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PRAGMATISM IN ISLAMIC FINANCE AND THE WAY FORWARD: LESSONS FROM HAJJ LOAN FINANCING PRODUCT IN INDONESIA

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Abstract

This paper will analyze the contract of financing product of "Hajj Loan" applied by Islamic bank in Indonesia, case study of BSM which is known as the biggest Islamic bank in Indonesia. First of all, this paper will give some overview about the product of "Hajj loan" in the perspective of contract. Second, this paper will analyze some shariah problems that appear in Hajj loan product and show the Pragmatism Paradigm of Islamic Finance. Finally, this paper will try to criticized some paradigm issue used by bankers in developing their product.

Keywords: Islamic finance, Hajj loan financing

I. INTRODUCTION

Hajj is one of the pillar of Islam in which can be stated as the expression of many things; it is a "show of creation", a "show of history", a "show of unity", a "show of the Islamic ideology" and a show of the *Ummah* (Shariati, Ali 2005). Allah SWT say in the Holy Quran in Surah al-Baqarah verse 196:

وَأَتِمُّوا الْحَجَّ وَالْعُمْرَةَ لِلَّهِ فَإِنْ أُخْصِرْتُمْ فَمَا اسْتَيْسَرَ مِنَ الْهَدْيِ وَلَا تَخْلُقُوا رُءُوسَكُمْ حَتَّى يَبْلُغَ الْهَدْيُ مَحَلَّهُ فَمَنْ كَانَ مِنْكُمْ مَرِيضًا أَوْ بِهِ آذَى مِنْ رَأْسِهِ فَفِدْيَةٌ مِنْ صِيَامٍ أَوْ صَدَقَةٍ أَوْ نُسُكٍ فَإِذَا أَمِنْتُمْ فَمَنْ تَمَتَّعَ بِالْعُمْرَةِ إِلَى الْحَجِّ فَمَا اسْتَيْسَرَ مِنَ الْهَدْيِ فَمَنْ لَمْ يَجِدْ فَصِيَامًا ثَلَاثَةَ أَيَّامٍ فِي الْحَجِّ وَسَبْعَةً إِذَا رَجَعْتُمْ تِلْكَ عَشْرَةٌ كَامِلَةٌ ذَلِكَ لِمَنْ لَمْ يَكُنْ أَهْلَهُ خَاضِعِي الْمَسْجِدِ الْحَرَامِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ شَدِيدُ الْعِقَابِ.

"Fulfil the Pilgrimage and the Visitation unto God; but if you are prevented, then such offering as may be feasible. And shave not your heads, till the offering reaches its place of sacrifice. If any of you is sick, or injured in his head, then redemption by fast, or freewill offering, or ritual sacrifice. When you are secure, then whosoever enjoys the Visitation until the Pilgrimage, let his offering be such as may be feasible; or if he finds none, then a fast of three days in the Pilgrimage, and of seven when you return, that is ten completely; that is for him whose family are not present at the Holy Mosque. And fear God, and know that God is terrible in retribution."

Currently, a lot of people, even all muslim try their best exertion in the form of investment and benevolence loan to have a right preparation to go to Mecca in performing hajj. For this Islamic banking, this is very good situation whereby they can catch up this

opportunity, thus, many financial institutions in Indonesia such as Bank Syariah Mandiri, Bank Rakyat Indonesia Syari'ah and Muamalat offered a financing facility pertaining to hajj loan.

However, there are some question rises whereby in many cases some needy people enter into this contract. Off course, this is not corresponding with Shariah because according to Surah Al-Imran verse 97: *whoever enters it attains security; Pilgrimage thereto is a duty men owe to Allah,- those who can afford the journey; but if any deny faith, Allah stands not in need of any of His creatures.* In other words this explain that hajj only become compulsory when the man is capable in term of all aspects i.e. faith, knowledge, physical ability and most importantly his financial conditions.

According to the latest updated data on February 2012, Bank Syariah Mandiri has introduced its products called BSM Financing of Hajj Loan to help hajj pilgrims in Indonesia. This is bridging financing from the bank to the customer exclusively for covering the outstanding balance in Biaya Penyelenggaraan Ibadah Haji (BPIH). The contract between both parties will use the contract *al-ijara wa qardh*. The customer then has to pay back the financing amount within a specific period. However, repayment does not use the installment system per month, in the sense that there is no specific amount to be paid per month (Agustina, 2009).

