

Akad Qardh and Accesoir in Sharia Banking Not Yet Based on Sharia Economic Principles Free of Riba (Usury)

Maman Sudirman¹ Thohir Luth² Rachmad Safa'at³ Moh. Fadli³

1. Doctorate of Law Candidate at Law Faculty of Brawijaya University, Malang, Indonesia

2. Professor of Law, Faculty of Law, Brawijaya University, Malang, Indonesia

3. Lecturer at Faculty of Law, Brawijaya University, Malang, Indonesia

Abstract

Qardh and Accesoir financing agreements in Islamic Banking in Indonesia are made and signed between the Bank and the Customer in connection with the provision of financing from the Bank to the Customer based on the provisions of: Law of the Republic of Indonesia Number 21 Year 2008 concerning Sharia Banking (Islamic Banking Act), The Fatwa of the National Sharia Council of the Indonesian Ulema Council (Fatwa DSN MUI), particularly Fatwa Number 19 / DSN-MUI / IV / 2001 On Al-Qardh, dated April 18, 2001 Supreme Court Regulation Number 02 Year 2008 on Compilation of Law Syari'ah Economics (KHES), Law No. 4 of 1996 on the Rights of Dependent, Cabinet No. 8 of 2012, is not fully in accordance to the principles of sharia as referred to in Al-Quran and Al-Hadith, because there are still provisions that regulate the interest / Penalty / administrative sanction / penalty / additional, so that there is an indication of the act of 'Usury' in the making and signing of the Agreement Qardh and the Accesoir.

Keywords: Financing Agreement, Qardh, Accesoir, Riba (Usury), Sharia Principles.

1. Introduction

The rabbani economy is the main characteristic and model of Islamic Economics, generally speaking, it is seen as the economics driver. The "God" character of Islamic economics is not on the aspect of economic actors, but on the aspects of rules or systems that must be followed by economic actors. It is based on the belief that all economic factors including the human actors are basically possessed by Allah's and to HIM all matters are returned to (Qur'an Surah Al-Imran Verse 109). Through economic activity, human beings can earn as much as possible, but shall be within the boundaries of the following rules of the game. "He is the one who gives space or limits the sustenance of those whom He wills" (Quran Surah Al-Shura Verse 12 and Quran Surah Al-Rad Verse 26). Human action is driven by the desire to gain as much of the material as possible therefore the life competition is ruled by the natural selection. and the constitution Republic Indonesia 1945, ideally it should be the next form of the development of the past existing values, principles and formulation model of law norm, Sharia banking blooming is not balanced with availability of sufficient human resources, but shall be under the provisions of sharia. Shari'a means the divine law as stipulated in the Qur'an and Al-Hadith, for human everyday life. According to Abdullah Muhammad Khouj:

"The functions of Sharia, in general, sharia has three functions: 1). Treatment: to treat ill-mannered behavior, as well as existing spiritual, individual, social, economic and political problem, 2). Prevention: to prevent the individual from returning to ill-mannered ways and becoming involved in mischief, 3). Guidance: to help humans gain a full understanding of the purpose of their existence and the rules of their interpersonal relationships. These three functions are clearly presented so that humans can both understand and live by them".

Islamic finance has gained popularities in many countries. In the recent years, Islamic banking in Indonesia is growing rapidly. The Islamic scholars from time to time constantly discuss the issue of Islamic economics and advise all Muslims to return the discourse to iqtishaadiyyah ilmiyyah, ie talks about Islam merely based on Al-Quran and Al-Hadith on all matters relevant to aqidah, worshiping, mu'amalat, akhlaq and so on. Nowadays, in this modern world, business transactions had been expanded to different types or forms, such as "Islamic banking", "Islamic finance", "Takaful", and many more. According to M. Umer Chapra:

"Islam provides an economic system that makes it absolutely imperative to use the God-given resources for fulfilling the essential needs of all human beings and providing them with decent living conditions".

The Vatican advises Banks around the world to study and apply Islamic finance principles in order to regain the public trust amidst the current global economic crisis. This shows that Islamic economics is not only accepted and adopted by Muslim countries, the sharia-compliant system is now being recognized by the Vatican. "The Islamic finance which adopts the ethical principles is able to bring the bank closer to their clients and the spiritual touch will mark every financial service provided by the bank". Al-Qardh is a loan to customers given by the sharia financial institutions (muqtarid) for those who need it. "Qardh which is the principal agreement of the Financing Agreement created and signed between the Bank and the Customer, which upon this agreement, there is an additional document or accesoir issued.

