

The Principles for Islamic Debt Contract in the Sharia Pawnshop of Indonesia

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Abstract

This writing, basically, focuses on some Islamic principles in Sharia Pawnshop, especially Indonesia. These principles should be the basis of the legal relationship between the parties in the Sharia Pawnshop. Also these principles must integrate with the principle of mutual help (the Principle of *Taawun*) as its basis of the Sharia Pawnshop's contract. Because of debt contract is main key of Sharia Pawnshop. This writing is a legal research with using of analysis's conceptual approach. Using of this analysis, the author does try to formulate Islamic Principles in Sharia Pawnshop. This analysis, of course, refers to doctrines of Islamic Law. Therefore, the writer do hope to conclude which it can be justified scientifically. Legal experts agree that legal principle as the basic norm for rules of law. Legal principle contains a number of values and ethical guidelines. A legal norm, basically, has a philosophical basis which it can be the basis of establishment of such legal norm. Therefore, the rules of law which do not have a foothold of legal principle, they will be clumsy in its enforcement of the context.

Keywords: Legal Principles, Contract, and The Sharia Pawnshop of Indonesia

1. Introduction

Islamic contract is part of Islamic Law for *muamalah* context. *Muamalah* context means relationship of moslem commercial each other¹. Such Islamic contract, is a set of laws derived from the Quran and the *Hadith* of the Prophet Mohammad, including *Ijtihad* (Islamic Jurists' legal opinion). Actually, the Quran and *Hadith* are the main source of law to be the basic framework of Islamic Law.

The typical character of debt contract in sharia pawnshop, it is necessary to do an in-depth and detailed analysis of the enforcement of taawun principles as the underlying basic framework, especially in the context of the ability to profit (profits) on collateral goods which are still in control of *murtahin*. Because the cornerstone of the debt contract of receivable in sharia pawnshop, must be based on the principle of *taawun* as the basic foundation. It is intended that the debt contract as the principal contract in the perspective of sharia is not stuck in usury. The problem of usury in the perspective of sharia is a serious and crucial issue for a Muslim, because normatively according to the *Quran* that the theme of usury set it as a transaction that is forbidden for a Muslim to be involved in it.

Contractual relationship of parties in the Sharia Pawnshop, it is contractual relationship which puts debt contract as a main contract, while the mortgage contract (*akad rahn*) is only contract in *asesoir* (supplementary). The debt contract in the parties relationship in Sharia Pawnshop of the context, it is *al qardh*. According to Islamic Law, *al qardh* is a debt contract which puts amount of money as a object of mere contract. Therefore, Islamic Law does forbid any person to withdraw a financial advantage in such contract. It can be categorized as usury. Usury in Islamic teaching is a great sin. It means that Islamic Law only does allow moslem to make transaction on the basis of principle of mutual help (the Principle of *Taawun*) in such debt contract.

2. Method of Research

This writing is a legal research in using of legal normative. It is the set of process for legal discovery, legal principles, and legal doctrine to answer compact legal issue². Mark Van Hoecke³ says that "legal doctrine is often called a normative discipline, which is not only describing and systematising norms (a discipline about norms), but also and to a large extent, a discipline which takes normative positions and makes choices among values and interests". The study of normative law as a writing, not just to discuss the legal framework as a set of rules but more deeply into the set of values, but it plunges more deeply into the set of legal values, interests, and ideals embodied in a legal product.

Based on that argumentation, this writing's analyses in using of legal conceptual.

The writer explores to develop and to formulate the principles of Islamic contract in sharia pawnshops, so that with this conceptual approach, it is easy for us to identify the meaning of contractual principles in the

¹ Johni Najwan. (2017). "The Protection and Management of Environment In Indonesia Within The Islamic Law Perspective". *Journal of Law, Policy and Globalization*. Vol. 59, p. 104.

² Peter Mahmud Marzuki. (2005). *The Legal Research*. Jakarta: Kencana Prenada Media Group, p.93

³ Mark van Hoecke. (2011). "Legal Doctrine: Which Method(s) for What Kind of Discipline?", in Mark Van Hoecke. *European Academy of Legal Theory Monograph Series*. Oregon: Oxford and Portland, p. 13.

