

## Analysis of Loan Agreements According to Islamic Law and Civil Law

Rugaiya Rugaiya <sup>\*1</sup>, M.Taufan B. <sup>2</sup> & Suraya Attamimi <sup>3</sup>

<sup>1</sup> Faculty of Islamic Family Law, Universitas Islam Negeri Datokarama Palu, Indonesia

<sup>2</sup> State Islamic University (UIN) Datokarama Palu

<sup>3</sup> State Islamic University (UIN) Datokarama Palu

\*Corresponding Author: Rugaiya E-mail: [alhabsyierugaiyah72@gmail.com](mailto:alhabsyierugaiyah72@gmail.com)

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### ABSTRAK

This study aims to determine and analyze the loan system according to Islamic Law and Civil Law as well as to find out and analyze its advantages. This type of research is normative law by comparing the agreement law system in Islam and civil law. In other words, this research focuses on the legal norms contained in Islamic and civil law.

The results of this study indicate that the loan system, according to Islamic law, comes from the Arabic word *qard* which means to borrow. "*Qaradh* is taking something or other people's goods to take advantage of it within a certain time. Meanwhile, according to civil law, loans related to agreements in civil law which cannot be separated from the Civil Code. According to Article 1313 of the Civil Code, an agreement is formulated as an act whereby one or more persons bind themselves to one or more other persons. The word "agreement" is a translation of *overeenkomst*, which is one of the sources of engagement (*verbintenis*). The substance of the agreement in the article is an act (*handeling*). In addition, the collection of funds at conventional and Islamic banks has similarities and differences. The similarity is that both types of banks seek to benefit from other parties without harming them. The difference is that conventional banks practice interest rates, while Islamic banks use profit-sharing practices. Islamic banks do not use the practice of interest because it is not in accordance with religious teachings. Sources of fundraising in conventional banks are demand deposits, savings, and time deposits, while in Islamic banks, the sources are *al wadiah* and *al mudharabah*. People tend to choose banks that provide greater profits because they do not want the funds they invest not to provide profits. It is recommended that the banking system in Indonesia should be able to use *muamalah malia'a* products rather than usury banking products because the majority of the people are Muslim. The government should also revise the banking law, especially regarding loan, hoping it will be easier for people to apply for loans.

### 1. Introduction

Loan activities have been carried out for a long time in people's lives. It can be seen that almost all people have made these activities indispensable to support the development of their economic activities and to improve their standard of living. The conception of law in Islamic teachings differs from the general conception (civil law). In Islam, the law is seen as part of religious teachings, and legal norms are rooted in religion. Muslims believe that Islamic law is based on divine revelation. Therefore, it is called sharia which means the path that God has outlined for Man. The emergence of the law is because humans live in society. The law regulates rights and obligations in social life and how to implement and maintain these rights

<sup>1</sup> **Rugaiya** is a Ph.D Candidate Of Islamic Family Law Study Program at post graduate school, Universitas Islam Negeri Datokarama Palu, Indonesia. This paper was presented at The 1st International Conference on Islamic and Interdisciplinary Studies (ICIIS) 2022 as a Presenter held by the Postgraduate School Universitas Islam Negeri Datokarama Palu, Indonesia.

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and obligations. Civil law that regulates rights and obligations in social life is called material civil law. In contrast, civil law that regulates how to implement and maintain these rights and obligations is called formal civil law.

Departing from the above thought, if two people get into an agreement, then they intend that between them, a legal agreement applies. Indeed they are related to each other because of the promise they have given. Sometimes this bond is solemnly broken only when the promise is fulfilled. The problem of this study can be formulated as follows: What is the lending and borrowing system according to Islamic Law and Civil Law? What factors are the advantages of borrowing and borrowing from Islamic law and civil law? While the aim is to find out and analyze the loan system according to Islamic Law and Civil Law, as well as its advantages from Islamic law and Civil law.

