

Concept of Clause Aqad Qardh and Accesoir in Sharia Banking that Accommodate Economic Principles Free of Riba (Usury)

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Abstract

Concept of Qardh financing contract clause in sharia banking in Indonesia made and signed between the Bank and the Customer in connection with the provision of financing from the Bank to the Customer before the Notary as referred to in the Law of the Republic of Indonesia Number 2 Year 2014 on the Notary (UUJN) and the concept of Accesoir Power of Attorney Charging Deposit Rights (SKMHT) and the Deed of Assignment Rights (APHT) created and signed before the Land Deed Authority (PPAT) as referred to in Government Regulation Number 24 Year 2016 on PPAT (PPAT Regulation). The concepts of the Qardh and Accesoir Financing Agreement clauses to be free of usury must accommodate the riba-free sharia principles that are compatible with Al-Quran, Al-Hadith, Fatwa of the National Sharia Council of the Indonesian Ulema Council (Fatwa DSN MUI), especially Fatwa Number 19 / DSN-MUI / IV / 2001 On Al-Qardh, dated April 18, 2001, Supreme Court Regulation No. 02/2008 concerning the Compilation of Sharia Economic Law (KHES); The Law of the Republic of Indonesia Number 21 Year 2008 concerning Sharia Banking and up to now is not fully in accordance with sharia principles as mentioned in Al-Quran and Al-Hadith, since there is still a provision on interest /penalty/administrative penalties/penalties that the actions of 'Riba' in the making and signing of the Qardh and Accesoir Agreement. The journal is a continuation of previous journal as referred to previous journal to be published on July, 2017 with subject: "Akad Qardh And Accesoir In Sharia Banking Not Yet Based On Sharia Economic Principles Free Of Riba (Usury)".

Keywords: Concept, Clause Akad, Qardh, Accesoir, Free Riba, Sharia Principles.

1. Introduction

Banking is the heart or motor of the economy in various countries, including in the Republic of Indonesia. The economy of a nation is largely determined by the banking system, thereby expanding the thinking in the world about banking and especially in Islamic Banking or Sharia Banking.

The provisions on the clauses of the qardh and accesoir agreement are not yet stipulated in the Sharia Banking Law, the Fatwa of DSN MUI and KHES because in the Fatwa DSN MUI and KHES only explaining the general provisions of qardh.

The concept of Islamic economics has actually existed since the Prophet SAW spreaded of Islam in the 6th century ago (long before the birth of Adam Smith and Milton Friedman). Excavation of this concept has only begun since the writings of Islamic philosophers such as Ibn Taimiya ra, Imam Ghazali ra and just appeared on the surface scientifically by the scholars of the 1960s. This is seen in research journals such as Majallah Al-Iqtishod Al-Islami, IEA (Islamic Economics, Review of Islamic Studies). and in connection with the life of the economy is inseparable from the human self itself.

The terminology of Islamic shari'a has long been known in the life of a Moslem, even non-moslem people have known him. The term is implicitly expressed in the Qur'an and Al-Hadith, in general the people understand that the shari'a means the divine law of the Qur'an and Al-Hadith.

Currently the development of sharia financial markets (financial market sharia) is rife in the world, especially in countries that are predominantly Moslim. This is marked by the establishment of Islamic Financial Market in Kuala Lumpur which was pioneered by Islamic countries. The advancement of financial market sharia in Indonesia, especially in banking and sharia insurance is significant, followed by capital market and pawnshops sharia. 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.

Islamic banks have the potential to develop in Indonesia, partly due to the large number of Moslems and sharia banks have the potential to be developed in eighteen areas with high economic potential and a strong Islamic base.

"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 securitiny: a significant legal problem appears whenever the concept of interest falls in the purview of its definition.”

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 sama kind in different quantities, where the increase is not a proper compensation’.

No wonder that usury is one of the things that is forbidden in the Islamic Shari'a. There are so many arguments that show us the usury of usury and various means of usury. Riba is forbidden is very clear and firm as set out in Al-Quran, Al-Hadist, Jumhur Ulama, but also prohibited 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).