Riba is one of the things that is forbidden in the Islamic Shari'a. There are many principle arguments

support the forbidden of the riba. The law of this forbidden is straightforward and clear as set out in Al-Quran, Al-Hadist, Jumhur Ulama. The same rule guided in Judaism, Christianity, views of Christian scholars / XII-XV century, Christian / XVI-1836) As well as Greek teachings as presented by Plato (427-347 BC) and Aristotle (384-322 BC).

“The definition of the world Riba has been the subject of a protracted jurisprudential debate in the Arab and Muslim world in the twentieth century. It is not surprising that the question of Riba would come under strong scrutiny: a significant legal problem appears whenever the concept of interest falls in the purview of its definition.”

Basically this ribawi system resulted in transactions and economic activities of the monetary sector inflated decades. Mahmoud A. El-Gamal:

‘The Prohibition of Riba. The three-letter past-tense root of the term Riba is the Arabic verb raba, meaning to increase. Therefore, jurists defined the forbidden riba generally as “trading two goods of the same kind in different quantities, where the increase is not a proper compensation’.

One of the inadequate arrangements in the Sharia Banking Law is the disintegration of usury-free norms and the qardh contract clause and aksesoir in the Islamic Banking Law and the Fatwa of DSN MUI, KHES and this create a “vacuum norm” in the said provision, therefore a forward thinking is needed in order to improve the Shariah Banking Law, the Fatwa of DSN MUI, KHES in the implementation of riba-free sharia banking business (zero tolerance riba) in accordance with the principles of sharia economy.

Considering the above, the following are some potential problem that might appear:

Philosophical Problems. Epistemologically, the concept of monotheism, the concept of risalah and nubuwah, the concept of the day after death, the concept of economic prosperity, is seen as a framework to objectify human prosperous life. The philosophical basis of this research is how to get knowledge with regard to the clausal of qardh and aksesoir based on and according to free riba sharia economy principle, which is in accordance with Al-Quran and Al-Hadith. **The Ontology Perspective** is to examine the clausal of qardh contract that are based on Sharia Principles in the Sharia Banking Law in accordance with the principles of sharia riba-free economy as stipulated in Al-Quran, Al-Hadist. **Axiology Perspective** is to provide an explanation of what the benefit of the said knowledge about qardh contracts and aksesoir that is based on free sharia principles in the Islamic Banking Law in order to be a reference the Islamic banking business as for the benefit of all human being and universe.

Juridical Problematic. The provisions in the law and regulations as stipulated in Article 2 and Elucidation of Article 2 of the Law on Sharia Banking, the Fatwa of DSN-MUI, KHES related to the qardh contract and other related regulations have not regulated the qardh contract based on free riba principles. **Theoretical Problems.** The rules of the clausal on qardh contract and aksesoir in syariah banking that currently applied is not fully in accordance with the principles of sharia economy, thus it is not fully able to accommodate the expectation of the Moslem community both in Indonesia and other countries. **Sociological Problems.** There are discrepancies occur in the society in Indonesia in terms of application and development of qardh and aksesoir contracts, which are created and witnessed by the Notary and or PPAT with regard to the principles of sharia.

Based on the above problems, this research will study the following issues:

1. There is no clear regulation on the definition and or arrangement of what is usury/riba and there is a limitation on the explanation of the Article 2 of the Law on Islamic Banking which both leads into incomprehensive interpretation as accordance with the Qur'an and Hadist.
2. Qardh in Fatwa DSN MUI, KHES is stated in a very general view, without detailing clausal on qardh contract and aksesoir.
3. Aksesoir Act has not been regulated on Sharia Banking Law, Fatwa DSN-MUI, KHES and or other sharia regulations, instead it is still regulated based on the law of guarantee in general.
4. The Deposit Value in the aksesoir contract as stipulated in the APHT.
5. Other costs incurred during the contract development which include but are not limited to non-taxable income (PNBP) fees, land certificate assessment fee, Land value assessment fee, APHT registration fee at local administration office, roya fee (after final payment and paid to the).

Based on the said background and legal issues, there is a need to study further the legal implication and therefore, researcher in this study will focus on “Qardh and Aksesoir contract in Islamic Banking Based on Riba-free Sharia Principles”.