## **2. Literature Review**

Agreements in Arabic are termed the word *Mu'ahadah Ittifa'* or contract which is equated with the word contract (Chiruman & Surawardi, 1996:1), the contract in the agreement is called *Al-muahadah* (promise), *Al'ittifa'* (agreement) and *Al-'Aqdu* (bond). (Ibn Rushd, 1983:128) The contract in the agreement becomes a very important point. Three important points are the subject, the object and the agreed amount. Islamic jurists (*jumhur ulama*) provide a definition of *aqad* as a link between consent and Kabul which is justified by *syara'* which causes legal consequences for the object. A contract is an agreement or mutual commitment, either verbal, sign, or in writing between two or more parties that have binding legal implications for carrying it out. (Greetings, 1963: 506). The principles and terms of the agreement according to Islamic law 1) The divine principle, 2) *Huriyah* principle (freedom), 3) *Al-adala* principle (justice), 4) *Al-ridho* principle (willingness), and 5) *Kitaba* principle (written).

The word agreement comes from the Dutch word *Verbintenis* which is defined as an engagement, agreement and obligation or it can also be the word *Overeenkomst* which means agreement (R. Soeroso, 2010: 3). Meanwhile, according to Article 1313 of the Civil Code, an agreement is formulated as an act by which one or more people bind themselves to one or more other people. The word "agreement" is a translation of *overeenkomst*, which is one of the sources of engagement (*verbintenis*). Agreements are legal acts, while legal acts are actions where the occurrence or disappearance of a law or legal relationship as a result desired by an act in accordance with the will of both parties aims to occur certain legal consequences in accordance with legal regulations (Purwahadi Patrik, 1994: 46). Principles and terms of a civil agreement 1) The principle of good faith; 2) The principle of consensuality; 3) *Pacta Sunservanda* principle (binding force); 4) The principle of legal certainty.

## **3. Methodology**

The type of research conducted is library research with a qualitative descriptive approach. Data collection techniques were through library books, documentation, and expert reviews. Data analysis techniques are as follows: a) Deductive analysis, a method that discusses general problems and then draws specific conclusions. As stated by Sutrisno Hadi (1987: 49): "Deductive thinking departs from general facts and then draws specific conclusions." b) Inductive analysis is a method that discusses specific problems and then comes to a general conclusion. The inductive method intended by the author in the description of this research is based on the opinion stated by Sutrisno Hadi (1987: 42) as follows: "Thinking that starts from specific facts then draws conclusions that have a general nature." c) Besides that, the comparative analysis method is also used, by comparing various sources, which in this case relates to the theory or formulation in a civil manner with the formulation or theory following Islamic shari'ah. In this study, the comparative method has a very urgent role because the characteristic of this research is to get the results of the comparative technique between civil law and Islamic law. The approach used in this study is a normative approach and an empirical juridical approach. The method used to analyze was descriptive analysis. The data analysis techniques used consisted of three types: reduction, presentation, and data verification.

## **4. Result and Discussion**

### **4.1. Loan system according to Islamic law**

Loans/credit comes from the basic word *qarada* which means borrowed. *Yaqridhu* means borrowing, then in the form of *isim qardhan* which means loan. The above definition shows that the word credit comes from Arabic, which means borrowing, *Qaradh*, namely taking something or other people's goods to take advantage of it within a certain time.

In the interpretation of an-nur (Ashidiqi H., 1989), the word Qardh is explained as:

*"Qardh hasan is a gift that is given with a clean, holy heart that is not accompanied by a title, placed in its place according to the demands of syara' and according to the teachings that have been prescribed by Islam".*

Referring to the explanation above, giving loans to other people on the basis of helping, helping, to ease the burden of life for the borrower is a realization of *Ukhuwah Islamiyah*. The definition of *Qiradh* in the book *Mazahibil Arba'ah* (Chapter III p. 270) is an agreement between two people in which the first party surrenders the goods he owns to another party to be traded with him with the distribution of profits in an understandable form.

*Qiradh*, according to the book I'anatuthalibin is an agreement on a property where one person gives it to another person to be traded on the basis that the profit becomes a mutual right between the two. In Islam, humans are required to try to get sustenance to meet the needs of life. Islam also teaches humans that Allah is most merciful and his sustenance is very wide. Even Allah does not give this sustenance to the Muslims only but to anyone who works hard. Many verses of the Qur'an and the hadith of the Prophet Muhammad commanded humans to work. Humans can work on anything which does not violate the lines that have been determined. They can carry out production activities such as agriculture, farming, food and beverage processing, and so on. They can also carry out distribution activities, such as trade, or services, such as transportation, health, and so on.

