

Analysis of Legal Authority of Notary Make Deed Contract in Islamic Banking

Muhammad Haidar Fitri¹ and Akhmad Khisni²

Abstract. Act No. 30 of 2004 concerning Notary (UUJN) as amended by Act No. 2 of 2014 and Act No. 21 of 2008 of Islamic Banking (UUPS) has give authority to make attributive to the notary deed in Islamic banking contract. Notary in question is the one who meets the criteria of Article 3 UUJN and has been appointed by the Minister of Justice and Human Rights as a notary. Deed of Islamic banking contract has the power as valid evidence, when manufacture has to comply with the following requirements; as a mechanism of certificates in accordance with the matters set out in UUJN and UUPS, while in the content or deed bodies are in accordance with Law Compilation of Islamic Economics (KHES).

Keywords: Legal Authority; Notary; Deed Contract; Islamic Banking.

1. Introduction

Enforcement of Islamic Banking in Indonesia has been started since the enactment of Act No. 10 of 1998 concerning Banking that is, 10 November 1998. Article 1 point 12 of Act No. 10 of 1998 began to introduce financing based on the sharia principle. Provisions concerning Islamic Banking was strengthened, when the enactment of Act No. 21 of 2008 concerning Banking Sharia (UUPS). The objective of establishing Islamic banking as set in Article 3 of Act No. 21 of 2008 is to improve justice, solidarity and equality welfare. This objective is in accordance with Indonesia's economic system stipulated in the 1945 Constitution article 33 paragraph (4), namely, the economic system that is organized based on economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental friendliness, independence, and keep the balance between progress and unity national economy.

Contract in Islamic banking must use principles Sharia and the agreement must be in writing³. This kind of practice in the field has led to dissent within the law. Islamic principles identical with Islamic law, while recording an agreement in Indonesia should be based on Act No. 30 of 2004 concerning Notary, as amended by Act No. 2 of 2014 (UUJN). Notary Act can be applied to a notary Muslim and / or non-Muslims and / or can men and / or women. In accordance with Islamic law as stipulated in Surat Al-Baqoroh paragraph 282, according to the classical fiqh scholars, Katib / schedulers must be fair and equitable in nature must exist *'adaalah* that is away from all the major sins and separated to do minor sins continuously⁴. Based on these criteria, the scribes in a contract *mu'amalah* should not be non-Muslims, as non-Muslims means infidels and Kufr is the greatest sin and will not be forgiven by Allah.

Surat Al-Baqoroh paragraph 282 also requires witnesses in the contract should be a Muslim and a minimum *mu'amalah* consist of two men or if there are no men, women may witness to the provisions of two women is equal to one male witness. Derived from this provision, then these differences arose opinions regarding the validity and authenticity of a notary deed made by a non-Muslim or deed witnessed by one man and one woman, or only by two women. Opinions that uses the perspective of the provisions

¹ Students Mater of Notary Law, Unissula, Email : haidarfitri@rocketmail.com

² Lecturer in Faculty of Law UNISSULA Semarang

³ Article 2 and 1 (13) Act No. 21 of 2008 on Islamic Banking.

⁴ Ahmad As-Syathiri bin Umar, *Al-Yaquut An-Nafis*, Percetakan Darus Tsaqoofah, Bairut, p.225.

of Islamic law says that such a certificate is to be a certificate under the hand / inauthentic, meanwhile, opinion using the perspective of Notary Law said deed authentic. The issue is what will be studied by the author in the study entitled Analysis Of Authority Notary Law in *Make Deed Agreement On Islamic Banking*, There are two issues raised, namely; Is non-Muslim first notary deed authorized to make Islamic Banking in the contract, when the principles that should be used in the contract are the principles of Sharia or Islamic? And *second* Is the form and format of the deed drawn up by Notary Act has the power and legal certainty to the contract which use the principles of sharia?.

Research Methods

The method used in this research is Research Normative and technical collecting data via literature study. Data obtained from the study of literature and then analyzed qualitatively, and then arranged in a systematic order to obtain clarity on the issue and ultimately concluded deductively.