Islamic legal perspective, which of course, writer should refer to the doctrines which to develop in Islamic law. It is expected to provide scientific research conclusion.

3. Result and Discussion

3.1. The Principles for Islamic Legal Contract In Indonesia Sharia Pawnshop

Some of The Islamic Principles Contract In Sharia Pawnshop of Indonesia, author only do examine such sharia's principles contract which refers to principles contract contained in the Ordinance of Supreme Court of Indonesia of Number of 02 of 2008 on the Compilation for Economic Sharia Legal (*Peraturan Mahkamah Agung Republik Indonesia Nomor 02 Tahun 2008 tentang Kompilasi Hukum Ekonomi Syariah*), they are:

- a. The Principle for Freedom of Contract (*al-Hurriyah*). This principle means that the parties (creditor and debtor/*murtahin* and *rahin*) may freely to express their will in the contract. However, parties' free will must be within recognized by Islamic Law. It means that the parties only do their contract based on standard of *halal* or *haram* by Islamic Law set forth in the Quran *Hadith* of the Prophet Mohammad. *Halal* is something that is permitted by Islamic Law, while *haram* is something which is forbidden by its. The object of mortgage contract should not be in violation of Islamic Law, such as pork, alcoholic beverages, and goods obtained from theft, fraud, or other malicious act. Also, Islamic Law limits contract manufacturing for unlawful acts, such as usury transaction. Existence for the principle for freedom of contract in sharia contract, does provide guarantee materialized *pacta sunt servanda* principle. It states that Anyone who agrees to the agreement is obliged to be bound by the agreement that has been made in it. Wahberg¹ says that "*pacta sunt servanda* principle does become spiritual basis for moslem in obligation of contract".
- b. The Principle for volunteerism (*Ikhtiyari*)². This principle is a manifestation of the will of the parties in the frame work of helping each other in Sharia Pawnshop. The Institution of Sharia Pawnshop, basically, to help the customer voluntarily, to provide financial assistance due to economic hardship. Also, the customer is encountered voluntarily to enter into the debt contract with the Sharia Pawnshop, as in dire need of the money, either for consumption or for the needs of the business. However, The Principle for volunteerism (*Ikhtiyari*) is the principle of linking interest of Sharia Pawnshop (*murtahin*) and customer (*rahin*).
- c. The Principle of Good Faith. Henry Campbell Black³ in *Black's Law Dictionary*, formulates Principle of Good Faith as a "honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry... An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit, or belief of fact which render transaction unconscientious". Whereas, according to Wiliam Tetly, Q.C.⁴, that "define good faith in contract as just and honest conduct, which should be expected of both parties in their dealings, one with another and even with third parties, who may be implicated or subsequently involved". It means that principle of good faith, should be justice and honest in contract⁵. Good faith is always associated with honesty and fairness in entering of contract. In view's Yohanes Sogar Simamora⁶, The Principle of Good Faith has important function in contract. Yohanes Sogar Simamora, however, defines meaning of The Principle of Good Faith in two aspects. First, the good faith in contract performance which is *bonafides*. It is appropriate and feasible behavior between the two parties in the contract (*redelijkheid en billijkheid*). To examine whether a behavior in worthy and fair, based on objective unwritten norms. Second, the good faith also is a manner in honet payment .The essence of the principle of Good Faith is upheld as the basis of debt contract in the Sharia Pawnshop, is to provide a benchmark toward *rahin* as customer and *murtahin* to promote honesty intention, when they perform transactional relationship of debt to one another. It means that the Principle of Good Faith should realize the intention of debt contract which is not detrimental to either party.
- d. The Principle of Trust (*amanah*). Existence of this principle, basically, it is very urgent to maintain legal relationship for the Institution of Sharia Pawnshop (*murtahin*) and Customer (*rahin*). Customer as *rahin* will keep the promise to reimburse the loan on time. While, the Institution of Sharia Pawnshop (*murtahin*) as a

¹ Ridwan Khairandy. (2011). "The Philosophical Basis of Binding Strength to Contract". *Journal of Law*, Faculty of Law, Indonesia Islam University, Special Edition, 18, p. 37.