Philosophically, Islamic banks are banks whose activities leave the problem of usury, thus, the avoidance of interest that is considered usury is one of the challenges facing the Islamic world today. In recent times Moslim economists have devoted great attention to finding ways to replace the interest system in banking and financial transactions that are more in line with Islamic ethics. One of the most interesting parts that distinguishes Islamic banks and conventional banks is the principle of usury. Riba is an unnatural addition. As according to technical terms, usury means the taking of additional property or capital in a vanity.

Al-Qardh is a loan given to customers of sharia financial institutions (muqtarid) for those who need it. The Qardh Financing Agreement, which is the principal agreement of the Financing Agreement created and signed between the Bank and the Customer, and then on the Qardh Financing Agreement, there is a request for additional documents to ensure the settlement of the obligations of the Receiving Facility Customer, which will require additional documents in the form of an additional agreement or additional deeds and in terms of the Islamic Banking Act the guarantee is referred to as the Collateral. Such collateral includes collateral in the form of movable or immovable property submitted by the Collateral owner to a Sharia Bank and /or UUS (Sharia Unit Business), in order to ensure the settlement of the obligations of the Facility Receiving Customer.

One of the most inadequate arrangements in the Sharia Banking Law is the non-integration of usury free norms and the qardh contract clause and accesoir in the Law on Sharia Banking, the Fatwa of DSN MUI, KHES so that the vacuum norm in the Islamic Banking Law, Fatwa DSN MUI, KHES, so the need for forward thinking in order to improve the provisions in running the activities of free sharia banking business (zero tolerance riba) in accordance with the principles of sharia economy.

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 toaqidah, 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.

Sharia banking blooming is not balanced with availability of sufficient human resources, The development of Islamic Economy has been flourishing in the life of Indonesian people and brings impacts to several aspects of life, including in the field of law serving as the juridical basis.

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

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 concept of clause of qardh and accesoir 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 concept of 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 the concept qardh contracts and accesoir 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 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 concept of clause qardh contract and other related regulations have not regulated the qardh contract based on free riba principles. **Theoretical Problems.** The rules of the clause on qardh contract and accesoir in syaraih 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 the clause of qardh and accesoir contracts, which are created and witnessed by the Notary and or PPAT with regard to the principles of sharia.

The focus of research conducted by researchers:

1. Article 1 point (25), Elucidation of Article 2 point to (a) of the Sharia Banking Law
2. Fatwa DSN MUI as follows: Fatwa about Debt Receivable: (Fatwa Number 19 on Qardh).
3. Compilation of Islamic Economic Law (KHES)
4. Clause of akad qardh and aksesoir in Sharia Banking
5. Guarantee of immovable property "which the researcher specially limits" land and buildings".

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. Not comply with the syariah principle in the making and signing of akad aksesoir.
5. The Deposit Value in the aksesoir contract as stipulated in the APHT.
6. 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 feen, APHT registration fee at local administration office, roya fee (after final paymen and paid to the).
Based on the said background and legal issues, there is a need to study further the legal implication and therefore, researcherin 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. The researcher undertake the study of the concept of clause 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 concept of Qardh and Aksesoir agreement made and sign sign up before the notary or under hand 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. The approach of philosophy of law applied to review sharia banking principles that were still conflicts with the principles of islamic law. 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, comperative 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 Dictionay, 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 studywere analyzed by using content analysis method. Researchers conducted research in brawijaya university Malang, Indonesia and to be supported by facilities library very good and books complete, laboratory plagiasi, internet access, computer, Brawijaya Law Journals and other facilities, furthermore in the University of Indonesia, Gadjah Mada University, Bandung Islamic University, Padjajaran University, State Islamic University of Jakarta, Bank Indonesia and other.

3. Result of Research & Analysis

The sharia banking system in Indonesia is part of the Islamic economic concept that exists in the general economic environment. Therefore, sharia banking is not only required to generate profit through every commercial transaction, but also demanded to implement sharia values in accordance with Al Quran and Al-Hadith.