2. Research Method

This study is categorized as a normative legal research, i.e. a research that examines the legislation in a coherent legal order. In addition, since the objectives of this study relates to the ideal state of law, such as philosophy, legal principles, legal rules, logic, systematics and basic understanding of law, this research is therefore normative or doctrinal. The researcher undertake the study of Qardh and Aksesoir agreement in syariah banking has not been based on the principles of sharia riba-free economy, and is expected to develop a new model of Qardh and

Accessoir agreement which is fully based on the principles of sharia riba-free economy wherein it can be used as reference for the implementation of sharia banking that is related to several legal system, that is the aspect of Islamic law, the aspect of syariah banking law, UUJN aspect and PPAT Regulation and other legal aspects applicable in Indonesia. This research is also based on the "hermeneutical paradigm", which essentially according to Jazim Hamidi: "Philosophical teachings on understanding or understanding the text of law (or legislation), legal events, official documents of the state or legal doctrine, using the method of interpretation (Interpretation) holistically within the framework of the interrelationship between text, context and contextualization". The approach used in normative law research is the regulation approach, case approach, historical approach, comparative approach, conceptual approach and comparative approach. Type of Legal Material. Primary Law Material, namely Al-Quran, Al-Hadith, Ijma, Ijtihad, Qiyas, Provisions contained in positive law, namely: KHES; Fatwa DSN MUI, Sharia Banking Law. Secondary Law Material, namely: Text books of law, Dissertation, Journal, Journal of law, Magazine, Newspaper, and Internet. Tertiary Law Material, namely: Big Indonesian Dictionary, Al-Munawir Indonesia-Arab Complete Dictionary, Al-Munawir Arab-Indonesia Complete Dictionary, Black Law Dictionary, An-English-Indonesian Dictionary. Source of Law Material obtained through library, internet, journal, books,, Bank Indonesia Jakarta, Majelis Ulama Indonesia, National Sharia Council. The legal material obtained is recorded in a separate file, making it easy to find when they are needed for analysis purposes. Each file is filled with legal materials that have been grouped, in accordance with the interests of the analysis. Various information and data obtained in this study were analyzed by using content analysis method.

3. Result of Research & Analysis

Islamic economics has the source of "normative-imperative values", as a binding rule, thus, the Islamic economic position to values is value-loaded, rather than simply added value or even neutral value.

Akad qardh is agreement upon borrowing funds provided to Customer with the condition that the Customer is obliged to return the funds at an agreed time. The guidance on qardh in the quran is as follows "Who will lend to God a good loan, then God will multiply (repay) the loan for him and he will get a lot of rewards." Al-Quran Surah Al-Hadid [57]: verse 11.

Financing activity in a form of Qardh is applied in following condition: The Bank acts as the fund provider which provide loans (Qardh), the banks are required to explain the characteristics of the financing service given, the banks shall conduct an analysis of the financing planning upon the qardh provided which includes the personal aspect such as an analysis of customer character, the bank is prohibited to request a return repayment more than the amount of the loan given as per agreement, the bank is prohibited to impose any cost on the disbursement of the Qardh-based loans, except the reasonable administrative fee. The bank and customer shall be put the agreement in a written financing agreement on the basis of Qardh, the Bank may impose sharia-based sanction for the purpose of the customer development.

The right of mortgage is: "The right to guarantee imposed upon a land as ruled by the law Number 5 of 1960 with regard to Basic Regulation of Agrarian with or without objects united with the land as mean of a payment upon of certain debt, wherein it gives the creditor a priority to other creditors.

SKMHT (Surat Kuasa Membebaskan Hak Tanggungan or Power of Attorney) shall be made by a notary or PPAT (Land Acquisition Officer). There is some requirements applied in making the SKMHT. In general, authorization letter such as SKMHT can be made both under authentic and non-authentic agreement. However, SKMHT, shall only be made under an authentic agreement. APHT or granting deed mortgage (or het verlenen van mortgage in Dutch) is an agreement to give up the right to the land as a guarantee for the bank. In general, a loan guarantee can be in a form of land and building, and land alone, both certified and not certified. Loan the Sharia Banking Law is called financing.

Notary is a public official authorized to make an authentic deed or agreement and has other authorities as rule by imposing regulations. Land Acquisition Officer (PPAT) is a public official authorized to make authentic deeds upon legal acts related to the right to land or property. Preparation and filling-in the BLAT (form for land acquisition acts) shall be done by the respective PPAT, acting PPAT, temporary PPAT or Special PPAT, specifically to accessoir agreement in the form of SKMHT and APHT shall be made and signed in front of authorized PPAT authorized.