2. Results And Discussion

2.1. Description Each Authorized Notary Make Deed Contract In Islamic Banking

Article 1 paragraph 1 of Act No. 2 of 2014 set, that; Notary is a public official who is authorized to make an authentic deed and have more authority as referred to in this Act or under any other laws. Article 1 paragraph 13 of Act No. 21 of 2008 concerning Islamic Banking, provides that; Contract is a written agreement between the Bank of Sharia or Sharia Business Unit (UUS) and other parties that includes the rights and obligations of each party in accordance with Islamic principles. meaning written agreement also implies that, the agreement made by Sharia Bank or Sharia with the other party must always be made in writing and should be a party third justly wrote.

The understanding of Islamic principles are described in Article 1 Paragraph (12) UUPS with the following explanation; Islamic principles are the principles of Islamic Law in banking activities by the fatwa issued by the institution that has the authority in setting the fatwa in the field of sharia.

Based on the Decree of Bank Indonesia Board 32/34/1999 Number of Commercial Banks Based on Sharia Principles Article 1 letter i manage that; National Shariah Council is a council established by the Indonesian Ulema Council in charge and has the authority to ensure compatibility between products, services and business activities of banks with Islamic principles.

The legal basis that is the footing that, the principles of Islamic law in the field of *mu'amalah* formulated the National Islamic Council and has been codified in the Law Compilation of Islamic Economics (KHES) is a legal product and its status is a positive law and no longer solely as Islamic law. Therefore KHES is binding on all parties involved in the implementation of the Islamic banking contract.

According to Act No. 12 of 2011 on the Establishment Regulation Legislation article 8, paragraph (1), Bank Indonesia Board of Directors Decree Number 32/34/1999 is part of the legislation in force, since Bank Indonesia is one of the state institutions which are given the authority to regulate banking.

In theory Authority, then UUJN and UUPS had authorize in attribution to the notary to make an authentic deed to the parties to the agreement in the Islamic banking called the contract. UUJN, and KHES UUPS, did not determine the classification of the authority of

Islamic banking contract deed by notary Muslims or non-Muslims as well as male or female.

Contract *mu'amalah* itself in Islam is not forbidden to do with non-Muslims, that is to say in the pillars of the contract *mu'amalah*, especially al '*aaqidaini* (the parties) are not required by Islam all parties, except the contract *mu'amalah* related things that could be humiliating Islam such as selling the Qur'an to the Gentiles. Case in *mu'amalah* with non-Muslims is as hadith narrated by Sayyidata 'Aisha Radlia Allahu' Anha narrated by Imam Bukhari and Muslim in terms of purchasing food of the Prophet Muhammad to a Jew. In the event that the principal or only pillar in the contract *mu'amalah* unregulated, let alone recording contract which is an element far'iyahnya or branches.

In science literacy Fiqh originating from madzahibil arba'ah terms with the scribes had to write a 'fair. Interpretations of the word 'fair in Surat Al-Baqoroh paragraph 282 by many commentators as Imam Nawawi, Sulaiman bin Umar and Wahbah Az-Zuhaili understood not reduce nor add to what was presented by the parties.

These directives, classical fiqh experts then create criteria should scribes; mukallaf, independent, '*adaalah*, carefully / thoroughly, there is no conflict interest, is able to see, hear, speak, awake from things that are inappropriate (*Imuruah*) and is able to use independently rationality. These criteria are not an essence or form of justice itself, but the formulas will be used to find a fair scribes.

Criteria established by the experts of this classical jurisprudence is individual both the criteria nor the parties appoint scribes and no agency authorized to oversee and determine on a person justice. This differs from the system used in UUJN prevailing in Indonesia, where not only the individual criteria for the notary, but the appointment and supervision of a notary has been made institutionally as stipulated in UUJN; Article 2, and 3 f. Chapter IX which includes Article 67 to Article 81. clauses providing for sanctions, chapters 84 and 85.

Basing on the provisions set out in the Act's Notary, insyaa God of justice remains a notary could actually materialized regardless of religious subjectivity and gender. Therefore, referring to his opinion DR. (HC). KH Muhammad Ahmad Sahal Mahfudz related to the competence of one can not simply rely upon Muslims or non-Muslims, as well as male or female in the context of life in the Republic of Indonesia. Including individual areas of competence is ' fair required of notaries or scribes⁵.

