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# Analysis on the Adjusting Practice of Mortgage Rights Granting Deed Clause on Sharia Financing by Land Deed Officials in Purwokerto City

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### Abstract

The aims of this research are: to analyze the adjusting practice in the clause of Mortgage Rights Granting Deed on sharia financing by Land Deed Officials in Purwokerto City; to analyze the legal implications of issuing APHT that do not following the provisions of PERKABAN No. 8 of 2012 for the sake of Adjusting the Principles and Concepts of Sharia Financing. The research method used in this research is Normative Empirical. In practice, to align APHT with Sharia principles and the principal agreement, PPAT changes the editorials in the clauses. This is a violation and constitutes legal uncertainty.

**Keywords:** Mortgage Rights Granting Deed (APHT), Land Deed Officials, Agreement, Sharia Financing.

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### 1.0 Introduction

Article 1 paragraph (1) Government Regulation (*Peraturan Pemerintah/PP*) Number 24 of 2016 concerning Amendments to Government Regulation No. 37 of 1998 concerning the Position Regulation of Land Deed Officials states that Land Deed Officials is a public official authorized to issue authentic deeds regarding certain legal actions. Regarding Land Rights or Ownership Rights to Flat Units, Article 2 Paragraph (2) PP No. 37 of 1998 explains that the legal actions as referred to in paragraph (1) are: buying and selling, exchanging, grants, income in the company, distribution of joint rights, granting of building rights/use rights on proprietary land, granting mortgage rights, granting power of encumbrance.

The form and content of land deed have been determined by the Minister of State for Agrarian Affairs/Head of the National Land Agency (BPN) of the Republic of Indonesia. The latest developments regarding the issuance of Land Deed are regulated in Regulation of the Head of the National Land Agency (*Peraturan Kepala Badan Pertanahan Nasional/PERKABAN*) No. 8 of 2012 on Land Registration. According to Article 96 paragraph (1) of PERKABAN No. 8 of 2012, the form of deed used to make the land deed follows the provisions of PERKABAN No. 8 of 2012.

However, in practice, many land deeds still do not follow the filling instructions as referred to in PERKABAN No. 8 of 2012. One of them is the making of Mortgage Rights Granting Deed (*Akta Pemberian Hak Tanggungan/APHT*) in sharia financing. In issuing APHT for sharia financing, the Notary/Land Deed Officials of Purwokerto City adjusts the APHT clause to follow the sharia financing concept even though the APHT clause that is regulated in PERKABAN follows the credit concept. This is contrast to Sharia financing concept and not all Mortgage Rights Granting Deed are related to matters of debt and receivable. The practice of adjusting the APHT clause on sharia financing has legal implications for the Notary/Land Deed Officials (*Pejabat Pembuat Akta Tanah/PPAT*) who issued it, the product of the

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deed, and the concerned parties, especially the bank as the creditor. This gap between the ideal provision and its practical implementation motivates this study by analysing the implication of adjustment practice in Mortgage Rights Granting Deed by Land Deed Officials.

This study then aims to analyze the practice of adjusting the clause of Mortgage Rights Granting Deed (APHT) on sharia financing by Land Deed Officials in Purwokerto City and its legal implications. The methodology used is a normative empirical method by analysing primary and secondary data then analyzed by method of induction thinking. Our study contributes to the literature in analyzing the implication of adjusting practice in the clause of Mortgage Rights Granting Deed by Land Deed Officials as no previous study have touched on this topic to the best of our knowledge.

## 2.0 Literature Review

According to Article 1 number 1 PP No. 24 of 2016 concerning Amendments to Government Regulation No. 37 of 1998 concerning the Position of Land Deed Officials explains that Land Deed Officials (Pejabat Pembuat Akta Tanah/PPAT) is an official who is given the authority to issue an authentic deed on certain legal actions regarding land rights or property rights to flat units. Article 2 Paragraph (2) PP No. 37 of 1998 explains that specific legal actions in question consist of buying and selling, exchanging, grants, income in the company, distribution of joint rights, granting building use rights/use rights on land with property rights, granting mortgage rights,