This paper will analyze the contract of financing product of "Hajj Loan" applied by Islamic bank in Indonesia, case study of BSM which is known as the biggest Islamic bank in Indonesia. First of all, this paper will give some overview about the product of "Hajj loan" in the perspective of contract. Second, this paper will analyze some shariah problems that appear in Hajj loan product and show the Pragmatism Paradigm of Islamic Finance. Finally, this paper will try to criticized some paradigm issue used by bankers in develcpping their product.

II. LITERATURE REVIEW

1. Definition and Legality basis

Hajj Loan product offered by Islamic bank is a qard-based loan provided by Islamic banks to the customers in covering their shortfall of funds in order to gain hajj seats. This hajj loan is guaranteed by a deposit fund owned by the customer. This deposit fund is financed by Islamic banking itself. Then the customer must return the borrowed money in a certain period. On the merit of this loan, Islamic banks will get in return (*fee/ujrah*) which was based on the amount of funds lent.

This product is based Fatwa DSN (National Shari'ah Board) No. 29/DSN-MUI/VI/2002 dated June 26, 2002 on the financing arrangements by Islamic Financial Institutions. In the fatwa of DSN, the common arguments put forward regarding the permissibility of the contract based on *Al-ijara'* and *Al-qard* contract is a component of this product and include the following provisions⁵¹:

⁵¹ Ikhwan Sam, et. al., Himpunan Fatwa Dewan Syariah Nasional, edisi revisi, (Jakarta: Dewan Syariah Nasional MUI dan Bank Indonesia, 2006), h. 176.

1. In the management of Hajj for the customers, Islamic Bank may obtain payment for services (*ujrah*) by using the principle of *al-Ijarah* according DSN-MUI Fatwa No. 9/DSN-MUI/IV/2000.
2. If necessary, Islamic Bank can help bail out payment to BPIH customers using the principle of *al-Qardh* corresponding DSN-MUI Fatwa No. 19/DSN-MUI/IV/2001.
3. The amount of *al-Ijarah* fee should not be based on the amount of *al-Qardh* fund given by Islamic bank to the customer (Fatwa DSN No: 29/DSN-MUI/VI/2002 for Hajj Financing by Islamic Financial Institutions).

2. The principle of Al-qard (Loan)

According to AAOIFI shari'ah standard No. 19, *Qard* defined as is the transfer of ownership in fungible wealth to a person upon whom it is binding to return wealth similar to it. The essence of *qard* is to provide the loan to one who will gain from this act. By giving, the receiving party will employ and consume it in pursuit of his aims and then return back its equivalent value.

In this context, *qard* is deemed as a "*tabarruat contract*", or charitable contract. For example, if the debtors who owes money to utilize it in the righteous ways, while lenders is rich man, the rich man then was obliged to give a loans. Moreover, if the creditor knows that the debtors will commit adultery with loans, so repugnant to the creditor to provide debt and so forth based on the conditions that can change the law.

Remarkably, Imam al-Shafi'i underlying the meaning of *qard* based on the word of Allah (SWT) that mentioned in the Qur'an in surah Al-baqarah verse 245 as

مَنْ ذَا الَّذِي يُقرضُ اللَّهَ قَرْضًا حَسَنًا فَيُضَاعِفَهُ لَهُ أَضْعَافًا
كَثِيرَةً وَاللَّهُ يَقْبِضُ وَيَبْصِطُ وَإِلَيْهِ تُرْجَعُونَ ﴿٢٤٥﴾

"Who is it that would loan Allah a goodly loan so He may multiply it for him many times over? And it is Allah who withholds and grants abundance, and to Him you will be returned."

Based on the above verse, Imam Shafi'i provide criteria, that *al-Qard* here is a good loan, or interest free loan (القرض الحسن). This is a loan extended on a goodwill basis, and the debtor is only required to repay the principle amount borrowed. Consequently, in a loan contract, any excess for the lenders whether the excess is in terms of quality, quantity, tangible things, benefits and etc., is deemed as prohibited as this may amount to *riba* (usury). This is because the *ahkam of riba* will take place (ISRA, 2012).

3. The Principle of Ijarah

Recently, "*Ijarah*" is a term of Islamic *fiqh* that lexically, it means 'to give something on rent'. In the Islamic jurisprudence, the term '*Ijarah*' is used for two different situations. In the first place, it means 'to employ services of a person on wages given to him as a consideration for his hired services'. The employer is called '*mustajir*' while the employee is called '*ajir*' (ISRA, 2012).

The second type of Ijarah related to the usufructs of assets and properties, and not the services of human beings. 'Ijarah' in this sense means 'to transfer the usufruct of a particular property to another person in exchange for a rent claimed from him.' In this case, the term 'Ijarah' is analogous to the English term 'leasing'. Here the lessor is called 'Mu'jir', the lessee is called 'musta'jir' and the rent payable to the lesser is called 'ujrah'.