This opinion is also understood that, the notion of '*adaalah* as described by the classical jurist is guidance (guidance / irsyad) to find someone who is fair. Therefore, the appointment of a notary public in the contract manufacturing of Islamic banking as well as the criteria and rules that exist in the Notary Act is not contrary to Islamic law. Beyond that, if the parties then prefer notary Muslims with steps to follow classical jurisprudence expert opinion, it is not a steps that are diskriminitaif, given the parties also have the right to choose a notary as desired. Shari'a provisions on matters of a technical nature in *mu'amalah* in the world, is actually a thing that is not binding absolutely, as the traditions of the Prophet Muhammad narrated by Imam Bukhari and Muslim; Told of Sayyidata 'Aisha RA, that the real Prophet Muhammad heard the sound (noise), then the Prophet asked "voice is that?" The friend replied "new people taking care of dates, then the Prophet said" if you do not do like it, then it will undoubtedly either the date-palm. People are then stopped for a year and then the results are ugly. It is then told to Prophet

⁵ Muhammad Ahmad Sahal Mahfudz, 2011, *Kata Pengantar Rais 'Am PBNU Bahtsul Masaail dan Istinbath Hukum NU, Ahkaamul Fuqoha' Solusi Problematika Aktual Hukum Islam, Keputusan Muktamar, Munas dan Konbes Nahdlatul Ulama' (1926 – 2010 M)*, Penerbit Khalista, 1st Edition, p. xii – xiii.

Muhammad. He then said to something that becomes part of your concern in the world, then it's up to you. As for something that is part of your religion affairs, then return it to me. According to the history of the language by Imam Muslim, the Prophet inquired; "How related to your date? The friend replied "like this and like this (which basically failed)".

2.2. Description Form and Form Deed which Compiled By Notary Law Carries Strength And Legal Certainty against Contract Using the Principles of Sharia?

The strength of an authentic deed as legal evidence and strong is not only determined by eligibility and harmony in Islamic banking contract.⁶ Format or form and technique deed as regulated in Article 38 and 40 of Notary Law, could also have an impact on the loss of strength of evidence of the deed made by a notary, as it becomes deed under hand.

Terms of the agreement are as follows *mua'amalah*; the parties meet the minimum age of 18 (eighteen) years or has been married and other provisions contained in KHES Book I. the object of the contract, which is the object of the contract is the property or services that are agreed by the parties. A *mu'amalah* contract becomes valid when the object is obtained with the contract does not conflict with Islamic law, legislation, public order and morality.

The purpose of the contract must not conflict with Islamic law, legislation, public order and morality. The agreement of the parties is done in the absence of fraud, the hidden defect, disguises and / or coercion.

Four of these components must also exist in the *majlis* of the contract, and therefore, this component is also called a pillar. Provisions in KHES associated with the contract terms and the pillars are essentially nothing contrary to Article 1320 to article 1337 of the Civil Code governing treaty applicable in Indonesia. Suppose the case, then the opposition was also not a problem, because our legal system adheres to the principle of *lex specialis derogat generalist*.

Technical issues that must be considered by the notary in a deed contract Islamic banking among which are; language in the deed must be clear meaning and spelling-pronunciation so as not to cause multiple interpretations. It is regulated in Articles 48 to 55 KHES. The same is stipulated in Article 42 and 43 UUJN.

The language used is Indonesian, unless not understand Indonesian, the notary is obliged to translate and explain the contents of the deed into a language that can be understood by the parties and witnesses. Language certificates may also be made with a foreign language, when the party wants.

Format or arrangement deed UUJN only regulated in article 38, in which a deed must be made up of the initial deed, deed and end entity certificates. According to the author, article 38 prohibits UUJN does not mean other things do not conflict with the already established, such as the addition *Bismillahirrohmanirrohim* for the title, number, date and position of notary has been contained, the initial format of certificate is correct although there are additions.