The land deed officials' area of authority in doing authentic deeds is limited by the size of their working area. According to Article 12 Paragraph (1) PP 37 of 1998 concerning Position of Land Deed Officials, the working area of PPAT is one district/city of their land office area. While according to Article 12 Paragraph (2) of PP 37 of 1998 concerning Position of Land Deed Officials, the working area of Temporary and Special Land Deed Officials cover their working area as a government official who is the basis for their appointment. Government Regulation No. 24 of 2016 concerning Amendments to Government Regulation No. 37 of 1998, states that: (1) The working area of Land Deed Official is one province; (2) The working area of Temporary and Special Land Deed Officials includes their working area as a Government Official which is the basis for their appointment; (3) a Ministerial Regulation shall regulate further provisions regarding the working area of PPAT. This regulation means that PPAT's working area has expanded. However, because there is no Ministerial Regulation as its implementing regulation until now, PPAT's work area still follows the provisions of PP No. 37 of 1998, namely one district/city land office area.

Regarding the size of the PPAT working area, in PP No. 37 of 1998, it is known that there is an expansion of the work area. Still, the development of this work area is only limited to making three kinds of deeds: Deed of Exchange, Deed of Entry into the Company (*Inbreng*), and Deed of Sharing Joint Rights (Akta Pembagian Hak Bersama/APHB). For the three types of a deed, Article 4 Paragraph (2) of PP No. 37 of 1998 shall apply, which essentially explains the Deed of Exchange, Deed of Entry into the Company, and APHB. So until now, the PPAT work area still follows PP No. 37 of 1998, which is one district/city land office area. A study by Karmani et al. (2016) discusses legal arrangements regarding the work area of the Land Deed Official and to find out the sanctions against the Land Deed Officials who exercises authority outside the work area. The result finds that the provision in Article 12 Paragraph 1 Government Regulation No. 24 of 2016 Regarding Position Regulations for Land Deed Officials is not imposed according to the rules stated. No articles in that regulation has explained the sanctions if Land Deed Officials exercises their authority outside of their working area and thus no sanctions were imposed. Karmani et al. then argues that such practice is against the principle of *Lex Posterior Derogat Legi Priori*.

Article 1 Paragraph 5 the Mortgage Rights Law classifies Mortgage Rights Granting Deed as a document issued by land deed officials that contains the granting of Mortgage Rights to certain creditors as collateral for the settlement of their receivables. Mortgage Rights Granting Deed is based on an assessor agreement in which there is a subsequent agreement that follows the main agreement. The consequences of the assessor nature of the mortgage agreements are as follows: the existence of a principal/main agreement namely the debt agreement (Mustofa, 2017); the write-off depends on the main agreement; if the main agreement is cancelled, the subsequent agreement is also cancelled; a transition occurs with the transfer of the main agreement. (Bahsan, 2007). The imposition of Mortgage is an agreement that is a formal agreement when viewed based on its form. The formal agreement is based not only on the concerned parties' agreement but also based on the law requiring certain formalities that must be fulfilled so that the agreement is valid by law. Certain formalities, for example, regarding the form or format of the agreement must be made in a certain form (Budiono, 2010).

In the imposition of Mortgage, the formal requirements are contained in Chapter IV of Law No. 4 of 1996 concerning Mortgage Rights which regulates the procedures for granting, registration, transfer, and abolition of Mortgage. Article 10 paragraph (1) Mortgage Rights Law explains the granting of mortgages is preceded by a promise to provide mortgages as guarantees for repayment of debts as outlined in the main agreement. Article 10 paragraph (2) Mortgage Rights Law requires the granting of Mortgage Rights to be carried out by obtaining a Mortgage Right Granting Deed by Land Deed Officials following the applicable laws and regulations. Article 10 paragraph (3) Mortgage Rights Law explains that if the object of Mortgage comes from the conversion of old land rights that have met the requirements to be registered but have not been registered, then the registration of the land is requested along with the granting of mortgage rights. Article 13 of Mortgage Rights Law explains that the granting of Mortgage must be registered at the Land Office no later than 7 (seven) working days after signing the Mortgage Rights Granting Deed. Article 17 also explains that the form and content of the previously mentioned deed, the structure and content of the Mortgage Land book, and other matters relating to the procedure for granting and registration of Mortgage Rights are determined and implemented based on the Government Regulation as referred to in Article 19 of the Law. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

The form of Mortgage Rights Granting Deed is regulated in the Regulation of the Head of the National Land Agency (PERKABAN) of the Republic of Indonesia Number 8 of 2012 concerning. According to Article 96 Paragraph (3) PERKABAN No. 8 of 2012 the form of APHT should not be different from what has been determined in the attachment to this regulation. Article 96 Paragraph (5) explains the

