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"Indonesia Clean of Corruption in 2020"

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

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REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE

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A. Background

Judging from the background of its formation, the formulation of the hybrid contract is motivated by a passion to expand the range of Shariah banking in order to be more competitive than conventional financial institutions. The world's conventional financial institutions have advanced so rapidly, because it is centuries old. The products offered is already so varied. Banking Shari'ah established with a mission of Islam in economics to be applied in the financial institutions are required to be able to race competitively catch up to conventional financial institutions. The spirit of this competition can sometimes only shift the original ideals of the Shari'ah banking so out of the idealistic mission. Ideally, Shari'ah banking mission to operationalize by function with fairness, honesty and mission enliven real sector. Akad which became the main base is musharakah or mudarabah with the principle of sharing in a partnership approach. However, because of the demands of profitability and encouraged the spirit of acceleration enlarge market share, concerns the question that arises is whether the main concern of Shariah banking can be shifted from the spirit of the mission to realize the ideal into the spirit of competition in the formalities of the subordinated kesyari'ahan ideal mission?

Looking at the above, there were some fundamental problems with the implementation of the contract, namely whether the hybrid will not shift the original ideals of Shariah banking, because there is concern shifted to the usury that no longer different from the conventional financial institutions. A further problem of how to revitalize the agreement in the contract hybrids in value based banking Shari'ah Islamic justice. This problem appears motivated by a sense of concern author of various hybrid

forms of contract that can not represent the substance of justice is a principle addressed in the rules of jurisprudence muamalah. Thus this dissertation research is expected to create more hybrid contract represents an agreement.

B. Issues

The problem is an attempt to state explicitly what questions wishing to be answered.[1] Focused on comments, which are at issue in this study as follows:

1. How is the implementation of the contract agreement hybrids in Islamic banking?
2. Constraints whatever the hell that arise in the implementation of the contract agreement hybrids in Islamic banking?
3. How to revitalize the agreement in the contract hybrids in Islamic banking based on values of justice Islam?

C. Theoretical Framework

The theory is a term which is discussed in various circles when questioning a problem, both in the realm of science as well as in everyday life. Theory is always associated with something abstract.[2] According to S. Sarantakos, as cited Otje Salman S and Anthon F. Susanto, the theory is "a set/collection/combined 'proposition' that are logically related to each other and tested and presented in a systematic". According to him, the theory is built and developed through research and are intended to illustrate and explain the phenomenon.[3] For many experts, the theory of an evolving set of ideas that, in addition to trying to maximally meet certain criteria, though it may be just a partial contribution to the overall more general theory.[4]

If the "theory" is defined as "the overall statement of interrelated", then "legal theory" is understood as "a whole statements that are interrelated with the law".[5] The term 'legal theory', in the literature used for varying purposes; the word 'legal theory' is often used and is the translation of legal theory, or rechtstheori; some are even calling it jurisprudence, legal philosophy, or thoery of justice.[6] According Sudikno Mertokusumo, legal theory is "the branch of law that discuss or analyze - not simply explain or answer

[1] Jujun S. Suriasumantri, *Philosophy of Science An Introduction to Popular*, Jakarta: Pustaka Sinar Harapan, 2014, p. 312.
[2] Juhaya S. Praja, *Legal Theory and Applications*, Bandung: Pustaka Setia CV, 2011, p. 1.
[3] Otje Salman S and Anthon F. Susanto, *Legal Theory*: Given, Collecting, and Reopened, Bandung: Refika Aditama, 2010, p. 23.
[4] *Ibid.*, p. 23.
[5] J. J. H. Bruggink, *Reflections About Law*, Translator: B. Arief Sidharta, Bandung: PT Citra Adtya Bakti, 2012, p. 3.
[6] Sudikno Mertokusumo, *Legal Theory*, Revised Edition, Yogyakarta: Light Atma Heritage, 2012, p. 1-4.

any questions or concerns - were critical of law and positive law using interdisciplinary methods".[7] Legal theory is not the philosophy of law nor jurisprudence dogmatic or dogmatic law.[8] In line with these expressions, a number of theories will be put forth in the following description is intended to argue that things are going to be explained is a scientific, or at least want to give the idea that the things described it meets the standard theoretical.

Based on the information, the theoretical framework in this study are presented in a three-level theory.

1. **Value Theory of Justice in Islam**

   This research seeks to examine "the revitalization of the agreement in the contract a hybrid based on values of justice Islam", therefore to analyze the issues discussed in this study, mainly related to a matter of justice is the main goal of law, then the values of justice Islam is seen as relevant as the basic theory (grand theory).

