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Free of Usury the Deed of Appropriation Land Mortgage in Sharia Banks

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Abstract:

Islamic Sharia Banking in Indonesia related to make and sign deed of appropriation land mortgage between Customer and Bank shall refer to the applicable law in Indonesia as stipulated under the law Number 4 years 1996 concerning Land Mortgage, Government Regulation Number 24 Year 2016 on PPAT (PPAT Regulation), Fatwa of the National Sharia Council of the Indonesian Ulama Council (Fatwa DSN MUI), 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, Ministry of Agrarian and Spatial Planning/National Land Agency Number 8 Year 2012 concerning implementation regulations of land registration and other related regulation that applies in Indonesia. The most important thing in deed of appropriation of land mortgage is free of usury in accordance with the principle of sharia as stipulated as referred to in the Al-Quran and As-Sunnah and this was reflected in deed of appropriation of land mortgage which regulate provisions about value of land mortgage who do not regulate the total amount of the value of land mortgage that exceeds the loan as referred to in the principle agreement. This paper aims to understand the current sharia banking practices and the state of the sharia banking system in Indonesia.

Keywords: *land mortgage, deed of appropriation land mortgage, usury (riba), free of usury, value of land mortgage*

1. Introduction

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 functions are clearly presented so that humans can both understand and live by them (Abdullah Muhammad Khouj, 1994).

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*, i.e. talks about Islam merely based on Al-Quran and Al-Hadith on all matters relevant to aqidah, worshiping, mu'amalat, akhlaq and so on (Abdul Hakim Bin Amir Abdat, 2010)

Islamic finance has gained popularities in many countries. (Amin Hanudin; Rahim Abdul Rahman & C 2016). 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 (M. Umer Chapra, 1986). In the recent years, Islamic banking in Indonesia is growing rapidly. (Yulianto, Agung & C, 2016).

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), (Thohir Luth, 2013). 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. (Rachmad Safa'at, I Nyoman Nurjaya & C, 2015) 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 (Irham Rosyidi, I Nyoman Nurjaya & C, 2015), Sharia banking blooming is not balanced with availability of sufficient human resources (Gustiawan, Willson & C, 2016), but shall be under the provisions of sharia. Sharia means the divine law as stipulated in the Qur'an and Al-Hadith, for human everyday life. (Thohir Luth, 2011).

The Vatican advises Banks around the world to study and apply Islamic finance principles in order 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 shariah-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". (Jakarta, Aktual.com).

Sharia banking blooming is not balanced with availability of sufficient human resources (Gustiawan, Willson & C, 2016), 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 (Thohir Luth, 2011). 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. (Aziz, Muhammad Ridhwan Ab & C, 2016).

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 (Muhammad Arifin Bin Badri 2012). The law of this forbidden is straightforward and clear as set out in Al-Quran, Al-Hadist, Jumbuh 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), (Ascarya, 2012).

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 security: a significant legal problem appears whenever the concept of interest falls in the purview of its definition (Graham & Trotman, 1988).

Basically, this ribawi system resulted in transactions and economic activities of the monetary sector inflated decades. (Irham Fahmi, 2014).

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 (Mahmoud A. El-Gamal, 2009).

One of the inadequate arrangements in the Sharia Banking Law is the disintegration of usury-free norms and the Deed of Appropriation Land Mortgage in Sharia Banks 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 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 clausal of Deed of Appropriation Land Mortgage in Sharia Banks 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 Deed of Appropriation Land Mortgage in Sharia Banks 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 Deed of Appropriation Land Mortgage in Sharia Banks 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 Deed of Appropriation Land Mortgage in Sharia Banks and other related regulations have not regulated the qardh contract based on free riba principles. Theoretical Problems. The rules of the clause Deed of Appropriation Land Mortgage in Sharia Banks in syarah 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 Deed of Appropriation Land Mortgage in Sharia Banks, which are created and witnessed by the Land Mortgage Official with regard to the principles of sharia.

