signed before the appearer, witnesses, and the Notary as stated in the minutes. If this is violated, it will result in the power of a notary deed becomes a deed under the hand. In addition, this condition can be a reason for the aggrieved party to demand reimbursement of costs, compensation, and interest from a Notary."

The article provides sanctions not for typos or writing errors of the notary, but sanctions for the notary if the correction is not made before the appearer, witnesses, and the notary and so on. In addition, the provisions of this sanction are detrimental to the parties because if the correction does not meet paragraph (2), the notarial deed will become a private deed. The beneficial rule of this paragraph for the parties is that they can claim fees, compensation and interest from a notary. But again, this applies if paragraph (2) is not fulfilled; not because of a typo. Therefore, this article still leaves a problem, namely what about typographical or typographical errors that were not found by the parties so that when used as evidence it caused losses to the party who used the deed to confirm or serve as a basis for recognizing their rights. This is actually related to the principle that a notary must have when exercising his authority, namely the principle of prudence. If this principle is violated and causes harm to the party, legally he has been negligent which resulted in losses. This will be the reason for the imposition of Article 1365 of the Indonesian Civil Code, which is known as the article against the law. On the basis of this article, a notary can be sued in a civil manner to pay compensation.

Form and Strength of Binding Notary Deed

A notarial deed has a certain standard form contract, so that the composition and wording of each deed regarding certain transactions are similar, if not the same. This standard form is necessary because it relates to the nature of standard contract of a deed. In the nature of the deed there are 3 proofs, namely, external proof, formal proof, and material verification (Mertokusumo, 2009). Meanwhile, the power of proof of authentic deed is perfect and binding. Perfect means that no other evidence is needed, only one authentic deed is perfect, it means that the legal action stated in the deed must be acknowledged as true, as long as there is no evidence of the opponent disqualifying it (Subekti, 1977).

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Liability of a Notary in Realizing Sharia Compliance Associated with Consumer Protection Law

The previous description explained that the majority of Indonesian people are Muslims. It is a fact that should not be discussed or hidden. Therefore, it is very natural that the State pays attention to the interests of the majority, especially those of a special nature (Soemitro, 1990). One of the specifics lies in the need for halal in all types of transactions, including lending and buying, buying and selling, and all derivatives. For this reason, sharia banking has been born which eliminates doubts for Muslims in transactions using banks, namely the avoidance of usury.

In considering the letter a of the Sharia Banking Law, Law No. 21 of 2008, "*that in line with Indonesia's national development goals to achieve the creation of a just and prosperous society based on economic democracy, an economic system was developed based on the values of justice, togetherness, equity, and appropriate benefits in accordance with sharia principles*"; This philosophical basis is further emphasized in the general explanation which states, "*Sharia Banking Principles are part of Islamic teachings related to economics. One of the principles in Islamic economics is the prohibition of usury in its various forms*".

Therefore, by strictly speaking, usury which is an obstacle for Muslims in transacting through/using bank services is eliminated in the Islamic banking environment. It is a small part of the realization of the government's obligation to protect its entire people. In its operations, banks provide financing in various forms.

Although the agreement in Islam prioritizes the consensual principle, but there is something that must be written as in an agreement or transaction that is not cash. Financing from a bank is one of the non-cash agreements in the sense of achievement that utilizes financing that does not make achievements in cash but performs achievements gradually and continuously. Therefore, from the point of view of Islamic law, such an agreement is an obligatory agreement to be written.

In Indonesian banking law, financing transactions at Islamic banks must use a notarial deed in the form of a party deed. In such a deed, the parties express their wishes to a notary. It is the notary who makes the deed which is then followed by the procedure as stipulated in the Law on Notary Positions. Practically, Dees are standard form. Due to deed it is standard in a form; there can be special wishes that are not properly formulated in a notary deed. Here it should be remembered that banks and customers from the beginning intended to avoid the prohibition of usury, and wanted to make transactions halal. Choice of Islamic banks must still be based on the fact that the parties want to act according to sharia.

From this principle, there are liability of a notary as stated in the authority, obligation, and prohibition for a notary, namely being able to be trustworthy, honest, thorough, independent, impartial, and safeguarding the interests of the parties, and able to formulate the will of the parties. Thus, the notary is liability for the implementation of the desire to be free from haram in the transactions of the parties. The attitude of trustworthiness, honesty is the basis for a notary to be patient and painstaking in listening to the wishes of the parties and capturing the desire to be free from haram. If in a deed that has been made it is still not in accordance with what was stated by the parties and the principles of sharia financing, the deed can still be repaired, but it seems in the business world this is a little inconvenient.

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In this relationship of liability, because a notary receives services in return for services rendered, he can be prosecuted under civil law and consumer protection law, as well as seen from the Civil Code. This is because the notary gains benefits in the form of services that he can then legally, he can be burdened with liability which have implications for compensation.

When the notary does not fulfil the wishes of the parties, or incorrectly expresses the wishes of the parties, the notary and the parties can make corrections. However, the implication on the position of the deed is that it is no longer an authentic deed with perfect and binding proving power, but becomes an underhand deed with the strength of proof will depend on the acknowledgment of the opposing party. This will creates a different situation from if the deed is an authentic deed which does not require proof because it is perfect and binding.

In such situation can causes a loss, the party who is harmed (the appearer) due to the condition of the deed, can claim compensation either on the basis of civil law in the form of an unlawful act (origin 1365 of the Indonesian Civil Code), or through consumer protect law. If using civil law, the injured party who is the plaintiff must prove the defendant's fault (base on fault liability principle). This is different from using consumer protection law because consumer law strictly adheres to the absolute liability principle which basically determines that the defendant must be liability for the defendant's losses.

Thus, a notary as a profession can be held civilly liability for mistakes when carrying out his profession (at the time of making a deed) either using civil law or using consumer protection law.

CONCLUSION

From the description and analysis that has been presented, conclusions that can be drawn to provide answers to the main questions in this study are:

1. The liability of a notary in making a sharia deed that still contains elements that are prohibited by sharia is to correct the error with the appropriate procedures required by laws and regulations with the consequence that the deed is no longer an authentic deed because it becomes a private deed.
2. In carrying out the notary profession, a notary causing harm can be prosecuted on the basis of an unlawful act or based on consumer protection law because he is included in the category of service provider business actor which is carried out openly and can be accessed by all legal subjects.

RECOMMENDATION

As a recommendation from this article are:

1. The parties in making the sharia deed, important to pay attention the purpose of the sharia agreement, namely to avoid transactions that contain elements that are prohibited by Islamic law
2. The birth of Islamic banks is the state's concern for the special needs of citizens, therefore the parties must take advantage of the it’s situation for the realization of transactions that are free from elements which prohibited by Islam
3. There should be time for gathering between Islamic banking, the Sharia Supervisory Board (Fatwa MUI), the Financial Services Authority (OJK), and the Indonesian Notary Association (INI) to be able to formulate the form of a deed that is truly based on sharia.

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Received: 28-Feb-2022, Manuscript No. JLERI-22-11401; **Editor assigned:** 03-Mar-2022, PreQC No. JLERI-22-11401(PQ); **Reviewed:** 16-Mar-2022, QC No. JLERI-21-11401; **Revised:** 11-Apr-2022, Manuscript No. JLERI-21-11401(R); **Published:** 15-Apr-2022

Citation Information: Suriaatmadja, T.T. (2022). Notaries liability in the implementation of sharia compliance in financing contracts in the form of notarial viewed from the Indonesian consumer protection law. *Journal of Legal, Ethical and Regulatory Issues, 25*(4), 1-10.