2. **The Principle of Freedom of Contract Theory**

   This theory can be used in applying the implementation of an agreement in the current hybrid contract. The principle of freedom of contract is a principle which states that everyone basically allowed to make contract (agreement) that contains and the origin of any kind is not contrary to law, morals and public order.[9]

3. **The Principle Theory Konsensualitas**

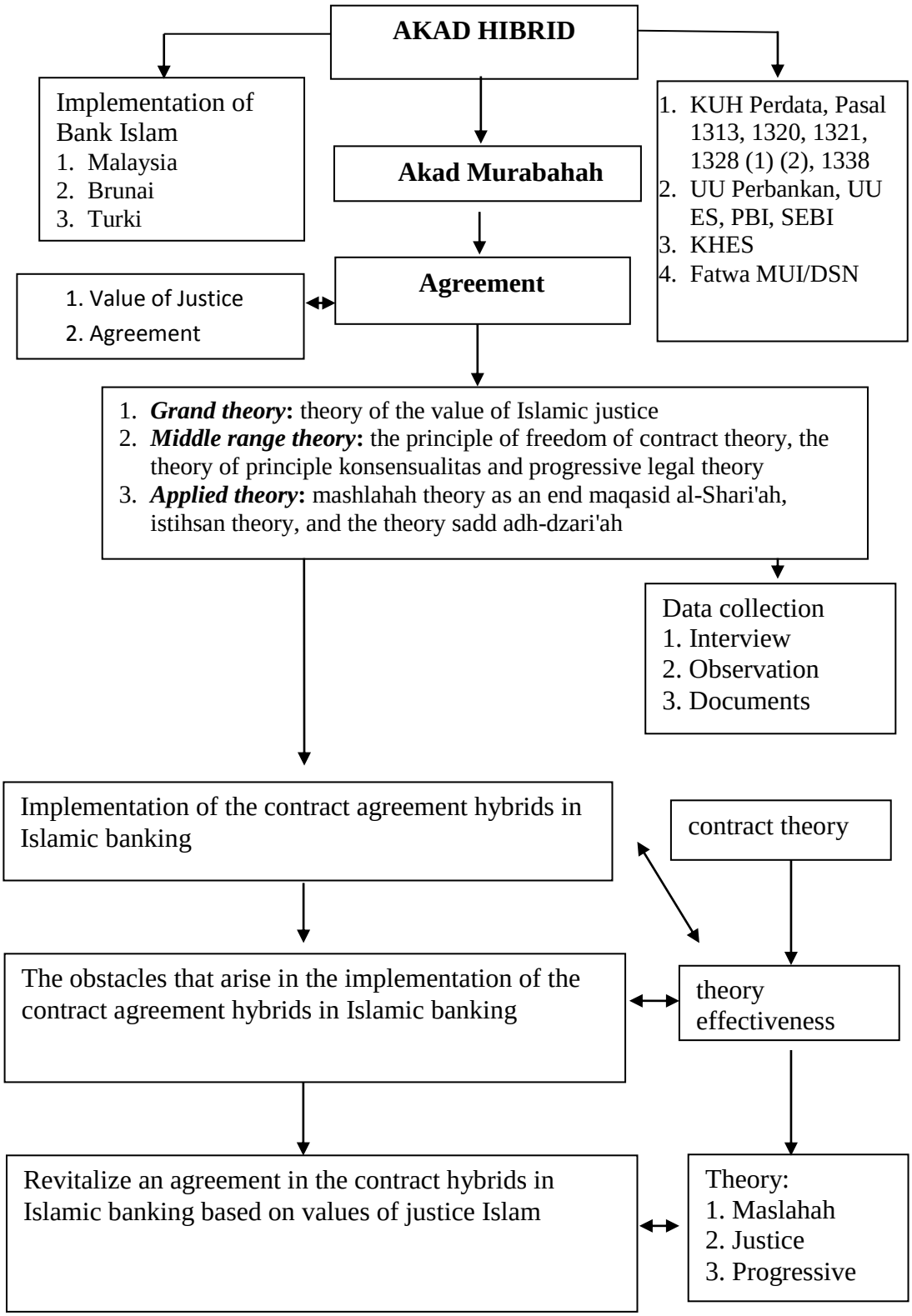
   Konsensualitas derived from the word "consensus" means the agreement. With the agreement meant that among the parties concerned reached an accordance of the will, that is to say: what is meant by that one is also desired by others. Both will meet in the "agree" is. Achieving agreed this was expressed by both parties to utter the words, for example: "agree", "accoord", "okay" and so forth, or by joining together to put the signature under the statement-a statement as a sign (evidence) that both sides have agreed to all what is listed above the article. That what is desired by the one it is also desired by others or that their will is "the same", is actually not correct. That is true is that they want is "the same in the opposite".[10]

[7] *Ibid.*, p. 87.
[8] *Ibid.*, p. 86.
[9] Subekti, *Contract Law*, Jakarta: Intermasa, 2014, p. 13.
[10] *Ibid*., p. 15.