Based on the above problems, this research will study the following issues: free of usury (riba) on the deed of appropriation land mortgage in sharia banks. 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 free of usury (riba) on the deed of appropriation land mortgage in sharia banks.

2. Methodology

The approach used in normative law research is the regulation approach, case approach, historical approach, comparative approach, conceptual approach and comparative approach (Peter Mahmud Marzuki, 2008). The researcher undertake the study of the free of usury (riba) on the Deed of Appropriation Land Mortgage in Sharia Banks in Indonesia and is expected to develop a new model of contract made and sign up before the Land Mortgage Official which is fully based on the principles of sharia free of usury related to several legal system: Islamic law, syaria banking law, Law Number 4 years 1996 concerning Land Mortgage, Government Regulation Number 24 Year 2016 on PPAT (PPAT Regulation), Fatwa of the National Sharia Council of the Indonesian Ulama Council (Fatwa DSN MUI), 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, Ministry of Agrarian and Spatial Planning/National Land Agency Number 8 Year 2012 concerning implementation regulations of land registration and other related regulation that applies in Indonesia. This paper is categorized as a legal research or normative legal research. This paper based on the "hermeneutical paradigm", which essentially according to 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 (Jazim Hamidi, 2005). Various information and data

obtained in this study were analyzed by using content analysis method (Valerina JL Kriekhoff, 2002). Each file is filled with legal materials that have been grouped, in accordance with the interests of the analysis (Abdul Rachmat Budiono, 2007). Type of Legal Material. Primary Law Material (Al-Quran, Al-Hadith, Ijma, Ijtihad, Qiyas, KHES; Fatwa DSN MUI, Sharia Banking Law and the legal material obtained is recorded in a separate file, making it easy to find when they are needed for analysis purposes. Secondary Law Material (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. Researchers conducted research in Brawijaya University Malang, Indonesia and to be supported by facilities library very good and books complete, laboratory plagiarism, internet access, computer, Brawijaya Law Journals and other facilities, furthermore in the Gadjah Mada University, University of Indonesia, State Islamic University of Jakarta, Bandung Islamic University, Padjajaran University, Bank Indonesia and other.

3. Result and Discussion

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. (Thohir Luth, 2013). Islamic development institutions are an important entity in the development of this country. Its development and achievement could be driven even further if these Islamic development institutions are better governed in an Islamic manner. (Fadzila Azni Ahmad, 2016). Religion has power to influence value systems of any given societies. Religious ethics plays a part in influencing public in many ways, particularly, through lifestyle of its believers (Abel Majaliwa, 2017).

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 against that which will harm them. God, the Divine, uses several derivatives of the word shariah when addressing His final messenger to creation, prophet Muhammad, in the Quran. (Karim Ginena, Azhar Hamid).

Sharia Principles is the principle of Islamic law in banking activities based on fatwa or decree issued by institutions that have authority in determining decree in the field of sharia (Article 1 paragraph (12) of the Islamic Banking Law. The contents of the article are sharia principles based on the fatwa, according to the author of the highest legal sources of Islamic law namely Al Quran and Al-Hadith, so in the article does not mention the source of Islamic law of Al Quran and Al-Hadith, in addition there is no clarity about the Fatwa Issued by the institution that has authority in the determination of the Fatwa in the field of sharia who the parties).

Business activities based on Sharia Principles (Elucidation of Article 2 of the Islamic Banking Act), 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 (*fadhli*) 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.

Notary is a public official authorized to make an authentic deed or agreement and has other authorities as rule by imposing regulations. (Article 1 Number 1 of the Law of the Republic of Indonesia Number 2 Year 2014 Concerning Amendment to Law Number 30 Year 2004 Concerning Position of Notary).

Land Mortgage Official (PPAT) is a public official authorized to make authentic deeds upon legal acts related to the right to land or property. (Article 1 number (1) of Government Regulation Number 24 of 2016 concerning Amendment to Government Regulation Number 37 of 1998 on the Regulation of Officials of Land Deed Authority). 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.

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.