The most important thing to be considered in Islamic banking system is contract or agreement. This contract becomes a determinant part of every economic transaction. Therefore the contract must be made by both parties

who transact, because of the agreements, that transactions of being legitimate or illegitimate.

Clause in this research is a provision or agreement between the Bank and the Customer regarding the qardh and accesoir in sharia banking that accommodates the principles of sharia free economy made and signed by the parties either under the hand or made and signed before the Notary or PPAT.

According to KHES, the agreements based on the following principles: 1. Ikhtiyari / voluntary; Trust / keep promise; 2. Ikiltiyari / caution. Each contract is done with careful consideration and done with precision and care; 3. Luzum / unchanged; 4. Mutual luck; 5. Taswiyah / equality; 6. Transparency; 7. Ability; 8. Taisir / amenity; Good faith; 10. For the lawful.

Qardh or Al-Qardh is a loan provided to the requiring customer (muqtaridh), as referred to in Qardh General Provisions in the Fatwa DSN MUI. Akad qardh is a loan agreement of funds to the Customer provided that the Customer is obliged to return the funds received at the agreed time. Qardh Contracting can be created and signed under the Hands or Legalization or Warmerking or Notaril. Qardh according to the Fatwa of the National Sharia Council Number 19 / DSN-MUI / IV / 2001 about Al-Qardh, dated April 18, 2001. The contents of the Fatwa consist of General Provisions, Sanctions and Funding Sources and Additional Clauses.

The making and signing of the deed in general and including for the Qardh Agreement, including: the beginning of the deed or head of deed, the deed and the end of the deed or the cover of the deed. Beginning of Deed or Head of Deed, comprising: Title of Deed; deed number; Hour, day, date, month and year; Full name and place of notary public. The Deed body comprises: full name, place and date of birth, citizenship, occupation, position, occupation, residence of the persons and / or persons they represent; Description of the position of acting; The contents of the deed which is the will and desire of the interested parties; And the full name, place and date of birth, and occupation, position, position and residence of each witness and the end of the deed or cover of the deed.

The contents of the Qardh Agreement which is the will and the desire of the interested parties based on free sharia-based economic principles, namely the existence of agreements in the contract in accordance with the principles of free sharia-based economy.

Preparation and signing of APHT, consisting of: General and Filling of the Deeded Chamber Numbered. There is currently no provision on the making of APHT in accordance with Sharia Principles, Principles of Sharia Banking and Principles of Sharia Economics. Clauses that can still be used are:

- Point 3 (three) Perkaban Number 8 year 2012 stating: "3. In making the PPAT Deed, to maintain the accuracy of data, to avoid any improvement/deletion/replacement/addition (renvoi) ".

Concept:

In making the PPAT Deed, it can be done the repair / deletion / replacement / addition (renvoi) in order to be adjusted to the sharia principles, because the renvoi as a means to rectify the deed signed if necessary repair.

- Point 46 (forty six), which states "46). Filled out if there are other promises agreed ".

That there are words of other promised promises not specified in the Covenant or not regulating additional clauses contained in the APHT so as to create a gap which the Bank may exploit, so in practice the bank usually adds a Clause on fines. This is not in accordance with the sharia because the penalties include the interest of the Bank which includes the form of Riba as mentioned in the Word of God Ta'ala in Al-Quran and Al-Hadith and Jumhur Ulama.

Concept:

Arrange clauses or conditions in the APHT in accordance with the principles of sharia.

Beginning of Deed or Head of Deed for APHT, consisting of: Head of Letter of PPAT, Title of Deed, Deed and Current Year Number, First Sheet or Second Sheet (Choose One), Day, Date, Month and Year; And full name and place of PPAT position, Appointed or Appointed (Choose one and adjust to Appointment Letter). The Board of Acts for APHT, consisting of: full name, place and date of birth, citizenship, occupation, position, position of residence of the persons and / or persons they represent; A description of the position of action; The contents of the Deed which is the will and desire of the interested parties; And full name, place and date of birth, and occupation, position, position and residence of each witness and Deed of Legal.