D. Framework

In contract, the relationship between the parties should be guided by the elements mutually voluntary ('an tarādin) which is implemented in the form of an agreement between the parties involved, by means of the disclosure of the intent is clear and can be understood by each party. The contract or transaction becomes a means of harmonizing the wishes and interests of the parties. Compliance is an economic activity with Islamic rules in the perspective of jurisprudence muamalah will be assessed from akadnya. So important positions in fiqh muamalah contract, so there is a juristic muamalah defines as a set of contract-a contract that allows exchange of benefits.[11] In harmony with the basic characteristics bermuamalah that is innovative, also in line with kaedah al asl fi'l-Mu'amalah al-ibāhah Illa yadulla an argument of 'Ala tahrīmihā (according to the origin of all forms muamalah is permissible unless there is proof that shows keharamannya).[12]

[11] Rachmat Syafe'i, *Jurisprudence*, Bandung: Pustaka Setia, 2014, p. 15-16.
[12] National Sharia Council (DSN) - Indonesian Ulema Council (MUI) kaedah almost always include this as one of the basic fatwa specified.


AKAD HIBRID
Implementation of Bank Islam
1. Malaysia
2. Brunai
3. Turki
1. KUH Perdata, Pasal 1313, 1320, 1321, 1328 (1) (2), 1338
2. UU Perbankan, UU ES, PBI, SEBI
3. KHES
4. Fatwa MUI/DSN
Akad Murabahah
Agreement
1. Value of Justice
2. Agreement
1. Grand theory: theory of the value of Islamic justice
2. Middle range theory: the principle of freedom of contract theory, the theory of principle konsensualitas and progressive legal theory
3. Applied theory: mashlahah theory as an end maqasid al-Shari'ah, istihsan theory, and the theory sadd adh-dzari'ah
Data collection
1. Interview
2. Observation
3. Documents
Implementation of the contract agreement hybrids in Islamic banking
contract theory
The obstacles that arise in the implementation of the contract agreement hybrids in Islamic banking
theory effectiveness
Revitalize an agreement in the contract hybrids in Islamic banking based on values of justice Islam
Theory:
1. Maslahah
2. Justice
3. Progressive

E. Research Methods

1. Research Paradigm

The paradigm used in this study is the paradigm of criticism or critical paradigm (*critical theory*).

2. Types of Research

This research uses juridical sosiolegal (socio-legal approach) / non-doctrinal legal research.

3. Personality Research

In connection with the formulation of the problem and the purpose of this study, the nature of this study exploratory, descriptive or explanatory.

4. Method Approach

The method used is the approach of law (statute approach) and the conceptual approach (conseptual approach).

5. Types and Sources of Data Research

The data source of this research consisted of:

a. Primary data, ie data obtained from the practice of law/legal empirically,[13] in this case the results of interviews with informants/respondents, among others.

1) Secondary data, ie data obtained from the literature and documentary studies in order to obtain primary legal materials, secondary law, and tertiary legal materials.

6. Data Collection Technique

Data was collected by means of literature study, observation and interviews.

7. Data Analysis

The analysis of data using qualitative descriptive analysis.

8. *Social Setting*

The focus of study in this research is related to the issue of revitalization of the agreement in the contract hybrids in Islamic banking based on values of justice Islam. The scope of the study specifically limited regarding the agreement in the hybrid contract.

[13] Primary data is data obtained from the source or from the first source, namely by studying the behavior of people in the community that is through research. See Soerjono Soekanto, 1998, *Introduction to Legal Research*. UI Press, Jakarta, p. 12.

9. Data validity

In this study used several techniques examination of the validity of data that is tailored to the criteria, among others: Triangulation.

F. New Theory

In practice, if the bank represent the customer to purchase goods from a third party, it turns murabaha sale and purchase agreement has been done before the goods are, in principle, be the property of the bank. So banks delegate to clients to buy goods to third parties, and the sale and purchase agreement murabaha made at the time of handing over money, then here akadnya invalid.