Every Shariah financial institution should apply the following provisions: (Wirduyaningsing, Karnoen Perwataatmadja & C, 2012) 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. (Muhammad Arifin Bin Badri, 2012).

The theory of *Mashlahah al Mursalah* is used as the main analysis tool to answer the formulation of the dissertation research problem of appropriation land mortgage in sharia related to the creation and signing of agreement which are made and signed in front Land Mortgage Official (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 the deed of appropriation land mortgage in sharia banks relate to the creation and signing of agreement which are made and signed either by or in front of a notary or Land Mortgage Official (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 act to customer as the main target or the business purpose of the business players, and to notary

and or Land Mortgage Official (PPAT) as the authorized public official to create and sign the deed of appropriation land mortgage in sharia banks.

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 *fries ermessen*. (Moh. Fadli, 2011). The theory of *receptie 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.

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. (Imam Wahyudi, Miranti Kartika Dewi & C, 2013) 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. (Wirdyaningsih, Karnaen Perwataatmadja & C, 2006). The concept of reconstruction of sharia banking regulations are selection of customers based on their respective objectives, Banks to finance real sector, Banking applies unilateral *mudaraba*, (Muhammad Arifin Bin Badri, 2012).

In order to well implement free of usury (*riba*) on the deed of appropriation land mortgage in sharia banks, 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 maintain 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 cannot 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 them self or to be excluded from the sharia banking ecosystem.

According to previous studied, some banks have not fully implemented the principles of sharia in accordance with Al-Quran and Al-Hadist 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 effective 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.

Deed of appropriation land mortgage between Customer and Bank shall refer to the applicable law in Indonesia as stipulated under the law Number 4 years 1996 concerning Land Mortgage, Government Regulation Number 24 Year 2016 on PPAT (PPAT Regulation), Fatwa of the National Sharia Council of the Indonesian Ulama Council (Fatwa DSN MUI), 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, Ministry of Agrarian and Spatial Planning/National Land Agency Number 8 Year 2012 concerning implementation regulations of land registration and other related regulation that applies in Indonesia. The most important thing in deed of appropriation of land mortgage is free of usury in accordance with the principle of sharia as stipulated as referred to in the Al-Quran and As-Sunnah and this was reflected in deed of appropriation of land mortgage which regulate provisions about value of land mortgage who do not regulate the total amount of the value of land mortgage that exceeds the loan as referred to in the principle agreement. This paper aims to understand the current sharia banking practices and the state of the sharia banking system in Indonesia. To effectively address Usury (*Riba*), we need to see it as a religious faith declining of Muslims in Indonesia that affects the whole life and not just in the deed of appropriation land mortgage in sharia banks. It affects both the private and public activities of a people especially in financial transaction business in sharia banks.

5. Conclusion

Usury (*Riba*) is a very big global problem in sharia banking in Indonesia and to effectively address Usury (*Riba*) on the deed of appropriation land mortgage in sharia banks, we need to see it as a religious faith declining of Muslims in Indonesia that affects the whole life and not just in the deed of appropriation land mortgage in sharia banks. It affects both the private and public activities of a people especially in financial transaction business in sharia banks and 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. The most important thing in deed of appropriation of land mortgage is free of usury in accordance with the principle of sharia as stipulated as referred to in the Al-Quran and As-Sunnah and this was reflected in deed of appropriation of land mortgage which regulate provisions about value of land mortgage who do not regulate the total amount of the value of land mortgage

that exceeds the loan as referred to in the principle agreement. This paper aims to understand the current sharia banking practices and the state of the sharia banking system in Indonesia.

The researcher recommends: The House of Representatives of the Republic of Indonesia cq President of the Republic of Indonesia, to revise article 2 of Banking Law and necessary to add and or refine the KHES regulating the principles of sharia free of usury which can be used as a reference and or guidance for all syariah financial institutions and other related parties and 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 shari'ah that are completely free of usury (Zero Tolerance Riba). Land Mortgage Officila in making and signing deed of appropriation land mortgage in sharia banks to abide by and comply with Sharia Principles.

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