To start a business like this requires capital, no matter how small. Sometimes people get capital from their savings or look for their families or from their friends. If not available, the role of financial institutions becomes very important because they can provide capital for people who want to do business or buy certain goods. The relationship is mutually beneficial, resulting in a brotherly relationship. The thing to note is if the relationship does not follow the rules taught by Islam. Therefore, the parties involved must follow the ethics outlined by Islam.

In Islamic banking, the use of the word loan is not appropriate for two reasons;

- a. Loans are one of the methods of financial relations in Islam
- b. In Islam, a loan is a social contract, not a commercial contract.

This means that if someone borrows something, he should not be required to give additional (more than he borrowed) to the principal of the loan. This is based on the hadith of the Prophet Muhammad SAW, which says that every loan that results in excess is usury. At the same time, scholars agree that usury is haram. For example, in Islamic banking, loans are not called credit but financing. If people come to Islamic banks and want to borrow funds to buy certain items, such as cars or houses, they have to do buying and selling with Islamic banks. Here, Islamic banks act as sellers and customers as buyers. If the bank provides a loan (in the conventional sense) to the customer to buy the goods, the bank may not take advantage of the loan. As a commercial institution that expects a profit, it is certainly not possible for a sharia bank to do so. Therefore, buying and selling must be carried out, where Islamic banks can take advantage of the price of goods sold, and profits from buying and selling are allowed in Islam. Another example is trading because there is generally a circulation of funds in it. Customers can apply for *mudharabah* financing. Banks and customers can share profits/profits by estimating the average turnover of each month.

#### **4.2. Loan System According to Civil Law**

Loans related to agreements in civil law cannot be separated from the Civil Code. According to Article 1313 of the Civil Code, an agreement is formulated as an act whereby one or more persons bind themselves to one or more other persons. The word "agreement" is a translation of *overeenkomst*, which is one of the sources of engagement (*verbintenis*). The substance of the agreement in the article is an act (*handeling*). The word "act" has been criticized by jurists because it is unsatisfactory, incomplete, and very broad. The agreement should be a legal act (*rechtshandeling*). This change in formulation can be seen from the multi-sided legal action agreement between two or more parties to come into an engagement. An agreement is a legal action to achieve conformity of will with the aim of causing certain legal consequences.

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Adding the word law (*recht*) brings a change in the meaning that not all actions are included in the meaning of agreement. In its development, the agreement is no longer a legal act but a legal relationship (*rechtsverhouding*). This view was put forward by van Dunne (1985), who said that agreement is a legal act, as a classical or conventional theory. *Communis Opinio Doctorum* defines the meaning of an agreement as a legal act that has two sides (*een tweezijdige rechtshandeling*), namely the act of offering (*aanbod*) and acceptance (*aanvaarding*). An agreement should be two legal acts. Each has one side (*twee eenzijdige rechtshandeling*), namely an offer and acceptance based on an agreement between two or more people who are interconnected to cause legal consequences (*rechtsgevolg*). This concept gave birth to the meaning of the agreement as a legal relationship. This is the legal reasoning used to explain the essence of the agreement meant as a legal relationship between the customer and the debtor. In order for an agreement to be valid according to the law, 4 (four) requirements should be fulfilled as stated in Article 1320 of the Civil Code, namely: agreeing to those who bind themselves; the ability to come into an engagement; a certain thing; and a lawful cause. Such requirements are also recognized in every legal system in other countries, such as the UK, France, and Germany.

### **5. Conclusion**

Loan system according to Islamic law, the word *qard* comes from Arabic, which means to borrow. "*Qaradh* is taking something or other people's goods to take advantage of it within a certain time. Meanwhile, according to civil law, Loans related to agreements in civil law cannot be separated from the Civil Code. According to Article 1313 of the Civil Code, an agreement is formulated as an act whereby one or more persons bind themselves to one or more other persons. The word "agreement" is a translation of *overeenkomst*, which is one of the sources of engagement (*verbinten*). The substance of the agreement in the article is an act (*handeling*).

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