Therefore, according to the researchers, these erroneous practices that should not happen again, so akadnya legitimate. In other words, banks that want to delegate to the customer to purchase goods from a third party, the sale and purchase agreement murabaha to be done after the goods are, in principle, be the property of the bank. However, researchers realized that if the goods must already exist and already belongs to the bank, the bank may be at risk if, for example: how to cancel the purchase contract customers or clients eg do not get along with the goods in accordance with the order. To avoid this risk, according to researchers, the Islamic banking must first make arrangements ensured that customers will buy the goods ordered. So before the purchase contract is done murabaha, the bank must thrusting letter legally binding agreement that the customer must buy the goods in accordance with the order. The agreement must be made in concrete (clear, tangible and understood customer) so the bank can avoid the risk of cancellation of purchase. Here the researchers call a concrete theory hybrid contract

The formulation of the researchers on the concrete theory of hybrid financing agreement based on the principles of murabaha as follows: 1) Banks that want to delegate to the customer to purchase goods from a third party, the sale and purchase agreement murabaha to be done after the goods are, in principle, be the property of the bank; 2) To avoid the risk of cancellation of purchase by the customer, before the purchase contract is done murabaha, the bank must menyodorka0n letter legally binding agreement that the customer must buy the goods in accordance with the order. The agreement must be made in concrete (clear, tangible and understood customer) so the bank can avoid the risk of cancellation of purchase. Here the researchers call a concrete theory hybrid contract.

Theory concrete hybrid contract is a new theory, new findings from researchers in

this dissertation. Concrete theory (the theory of real, not secretly, not gharar). This theory is not derived from previous research as far as researchers have not found any concrete theory terms. Nonetheless, the researchers made the new theory is inspired by the special rules in the field of Jurisprudence muamalah or transaction that reads:

كُلُّ شَرْطٍ كَانَ مِنْ مَصْلَحَةِ الْعَقْدِ أَوْ مِنْ مُقْتَضَاهُ فَهُوَ جَائِزٌ

The Meaning: "Any requirement for kemashlahatan contract or required by the contract, the conditions may be allowed".[14]

G. Conclusion

1. Conclusion

a. The practice of implementation of the agreement on banking Shari'ah hybrid contract that combines murabahah with wakalah.

b. Irregularities in the implementation of the hybrid contract, when viewed from the side of justice, not least the managers/employees of Shariah banking is not yet understood in detail and has not been able to carry out the contract-contract in Shari'ah banking consistent with the principles of Islam.

c. To revitalize the hybrid contract agreement in the banking Shari'ah-based Islamic values of justice, it is necessary to apply the theory konkri. This theory is a new theory, new findings from researchers.

2. Implications Studies Dissertation

a. In this modern age either banking or financial industry are required to meet the business needs of modern society in order to compete with other modern products.

b. The development of shari'a banking and finance is progressing very rapidly and facing increasingly complex challenges.

3. Recommendations

a. Should the judges, notaries, Advocates / lawyer, the director general of taxation, financial institutions shari'ah / Islamic banking, academics / students to study, understand the implementation of the contract agreement hybrids in shari'a banking.

[14] Ali Ahmad al-Nadwi, 1420 H/1998 M, *al-Qawa'id al-Fiqhiyah*, Dar al-Qalam, Beirut, hlm. 95.

b. Propose to the Government and the Parliament to revise Article 2 and the explanation of Law No. 21 of 2008 concerning Sharia Banking, related to the term "Economic Democracy into Democratic Unity/Pancasila Democracy".

c. In the implementation of the agreement on the hybrid contract is often combined banking Shari'ah is murabahah combined with wakalah. To avoid mistakes and caution, then the bank is going to delegate to the customer to purchase goods from a third party, the sale and purchase agreement murabaha to be done after the goods are, in principle, be the property of the bank, for it must be supervision of the Shariah Supervisory Board Fitness/FSA at the Finance Institute of the shari'a, so the contract-contract / agreement on Perbanaan Shari'ah Hybrid can be implemented in accordance with the Islamic shari'a.

d. Need to increase HR employees/managers of Shariah banking from the helm to the bottom of all involved must be in continuous training and that provided/prepared colleges specifically for menggodog Islamic Shari'ah economics, from below elementary, junior high, high school and university.

e. To revitalize the hybrid contract agreement in the banking Shari'ah-based Islamic values of justice, it must uphold the principles of Shariah, togetherness, and the precautionary principle as stated in Article 2 of Law No. 21 Year 2008 concerning Sharia Banking which has been proposed to read as follows: "Sharia banking in conducting its business activities berasaskan principles of shari'a, democracy Mutual, and the precautionary principle".

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