² Djamil, Faturrahman. (2001). *Law for Shariah Contract In Compilation of Contract Law*. Bandung: Cet. 1, Citra Aditya Bakti, p. 30.

³ Henry Campbell Black. (1968). *Black's Law Dictionary (Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern)*. Revised Fourth Edition, S.T. Paul Minn. West Publishing Co., p. 822.

⁴ Wiliam Tetly, Q.C. (2004). *Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering*, McGill University.

⁵ Abd. Shomad. (2012). *Islamic Law In the Norm For Shariah Principle of Indonesia Legal System*, Revised Edition. Jakarta: Kencana Prenada Media Grup, Indonesia, p. 83.

⁶ Yohanes Sogar Simamora. (2005). "Legal Principle for Contract in Procurement of Goods and Services by the Government". *Dissertation*. Surabaya: School of Law, University of Airlangga, Indonesia, p. 33.

- one of the parties that does receive collateral goods, also it is demanded a commitment to keep the collateral goods, in order to the collateral goods are not damaged, destroyed, or missued.
- e. The Written Principle (*al-Kitabah*). This principle is put in Sharia Pawnshop, in order to maintain responsibility of parties toward contract in commitment. This principle in the debt contract of Sharia Pawnshop, can be the basis for the parties to the benefit of the evidence if there a dispute in the future. This principle also, to ensure customer's obligation of the repayment of the loan. While, Sharia Pawnshop has obligation to ensure collateral goods safely. However, the existence of the Written Principle, in order to ensure responsibility of commitment the parties in the Sharia Pawnshop.
 - f. The Principle of Prudence (*Ikhtiyati*). Significance of this principle could keep the transaction of parties in Sharia Pawnshop, so as not to deviate which in the norms of the Islamic Law. This principle, basically, to ensure object of the debt contract in the safe by the bad. It means that customers feel secure against their belongings which were pledged as collateral. While, the Institution of Sharia Pawnshop (*murtahin*), also feels secure toward the loan which borrowed by customer, especially regarding the reimbursement time.
 - g. The Principle of Mutual Benefit. This principle, in the context of debt contract, lasting in Sharia Pawnshop for *murtahin* is to get the reward of the hereafter. *Murtahin's* helping of the loan is not intended to benefit financially. However, Islamic Law forbids the Institution of Sharia Pawnshop for financial gain in the debt contract-based on *al qardh*. It is a great sin.
 - h. The Principle of Equality (*taswiyah*). Existence of the Principle of Equality in Sharia Pawnshop, allows parties as equality in position of contract debt. There is no one party which is superior to the other party, so as to allow one party can impose its will in the contract to the other party. It means that the parties which in the debt contract, they are the parties who are in the partnership, so there should no legal relationship which it only benefits one party.
 - i. The principle of Openess. This principle relates to the disclosure of information by the parties in the debt contract. The information will be very important in the context of both parties' accountability, since it contains information regarding honesty and personality of the contracting parties in debt contract of Sharia Pawnshop.
 - j. The Principle of Ability. In the context of debt contract of Sharia Pawnshop, the Principle of Ability, it applies especially to the condition of customer, when entering in a contract, has financial ability to reimburse the loan. By this principle allow *murtahin* to investigate *rahin's* ability in the reimbursement. This principle also is urgent to relate *murtahin's* ability as party which in the promise of keeping the collateral goods.
 - k. The Principle of Convenience. In the proposition of legal relationship in the debt contract by the parties in the Institution of Sharia Pawnshop, the Principle of Convenience is also very important. It is closely related to the convenience provided by *murtahin* in the suspension of reimbursement if *rahin* is still infinancial trouble. *Vice versa*, *rahin* to reimburse as soon as possible without delay if he or she has a spaciousness sustenance. However, if the time limitis due, *rahin* has no hope to be able to repay the debt, then *rahin* should provide convenience for *murtahin* to auction or sell *rahin's* collateral goods,in order to pay off the debt.
 - l. The Principle of Kosher. This principle in sharia contract, is not only based on applicable law but also Islamic law. It means that principle of kosher to provide intent of contract which is not forbidden by God.¹. This principle is very important as one of conditions that contract valid under Islamic Law. It is strictly to create contract which is contrary to Islamic Law. It means that parties may not create a contract in Allah prohibition. For example, object of contract which is contrary to Islamic Law, among others prostitution, gambling, trade in alcoholic beverages, including all prohibited by God.
 - m. The Principle of Bindingness (*luzum*). The meaning of bindingness in the Ordinance of Supreme Court of Indonesia of Number of 02 of 2008 on the Compilation for Economic Sharia Legal (*Peraturan Mahkamah Agung Republik Indonesia Nomor 02 Tahun 2008 tentang Kompilasi Hukum Ekonomi Syariah*), means that the contract should have clear objectives. The objective of debt contract of Sharia Pawnshop referring to this ordinance, is that contract only for the social virtues in order to help financial aid to those who really need. However, main characteristics of the debt contract in Sharia Pawnshop, not for purposes of financial gain. So also in the perspective of *rahin*, it should not ignore the clarity of use of capital borrowed, which for the sake of economic need or other economic business in accordance to guidance of Islamic Law.