Head of the Land Office should refuse to register the official deed of the Land Deed that do not follow the provisions during its issuance process as referred to in this regulation.

tasks of the bank, namely providing funding facilities to meet the needs of parties who are deficit units. (Antonio, 2001). Article 1 Number 25 of Law No. 21 of 2008 explains that financing provides funds or equivalent claims requiring parties who are financed and/or given funding facilities to return the funds after a certain period with compensation (*ujrah*), without compensation or profit-sharing. In providing financing to customers, banks need guarantees. Collateral is a guarantee given by a debtor or a third party to a creditor to guarantee his obligations in an engagement. (Badruzaman, 2005). According to Law No. 10 of 1998 concerning Banking, collateral is a belief in good faith and the ability and ability of the debtor customer to pay off his debts or return the financing following the agreement. Guarantees, by their nature, are divided into two, namely general guarantees and the second is unique guarantees. (Rachmadi Usman, 2008). General guarantees arise because of the law, so they do not need to be agreed upon in advance. Special guarantees arise because there is an agreement between the bank and the owner of the collateral or between the bank and a third party who bears the debtor's debt. Special guarantees can be divided into two, namely personal guarantees and material guarantees. Individual guarantees, for example, are guarantee agreements or *borgtocht*, corporate guarantees, the commitment of responsibility, and bank guarantees (bank guarantee). Material guarantees consist of pledges, fiduciary, and mortgages.

The provision of guarantees in the distribution of Financing in Islamic banking is legally allowed. The permissibility of providing proofs in Islamic Financial Institutions' practice was initially based on the National Sharia Council Fatwa No. 68/DSN-MUI/III/2008 concerning Rahn Tasjily. This refers to collateral in the form of goods for debt, but the collateral (*marhum*) remains in control (utilization) of *rahin* or the customer receiving the facility (the debtor) as the party who delivers the collateral, and proof of ownership of the collateral is submit to the *murtahin* (recipient of the goods). Guarantee or creditors. In its development, the Indonesian Ulema Council issued the National Sharia Council Fatwa No. 92/DSN-MUI/IV/2014 Regarding Financing Accompanied by *Rahn* or financing collateral from pawn (Abubakar, 2017). The issuance of this regulation clarifies the permissibility of using collateral in financing or distributing funds to Islamic Financial Institutions. According to Article 37 number (1) of Law No. 21 of 2008 concerning Islamic Banking, collateral is an additional guarantee, either in the form of movable or immovable objects which is submitted by the owner of the collateral to a Sharia Bank, to guarantee the settlement of the obligations of the customer receiving the facility. Article 40 number (1) explains, if the customer receiving the facility does not fulfil its obligations, Islamic Bank and UUS may purchase part or all of the collateral, either through or outside the auction, based on voluntary submission by the owner of the collateral or based on the authorization to sell from the owner.

A more recent study by Bustomi (2020) on the role of Land Deed Officials (PPAT) based on Government Regulations for Land Registration finds that Land Deed Officials may assist the fulfillment of land registration objectives of the government through the land office by securing legal certainty and legal protection of related subjects and objects. Furthermore, Land Deed Officials also provide information for land administration. This finding is significant in the sense that if land rights are not registered at the land office, then the land rights holder will not be guaranteed to be able to secure a land rights certificate in which such documents are robust evidence to provide legal guarantees of a plot of land. Another research by Rahmawati (2021) examines the legality of mortgages as collateral in Islamic financing and whether such mortgage guarantees have equal position to credit in conventional banking. The research finds that mortgage in Islamic bank financing is viewed not only from the Mortgage Rights Law Number 4 of 1996 but also from Financial Services Authority Regulation Number 16/POJK.03/2014. In this manner, mortgages actually grant legal protection for concerned parties in Islamic finance banking.

### 3.0 Methodology

This research is categorized as normative, empirical legal research (applied law research). Empirical normative research begins with written positive legal provisions that apply to *in concreto* legal events in society. In this study, there is a combination of stages of study. The first stage is to examine the applicable normative law. The next stage is to examine the application of the normative law to *in concreto* events. (Soekanto, 2010). Primary and secondary data were obtained by the authors from documentation and interview methods which were then analyzed qualitatively by systematically analyzing the data to obtain a clear picture of the problem being studied. The results of interviews and documentation that the authors have obtained are categorized based on the problems being studied and the selecting the collected data, namely primary data and secondary data, and then analyzed based on the material obtained from the literature study. In concluding this legal research, the author uses induction thinking, namely by looking for the principles of legal science on existing phenomena to be analyzed with the principles of existing legal science to produce a conclusion. (Marzuki, 2016).