The final part deed governing Witnesses in UUJN is governed by Article 40 is as follows; To paragraph (1) of Article 40 of the fewest number of witnesses are two people, except for regulations specify otherwise. This provision is actually not an absolute contradiction with paragraph 282 of Surat Al-Baqoroh, given orders testify contract with a number of two men or two people if not found men, then one man and two women. This means that

⁶ Islamic Law Compilation, Book II, article 22, *Op., Cit.*, p. 16.

in Islamic law even for a minimal number of witnesses in the contract *mu'amalah* also two witnesses to the male gender.

In context total and type sex, if a Notary Public understand the provisions of Islamic law, should not be necessary to contrast with Islamic law, but instead notary can carry out the provisions of paragraph 282 of Surat Al-Baqoroh without violating UUJN.

To paragraph (2) of section 40, is also not contrary to paragraph 2 Surat At-Tholaq which requires witnesses to be fair. Both of these legal provisions, in principle, with the determination of the respective criteria actually the same aims, to bear witness to testify properly can testify as an agreement made by the parties. Although in no criteria UUJN keep *muruah* and *'adaalah*, but must witness his signature and initials plays an important role in keeping the truth authentication implementation of the contract as written in the deed. Therefore, concerns the witness would lie, when the witness was not a person who maintain *muruah* and *'adaalah* be rejected, when the parties and the witnesses have been read aktanya by a notary.

To paragraph (3) and (4) of article 40, which stipulates that the witness should be known by a notary or introduced to the notary by party, actually there is no problem with the conditions set forth in paragraph 282 of Surat Al-Baqoroh, that the witness is a person approved by the parties. Why is the introduction of Islamic law emphasized more witnesses to the parties and to contract loans receivable/*qaradl* pressed on the creditors, the goal is to secure her fortune creditors. Meanwhile in UUJN emphasize its introduction to the notary, because under the provisions of Article 84 UUJN, a notary can be sanctioned restitution of the parties to the invalidity of the deed he made. This means that such sanctions are also aimed at securing the property of the parties.

3. Closing

3.1. Conclusion

The results of the first study of the problem, namely, the non-Muslim notaries authorized to make the deed of agreement in Islamic banking for the following reasons; The first implementation of Islamic principles in the contract sharia does not mean the use of Islamic law in the area of the National Law, but only take legal principles are then compiled into Positive Law in the form of Law Compilation of Islamic Economics who meunurut Act No. 12 of 2011 has been into Positive law in Indonesia. The second recording mechanism in the agreement which requires fair Islamic law, Islam and witnessed two people women equal to one man just a guidance to realize the fair nature of the notary and witnesses, for the purpose of recording the agreement according to Islamic Law and the Law.

Notary is the same, namely, to protect the material rights of the parties. Therefore, differences in the way should not be used to determine whether or not a certificate of authenticity.

Referring to the results of this analysis, the conclusions are; Indonesia's first every notary authorized to make the deed Islamic banking contract. Both deed being authentic with the terms in the material are in accordance with the matters set out in the UUPS and KHES, and formally is in conformity with UUJN.

3.2. Suggestion

In order to realize the deed of authentic Islamic banking contract, it would require intense escort duties in accordance with the respective agencies of the following, namely; Kemenkumham in recruitment notary KHES socialization, Kemenristekdikti in making the

material KHES as a compulsory subject, the Supervisory Council of Notaries in kepengawasannya, Indonesian Notary Association in human resource development and of the Council of Islamic Economics notary Indonesian Ulema Council in the case of follow the dynamics of Islamic economic practices in the field.

4. Bibliography

- [1] Act No. 21 of 2008 on Islamic Banking.
- [2] Ahmad As-Syathiri bin Umar, *Al-Yaquut An-Nafiis*, Percetakan Darus Tsaqoofah, Bairut.
- [3] Muhammad Ahmad Sahal Mahfudz, 2011, *Kata Pengantar Rais 'Am PBNU Bahtsul Masaail dan Istinbath Hukum NU, Ahkaamul Fuqoha' Solusi Problematika Aktual Hukum Islam, Keputusan Mukhtamar, Munas dan Konbes Nahdlatul Ulama' (1926 – 2010 M)*, Penerbit Khalista, 1st Edition.
- [4] Islamic Law Compilation, Book II