Qardh is regulated under the degree of DSN-MUI (Council of Indonesian Islamic Scholars) No. 19/DSN-MUI / IV / 2001 about Al-Qardh, dated April 18, 2001, it consists of General Provisions, Sanctions and Funding Sources and Additional Clauses and is governed by KHES. General provisions qardh in KHES, namely: customers shall return the principal amount received at the specific time as mutually agreed, qardh administrative fee may be charged to the customer, the lender may request a guarantee to the customer when deemed necessary, the Customer may pay additional / voluntarily fee to the lender as long as it is not agreed upon in the transaction, if the customer is unable to return part or all of their obligations at the agreed time and the lender, the Sharia Financial Institution has ensured its inability to: a. Extend the repayment period; B. Delete /

write off some or all of its obligations.

The Sharia Supervisory Board is regulated in the Law Number 10 Year 1998 concerning the amendment to the law number 7 year of 1992 concerning Banks that uphold DPS as a syariah supervisory institution for banks implementing sharia principles.

Sharia Principles is the principle of Islamic law in banking activities based on fatwas or decree issued by institutions that have authority in determining devree in the field of sharia. According to Karim Ginena, Azhar Hamid:

Shariah etymologically means the source of drinking water and shar means to ordain. Muslims believe that sharia is an ethical way of life revealed by God to secure the success (falah) of creation in this world and the next. It does by promoting what will benefit beings and protecting againsts that which will harm them. God, the Divine, uses several derivatives of the world shariah when addressing His final messenger to creation, prophet Muhammad, in the Quran.'

Business activities based on Sharia Principles, among others, are business activities that do not contain elements of: **Riba**, the unjustified additional payment (vanity), applied among others, in exchange transactions of similar goods that are not the same quality, quantity and time of delivery (fadhl) or in a borrowing and lending transaction that requires the debtor to pay the loan more than the amount received over a specific time (nasi'ah), **Maisir**, is a transaction suspended upon an uncertain circumstance and akin to gamble, **Gharar**, a transaction upon an object which is unclear, unknown, unavailable when the transaction is made, unless otherwise stipulated in the Shariah, **Haram**, is transactions over objects which are prohibited based on sharia law; **Zalim**, is a transaction that creates an injustice for the relevant parties.

Every Shariah financial institution should apply the following provisions: free from the possibility of usury and apply the principle of profit sharing and fair trading.

There are four principles in sharia banking, namely: (1) the prohibition of interest in all transactions and business activities; (2) all activities and business activities must be undertaken in a fair fashion and the profit earned must be justified by both shar'i and the prevailing laws and regulations; (3) sharia banking is obliged to pay zakat; And (4) developing an environment that can bring benefits to society.

The theory of Mashlahah al Mursalah is used as the main analysis tool to answer the formulation of the dissertation research problem, Akad Qardh and Accesoir in sharia banking relate to the creation and signing of agreement which are made and signed either by or in front of a notary or Land Acquisition Officer (PPAT) must be in accordance with the objectives of Islamic law.

The theory of justice used as an analysis tool, considering that justice as one of the principles in Akad Qardh and Accesoir in sharia banking relate to the creation and signing of agreement which are made and signed either by or in front of a notary or Land Acquisition Officer (PPAT) must be in accordance with the objectives of Islamic law.

Parties in sharia banking who act as an entrepreneur or business player in the lending process to customer in reality have not provided a justice or there is still an arbitrary acts to customer, as the main target or the business purpose of the business players, and to notary and or landing acquisition officer (PPAT) as the authorized public official to create and sign qardh and accesoir contracts. Other than the theory of justice in general, the researcher also used the theory of justice as according to the perspective of Islamic law specifically in the formulation of the first and second problems.

We live in the era of welfare state, when public service becomes the main task of government or state. In this era, the government needs to be actively taking care of various matters relevant to its citizens. As a state of law, any conduct of governing and administering should be based on the imposing law. However, if the law has not been regulated, while there are technical matters that have no legal rules, then public needs may be abandoned. The need to the said speedy action requires discretionary power or freis ermesen.

The theory of receiptie a contrario is used as an analytical tool, since in Indonesia the majority of the population is Moslem who have customs according to Islamic values, so that the customs of society in Indonesia are in accordance with Islamic law. Akad Qardh and Accesoir is, therefore shall be adjusted to Islamic Law.