### 4.0 Results based on Practice

Notary/Land Deed Official Robiyantoko stated, in practice, the granting of Mortgage Rights has been carried out through an electronic system (HT-el). It stipulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 5 of 2020 concerning Electronically Integrated Mortgage Services where Mortgage Rights Granting Deed (APHT) is made. Sharia financing is still carried out in the presence of the Land Deed Official and in the presence of the parties carrying out the legal action concerned or by a person authorized by a written power of attorney following applicable regulations. This follows the provisions of Article 101 PMNA/Head of BPN RI Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation (PP) Number 24 of 1997 concerning Land Registration. Before the Mortgage Rights Granting Deed was created, Land Deed Officials collect juridical data concerning the subject (prospective grantor and recipient of a mortgage), physical and juridical data from the object of Mortgage. Thus, Land Deed officials can determine whether the parties are authorized to carry out the legal action. Land Deed Officials is also in this case

obliged to first conduct an examination at the Land Office regarding the suitability of the certificate of land rights or Ownership Rights to the respective Flats with the lists available at the local Land Office by showing the original certificates following the provisions of Article 97 paragraph (1) PMNA/Head of BPN RI Number 3 of 1997. Checking this certificate can be done electronically through the website so that Land Deed Officials know whether or not the parties are authorized to carry out the legal action. Checking this certificate can be done electronically through the website <https://htel.atrbpn.go.id/>. If everything is correct, a certificate-checking file will be issued, which will be printed by the Land Deed Official. Robiyantoko stated that after all checks related to the agreement document are carried out, the Notary/Land Deed Official then makes the main/principal agreement in which there is a promise to charge guarantees in the form of Mortgage guarantees,

Mortgage Rights Granting Deed is a follow-up agreement that exists alongside the main agreement. After the main agreement is made, then the making of the deed can be carried out. The binding of guarantees on Islamic Financing still uses the concepts in conventional banking because there is no provisions that govern the binding of contracts for sharia financing. Therefore, adjustments are also made in the articles to do not conflict with Sharia principles and align with the main agreement. In practice, so that the editors in Mortgage Rights Granting Deed align with Sharia principles and the main agreement, Land Deed Officials changes the editors in clauses such as debt editors into financing, debtors become customers or recipients of financing facilities, and creditors become banks or providers of funds. The reasons for the Notary/Land Deed Officials to change the editorial in the clause are the change in the editorial from debt to financing, debtors to customers or recipients of financing facilities, and from creditors to banks or providers of funds in the Mortgage Rights Granting Deed which do not change the substance of the deed. This is because sharia financing bank provides funds for the benefit of customers as stated in Article 1 paragraph (25) of the Sharia Banking Law that financing is the provision of funds or equivalent claims. In Sharia financing, the customer should pay off a minimum amount of financing that the bank has issued. According to Robiyantoko, the editorial changes to this clause are intended to harmonize the main agreement with the Mortgage Rights Granting Deed (APHT). This change does not change the substance of APHT because the Mortgage Rights is there to guarantee the repayment of the financing recipient's obligations to the bank if one day the recipient of the financing facility makes a default.

After the APHT is made, PPAT inputs the deed number, upload the deed, and other required documents on the National Land Agency Partner application or site, then the system will issue a cover letter for the deed to be submitted to the bank. The bank processes Mortgage registration through electronic services without visiting the land office. The bank makes the file, inputs the number and code of the deed, completes the Mortgage Rights Granting Deed (APHT) data made by PPAT, and then uploads the application letter file and other documents. The bank prints the deposit order and pays the Non-Tax State Revenue (PNBP), then the bank will get a State Revenue Transaction Number (NTPN). The land office checks the application file. The application file is performed on the HT-el application, which can be accessed through the <http://htel-pelaksana.atrbpn.go.id/>. In the HT Monitoring menu, the land rights registration officer will check the correctness of the data, namely regarding the subject of mortgage rights, as well as the object of mortgage rights by comparing documents related to the deed (land certificate), Deed of Establishment of the debtor or creditor if it is a legal entity, Taxpayer Identification Number of creditor or debtor, identity card of debtor or creditor if not a legal entity, identity card of Witness, Approval Form, identity card of approval party, and statement of real document with APHT and deed of the main agreement, if all are following the Land Office issues a Mortgage Certificate. The bank is required to print and paste the mortgage certificate on the Land Certificate.