The formulation of the above issues will be analyzed using:

- Al-Mashlahah Al-Mursalalah theory, because the Qardh Agreement and the Accesoir made and signed must be in accordance with the objectives of Islamic law or sharia principles in accordance with Al Quran and Al-Hadith.
- The theory of democracy, because it relates to the role of the people as the Islamic party in the state associated with sharia banking, especially in the manufacture and signing of qardh contract clauses and accesoir in accordance with the principles of sharia. The state that places the supreme power on the people is called a democratic state, symbolically often described as the government of the people, by the people and for the people (from the people, of the people, for the people). The principles of the state of law (nomocratic) and the principles of popular sovereignty (democratic) run in tandem as two sides of one currency. Such a legal state is known to be called a democratic legal state

(demokratische rechtsstaat) or in a constitutional form called constitutional democracy. The law can not be made, defined interpreted and established with an iron fist on the basis of mere power (Machtsstaat). On the contrary, democratic should be governed by law. The embodiment of the idea of democracy requires a legal instrument to prevent the emergence of mobocracy (a demotion of democracy in Aristotle's terminology) that threatens democracy itself.

- The theory of the welfare state (welfare state), because it relates to the role of the state in seeking the welfare of all people, especially the Moslem community in the Islamic banking activities in accordance with the principles of sharia. We live in the era of welfare state, when public service becomes the main task of government or state. In this era, the government is required to actively take care of various interests of its citizens. As a state of law, the conduct of governing and administering must be based on the law. However, if the law has not been regulated, while there are technical matters that have no legal rules, then public affairs may be neglected. The need for fast action requires discretionary power or *freis ermissen*. Allah never guarantees economic welfare without a human being doing business. As a God-given economy, Islamic economics has the source of "normative-imperative values", as a binding reference, by accessing the Divine rules, every human action has moral value and worship. Every human action should not escape the value, which vertically reflects good morals and horizontally benefits human beings and other beings. The moral values of the *samahah* (roomy chest, width of hand and generous) is a prerequisite for economic actors to get divine grace, both as traders, consumers, debtors and creditors. Thus, the Islamic economic position of values is value-loaded, not simply adding value (value added) or value-neutral.
- The theory of justice, because *akad qardh* and *accesoir* for the Muslim community can meet the principle of justice and in accordance with the theory of justice. According to Dr. Yusuf Al-Qardhawi, justice is the balance between the various potentials of individuals, both moral and material, between individuals and society and between societies of one another that is based on Islamic sharia.

Concept of *qardh* and *accesoir* clauses should be in accordance with the principles of sharia, the concept refers to Al Quran, Al Hadits, Fatwa DSN MUI, KHES and Siyasah Sharia as stipulated in UUJN, PPAT Regulation, Syariah Banking and related regulations, which does not contain elements of usury, *gharar*, *maisyir*, injustice and haram and wipe clauses of provisions/arrangements/agreements/clauses/clauses governing interest /penalties/administrative penalties/penalties/the value of the loan.

4. Conclusion

The concept of clause *qardh* agreement in sharia banking that applies the principles of *riba-free* sharia economy: wiped or eliminate clauses in the *Qardh* Agreement in the form of provisions/arrangements/agreements/clauses/clauses governing interest/penalties/ administrative penalties/penalties/additional . The concept of clause *Accesoir* in the form of APHT in sharia banking that accommodates the principles of sharia free economy, to make the rules or provisions of the prohibition against clauses of the value of the Guaranteed Values that exceed the loan value and so the clauses of contract *Qardh* and *Accesoir* always refers to Principles Sharia Principles, Principles of Sharia Banking and Principles of Sharia Economics.

The researcher recommends: Financial Services Authority, Bank Indonesia, Syariah Banking Deposit Insurance Agency, Regency/Municipal Land Office, National Sharia Council of Indonesian Council of Ulama (DSN-MUI), Legal Experts or Sharia Banking Practitioners, Notaries and Officers of Land Deed (PPAT) In order that its implementation will be subject to and comply with the provisions in accordance with Sharia Principles, Principles of Sharia Banking and Principles of Sharia Economics.

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