In addition, the enactment of the bank interest system will create a real vanity. When the economic conditions are not good, the bank can obtain a certain profit from the funds lent. For the debtor, this interest expense will reduce their profit and even further their capital. Conversely, when the economy is in good condition, the debtor can enjoy profit that should be earned by the bank. Moreover, if the interest charged is high enough and exceed the ability of the debtor in making a profit. In the long run, this will kill the debtor business. This, at the end, will deteriorate the source of income of the bank itself. It is very unfortunate that the man-made law does not inherit the beauty and the wisdom of the holy book verses. The law made by human is just a command, probation, and sanction made by, from, and for Human beings.

Refer to the Qur'an guidance, QS Al-Baqoroh verse 275 and An-Nisa Verse 29 which essentially reveals that Allah SWT allow any form of trading, forbid usury, and advise that human being to do business under a mutual agreement. Therefore, all Islamic institutional transactions should always be based on the profit-sharing and the

trading transaction shall employ an exchange between money and goods/services. Consequently, any muamalah activity should apply the principle of "goods/services first then money". This will encourage the production of goods/services, ease the flow of goods/services, and avoid the misuse of credit, speculation and inflation.

The concept of reconstruction of sharia banking regulations are:

1. Selection of customers based on their respective objectives.
2. Banks to finance real sector.
3. Banking applies unilateral mudaraba.

Akad Qardh and Accesoris in the form of SKMHT and APHT, either made and signed by hand or in front of a notary or PPAT between the Customer and Bank, especially syariah banks, beside shall refer to all provisions in UUJN, Regulation on role of PPAT, Perkaban Number 8 of 2012, also shall refer to the Elucidation of Article 2 of the Islamic Banking Act.

In order to well implement the qardh and accesoris contract in sharia banking, it is necessary to have a continuous control and monitoring from the Sharia Supervisory Board (DPS). The function of sharia supervision is to ensure that every plan and target can be well achieved. The function of sharia supervision and the bank management are like to-side of a coin as both are inseparable. The DPS is responsible to maintaining and realizing the security and stability of the national banking system. While, the responsibility for the performance each sharia bank lies on the owners and management of the bank. However, the sharia supervision can not guarantee that the bank will not fail. Sharia supervision is obliged to take steps and actions that need to be done within its authority, so that banks that do not follow the provisions of the sharia system will be imposed a sanction or legal action to as to improve themselves or to be excluded from the sharia banking ecosystem.

According to previous studies, some banks have not fully implemented the principles of sharia in accordance with Al-Quran and Al-Hadith as the banks shall abide Bank Indonesia regulations, while also required complying with all regulations/legislation applicable for the Sharia banks. The Sharia Supervisory Board, therefore, becomes very important. In order to be effectively functioning based on sharia principle, the supervisory board needs to have an independency toward all institutions under its supervision and it also need have sufficient capability to perform its role.

4. Conclusion

Akad Qardh in Islamic banking has not been based on the principles of riba-free sharia economy, because there are still elements of riba in the form of provisions/arrangements/ agreements/clauses/governing interest/penalties/administrative sanctions/penalties/ additions in the Qardh Agreement made and Signed by the parties or created and signed in front of a notary. Accesoris agreement in the form of APHT in sharia banking has not been based on the principles of riba-free sharia economy, because there are still elements of riba in the form of provisions/arrangements/agreements/clauses governing the amount of Value of Mortgage and all legal provisions governing APHT is still based on UUHT and the absence of UUHT sharia.

The researcher recommends: The House of Representatives of the Republic of Indonesia cq President of the Republic of Indonesia, to revise the Banking Law, especially the provisions of Article 2. It is necessary to add and or refine the KHES regulating the principles of sharia free economy which can be used as a reference and or guidance for all syariah financial institutions and other related parties. The Islamic Law Practitioners who are specifically related to sharia economy, sharia banking need to conduct further research on the practice of riba-free based syariah principles which is applied in Islamic banking in the Republic of Indonesia as well as in other countries. In order to continue further and more in-depth study on the topic of sharia banking financing agreement according to the principles of sharia that are completely free of usury (Zero Tolerance Riba). Notary and PPAT in making and signing Akad Qardh and Accesoris to abide by and comply with Sharia Principles and Principles of Sharia Banking. In order to make provisions on the provisions of SKMHT and APHT in accordance with Sharia Principles, Principles of Sharia Economics and Principles of Sharia Banking.

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