## 5.0 Findings & Discussion

The practice of redaction changes in the Mortgage Rights Granting Deed (APHT) clause are done by a notary/Land Deed Officials These include redaction of debt into financing, debtors becoming customers or recipients of financing facilities, and creditors becoming banks or providers of funds. According to the author, this is against the law and creates legal uncertainty because this practice violates the provisions of Article 10 paragraph (2) Mortgage Rights Law, which requires the Granting of Mortgage Rights to be carried out by issuing Mortgage Rights Granting Deed (APHT) by Land Deed Officials (PPAT) following applicable laws as well as according to Article 17 Mortgage Rights Law which states that Government Regulation regulates the form and content of Mortgage Rights Granting Deed. Article 38 paragraph (2) of Government Regulation 24 of 1997 explains the form, content, and method of making land deeds as regulated by Regulation of the Head of the National Land Agency (PERKABAN) No. 8 of 2012. Article 96 paragraph (1) PERKABAN No. 8 of 2012 explains the form of the deed and the procedure for filling it out following the attachments contained in this rule. One important point related to APHT is based on Article 96 paragraph (3) PERKABAN 8 of 2012 which confirms that the making of APHT cannot be carried out based on a deed that is not made following the provisions in paragraph (1).

Mustofa as Notary/PPAT Yogyakarta City and Lecturer at Masters of Notary Gadjah Mada University stated. The existing guarantee institutions have not been able to accommodate the existing provisions on sharia financing, or it can be said that there is still a legal vacuum. As existing guarantee institutions still use the existing provisions in conventional banking, especially mortgage rights, no sharia regulation regulates guarantees for sharia contracts. The provisions for making APHT are regulated in Article 96 paragraph (1) PERKABAN No 8 of 2012, where the making of the deed must be following the attachment of the PERKABAN. It must be appropriate. That is, it cannot be changed, including the clause or the editorial. If it is changed, the making of the APHT is no longer following the provisions of the applicable legislation.

Mustofa stated, if the deed given by the Land Deed Officials is not appropriate, the Head of the Land Office must reject the deed registered by the PPAT so that changes can be made as stipulated in Article 96 Paragraph (5) PERKABAN No. 8 of 2012. But respondent AK as an employee of the Banyumas Regency Land Office stated in practice, the checking officer only checks the suitability of documents. Such as land certificate, Deed of Establishment of the debtor or creditor if it is a legal entity, NPWP of the creditor or debtor, identity card of the debtor or creditor if not a legal entity, identity card of the Witness, Approval Form, identity card of the approval party, and a statement of

the truth of the document with the APHT and the deed of the main agreement, however, the contents of the entire APHT such as the contents of the clause whether it is following PERKABAN No. 8 of 2012 was not examined so that it passed the check.

Burhan Albar as Notary/Land Deed Officials of Yogyakarta City and Lecturer at Masters of Notary Gadjah Mada University stated, there is a legal vacuum or *recht vacuum* regarding the binding of guarantees to sharia contracts. The binding of guarantees is based on rules that use the concept of credit as in conventional banking. The regulation regarding the binding of collateral, especially mortgages used as a condition for binding collateral on sharia financing, is not suitable. Because the Mortgage Law is a regulation that explicitly regulates mortgage rights, it provides limitations on APHT as a PPAT deed that contains the granting of mortgage rights to creditors as a guarantee for repayment of debts. Regarding editorial changes to the APHT clause made by a notary/PPAT, such as redaction of debt into financing, debtors becoming customers or recipients of financing facilities, and creditors becoming banks or providers of funds. Albar stated that it violated the provisions of PERKABAN No. 8 of 2012, because the provisions for making PPAT deeds, including APHT are strictly regulated in PERKABAN No. 8 of 2012 which must be made following the attachments to these rules.

In addition, the inspection officer reasoned that he still had to adapt to the HT-el system to use this system properly and effectively and be able to provide problems solutions that occur in the system such as cannot be accessed, the server is full, and so on. Whereas the provisions of Article 13 Paragraphs (1) and (2) of the UUHT state that the granting of Mortgage Rights must be registered at the land office no later than 7 (seven) working days after the signing of the APHT. Constraints on the system and limited time make the work rushed and not optimal.