3.2. Significance of Taawun Principle In Indonesia Sharia Pawnshop

Conclusion of this writing that all of The Islamic Principles Contract In Sharia Pawnshop of Indonesia, have a relationship interlinked with the principle of mutual help as its main foothold. It means that all of those principles should integrate with the Principle of Mutual Help as fondation of debt contract in Sharia Pawnshop.

¹ Muhammad Aswad. (2013). "The Principles for Sharia financial transaction". *Journal of Iqtishadia*, 6, p. 343-345.

Today, it seems that the Principle of Mutual Help has not been placed firmly in transactional of legal relationship of Sharia Pawnshop. Based on that conclusion, the author provides recommendation that should the Principle of Mutual Help to be placed as main standard of legal relationship in the Sharia Pawnshop of Indonesia.

Principle of *taawun* within the framework of the debt contract in the Sharia Pawnshop, a philosophical meaning is about to lay the legal relationship between *murtahin rahin* on the basis of the responsibility of the divine. The responsibility is performed by the virtue of social which is based on spiritual fervor. Thereby, granting loans to the capital by *murtahin rahin* is not done by the interests for financial gain. Context meaning of *taawun* principle within the framework of the legal relationship between *murtahin* with *rahin* in Sharia Pawnshops, on the other hand, is to elaborate the position of Shariah Pawnshop as an institution that actually carry out the mandate of social responsibility. On this basis, the principle of *taawun* is basically to reaffirm the link between the legal relationship with *rahin* and *murtahin* placed within the framework of moral virtue, it is confirmed to provide assistance as a moslem social responsibility to others. In such a legal relationship, in fact to be emphasized is a form of social solidarity, so that all the agreements contained in the derivation of pawnshops shari'a is not intended for profit business.

4. Closing

The whole study of this research, the author concludes as follows: There are several principles of contract as a complementary underlying legal relationship between *murtahin* with *rahin* in debt contract in sharia pawnshop of Indonesia, among others: The Principle of Freedom of Contract (*al-Hurriyah*), The Principle for volunteerism (*Ikhtiyari*), The Principle of Good Faith, The Principle of Trust (*amanah*), The Written Principle (*al-Kitabah*), The Principle of Prudence (*Ikhtiyati*), The Principle of Mutual Benefit, The Principle of Equality (*taswiyah*), The principle of Openess, the principle of ability, The Principle of Convenience, The Principle of Kosher and The Principle of Bindingness (*luzum*). All of the principles of the contracts mentioned have an integral relationship which is interrelated with the principle of *taawun* as the main basis of debt contract in sharia pawnshop of Indonesia. All the principles should be integrated into debt contract of sharia pawnshop of Indonesia, then the principle of *taawun* remains a benchmark as the main basis of the contract. It is time for Indonesia Government, to impose special regulations in the form of legislation, which regulates Sharia Pawnshop in actually applying transaction of debt based *al-qardh*, which places the principle of *taawun*, on a foundation principle of contract.

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