If examined in Jan Michiel Otto's opinion, such practice is a legal uncertainty because the authorities or government agencies do not apply the law consistently and obediently. According to him, legal certainty can be achieved if there are clear, consistent, and easy to obtain (accessible) regulations, issued by and recognized because of the state (power); The ruling agency (government) applies the rule of law consistently and is submissive and obedient to it; Citizens principally adjust their behaviour to the rules; Independent and impartial judges (judicial) apply the rules of law consistently when they resolve legal disputes; Judicial decisions are concretely implemented. (Sidharta, 2006).

According to Utrecht, legal certainty can be achieved if there are general rules which make individuals aware of what actions may or may not be carried out; as well as legal security for individuals from government arbitrariness because, with the existence of general rules, individuals know what the state may charge or do to individuals. This legal certainty comes from Juridical-Dogmatic teachings, which are based on the Positivism school of thought in the legal world, which tends to see the law as something autonomous and independent because, for adherents of this school, the purpose of the law is nothing but guaranteeing the realization of general law. The general nature of the rule of law proves that the law is for certainty (Syahrani, 1999). Mertokusumo (1999) argues that maintaining legal certainty is a way to achieve legal goals. The main purpose of the law is to create an orderly and balanced society. With the achievement of public order, it is hoped that human interests will be protected.

There are several legal implications of issuing Mortgage Rights Granting Deed (APHT) that do not fully comply with the provisions of Regulation of the Head of the National Land Agency (PERKABAN) No. 8 of 2012, namely causing the agreement to grant mortgage rights null and void, make the bank or creditor lose his position as a preferred creditor who is prioritized as a holder of material guarantees, and the wronged parties can rightfully claim compensation from Land Deed Officials.

The granting of Mortgage Rights, when viewed from its form, is a formal agreement. Subekti (1998) argues a formal agreement is an exception to the principle of consensual contained in Article 1320 of the Civil Code, where based on the agreement, a certain formality has been stipulated by law and if the agreement does not meet the formalities stipulated by law, then the agreement will be "null and void". This means that an agreement has never been born legally from the beginning and there has never been an agreement.

Due to their positions, judges are required to state that there has never been an agreement. The court judge must request cancellation of the agreement because null and void do not apply automatically. (Subekti 1998). Likewise, the practice of cancelling Mortgage Rights certificates must still be prosecuted and submitted to the court because the application for deletion of Mortgage records must be based on a court decision or decision so that it does not automatically cancel. This is as stipulated in Article 22 paragraph (7) Mortgage Rights Law. Cancellations can be divided into two types: first, absolute cancellation, which is a cancellation that does not need to be explicitly demanded. Cancellation occurs because the form is flawed, prohibited by law. After all, it is contrary to decency and public order; Second, relative cancellation, which is a cancellation that is explicitly demanded and is usually filed (to court) by one of the parties. For example, representatives of people who are not authorized to carry out legal actions, people against whom violence and fraud are committed, or in error. (Matompo et al., 2017)

One of the formal requirements in making APHT is regarding the form of APHT where Article 17 UUHT states the form and content of the Deed of Granting Mortgage, determine, and implemented based on Government Regulation. Article 10 paragraph (2) UUHT stipulates that the granting of Mortgage is carried out by making APHT by PPAT following statutory regulations. PERKABAN No. 8 of 2012 is a delegation from UUHT and PP No. 24 of 1997 to regulate the form of deed used in making PPAT deeds. PERKABAN 8 of 2012 has a binding nature because it is made based on a delegation from a higher statutory regulation as stipulated in Article 8 Paragraph (2) of Law No. 12 of 2011. In Article 96 paragraph (3) of PERKABAN No. 8 of 2012 it is strictly regulated that PPAT cannot make APHT based on a deed whose preparation is not following the attachment of PERKABAN No. 8 of 2012. The phrase "cannot be done" in article 96 paragraph (3) is a mandatory requirement that is coercive. In addition, Article 10 paragraph (2) of the UUHT also mandates that the granting of Mortgage Rights carried out by PPAT follows the applicable laws and regulations.

Therefore, according to the author, the editorial changes in the APHT clause in sharia financing have implications for opening opportunities for Mortgage Certificates (SHT) and APHT to be sued for cancellation by the parties. Because the granting of mortgage rights, especially the making of APHT is made not following existing provisions, namely violating provisions related to the form of the deed. In the previous explanation, it was explained that the granting of Mortgage Rights was a formal agreement. One of the formal requirements

in making APHT is regarding the form of APHT which is currently regulated in PERKABAN No. 8 of 2012, a delegation regulation of UUHT and PP No. 24 of 1997. When viewed from the theory of cancellation, then the cancellation that the parties can sue in the future days is an absolute cancellation due to the shape of the defect.

If APHT and SHT are sued in the future because they are not made following applicable regulations, the lawsuit is granted and has permanent legal force; The agreement to grant mortgage rights, APHT and SHT is declared null and void by the judge. Then the bank or creditor can lose its position as a preferred creditor as a holder of material security rights and only has a general guarantee holder. As holders of Mortgage Rights, creditors have privileges compared to holders of general guarantees. Article 1 Paragraph (1), Article 20 Paragraph (1) letter b of the UUHT explains, if the debtor is in default (default), the debtor holding the Mortgage has the right to sell the land encumbered by the Mortgage through a public auction with the right to precede the other creditors. The executive power possessed by the Mortgage Certificate is the same as a court decision that has permanent legal force. This is because the Certificate of Mortgage has included *irah-irah*, which reads, "For the sake of Justice Based on the One Godhead". Execution is carried out using a *parate execute* institution following the Civil Procedure Code. This is as regulated in Article 14 Paragraph (2) and paragraph (3) of the UUHT, which states that SHT is valid as a *grosse acte hypotheek* as long as it concerns land rights.

Banks as creditors (financiers) holders of general guarantees do not have strong collateral rights and legal certainty that the debtor's debt will be repaid or the repayment of financing made by the customer. General guarantee holders do not have special rights that protect the certainty of repayment of their receivables. As a result, banks are only holders of general guarantees, so banks have to go through a long process to repay their receivables. Banks must file a Supplementary Confiscation Lawsuit based on Article 226 and Article 227 HIR to the District Court, which was previously preceded by the prominent lawsuit in the case of default. Default referred to in this case is related to the principal agreement in which the debtor cannot repay his debt. General confiscation applies to all debtor's assets. According to Article 62 of Government Regulation No. 24 of 1997 concerning Land Registration, PPAT can be sued for compensation by parties who suffer losses resulting from the neglect of the provisions as referred to in Article 38, Article 39 and Article 40 of PP 24 of 1997. Article 38 Paragraph (2) PP 24 of 1997, the minister regulates the form, content, and method of making PPAT deeds.

## 6.0 Conclusion & Recommendations

Mortgage Rights Granting Deed in Indonesia for sharia financing still follow the regulations that are commonly applied to conventional banks. This creates a discrepancy with sharia principles in the deeds such as using conventional banking terms debts, receivables, as well as creditors and debtors. Recommendations based on this research are: First, Notaries/Land Deed Officials and National Land Agency (BPN) should pay attention to and apply the rules related to the making of Mortgage Rights Granting Deed (APHT), especially the technical provisions regarding the creation of the deed contained in PERKABAN No. 8 of 2012 until there is a special provision regarding Mortgage Rights Guarantee for sharia financing so that the agreement for granting the Mortgage is legally valid and the deed made can later be used as evidence that has legal force, and minimizes the existence of lawsuits against deeds that are not made according to existing provisions; Second, it is necessary to immediately change the guarantee law, especially the Law on Mortgage and its implementing regulations, by adding provisions related to sharia financing guarantees to create legal certainty and harmony.

The scope of this research is limited to the practice of adjusting APHT clauses in Islamic banking financing which may differ from the rules that should be applied, namely Regulation of the Head of BPN No. 8 of 2012. Second, the legal implications in this study are only limited to the possibility of a lawsuit because it is not in accordance with the form and content of the regulations that apply when changes are made to the APHT clause on sharia financing which results in differences from the Regulation of the Head of the National Land Agency No. 8 of 2012. Thus, this research still provides opportunities for further study regarding whether APHT adjustments to sharia financing can be qualified as a legal discovery that opens the possibility of amendments to related regulations, especially Law no. 4 of 1996 concerning Mortgage and Regulation of the Head of BPN No. 8 of 2012.

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## Paper Contribution to Related Field of Study

This Paper contributes to the field of Islamic/Shariah Law as described in the introduction.

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