The rule of Ijarah, in the sense of leasing, is very analogous to the rules of sale, because in both cases something is transferred to another person for a valuable consideration. The only difference between Ijarah and sale is that in the latter case the corpus of the property is transferred to the purchaser, while in the case of Ijarah, the corpus of the property remains in the ownership of the transferor, but only its usufruct i.e. the right to use it, is transferred to the lessee.

Some basic Rules of Ijarah:⁵²

1. Ijarah is a contract whereby the owner of something transfers its usufruct to another person for an agreed period, at an agreed consideration.
2. The subject of lease must have a valuable use. Therefore, things having no usufruct at all cannot be leased.
3. It is necessary for a valid contract of lease that the corpus of the leased property remains in the ownership of the seller, and only its usufruct is transferred to the lessee. Thus, anything which cannot be used without consuming cannot be leased out. Therefore, the lease cannot be affect in respect of money, eatables, fuel and ammunition etc. because their use is not possible unless they are consumed. If anything of this nature is leased out, it will be deemed to be a loan and all the rules concerning the transaction of loan shall accordingly apply. Any rent charged on this invalid lease shall be interest charged on a loan.
4. As the corpus of the leased property remains in the ownership of the lessor, all the liabilities emerging from the ownership of the lessor, all the liabilities emerging from the ownership shall be borne by the lessor, but the liabilities referable to the use of property shall be borne by the lessee.
5. The period of lease must be determined in clear terms
6. The lessee cannot use the leased asset for any purpose other than the purpose specified in the lease agreement. If no such purpose is specified in the agreement, the lessee can use it for whatever purpose it is used in the normal course. However, if he wishes to use it for an abnormal purpose, he cannot do unless the lessor allows him in express terms.
7. The lessee is liable to compensate the lessor for every harm to the leased asset caused by any misuse or negligence on the part of the lessee.
8. The leased asset shall be remained in the risk of the lessor throughout the lease period in the sense that any harm or loss caused by the factors beyond the control of the lessee shall be borne by the lessor.

⁵² As stated by Ilyas (2012), in his argument for Majelis Tarjih Muhammadiyah. Also derived from ISRA book regarding the basic rule of Ijarah contract.

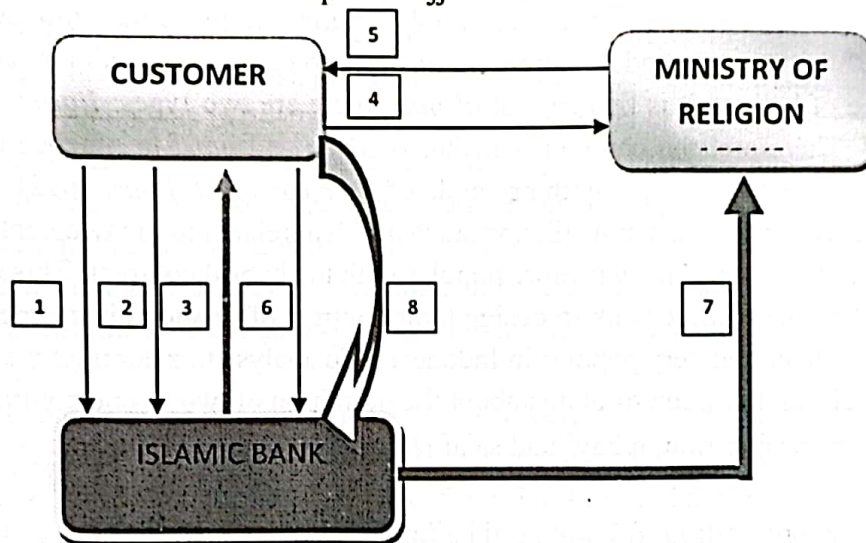
9. A property jointly owned by two or more persons can be leased out, and the rental shall be distributed between all the joint owners according to the proportion of their respective shares in the property.

III. RESEARCH FINDING

1. Description of Financing Product "Hajj Loan"

As stated above, hajj loan has quite big proportion from all financing product of Islamic Bank in Indonesia. The graph below illustrates the mechanism of "hajj loan" in Islamic Bank in Indonesia, especially Bank Syariah Mandiri which is well known as the biggest Islamic bank in Indonesia.

Graph 1. Hajj Loan Mechanism



1. Open Saving Account "Mabrur" aqad mudharabah
2. Apply Hajj Loan, based on aqd qard
3. Islamic Bank Gives Hajj Loan, with qard, and also sign contract qard for Hajj Loan and Sign contract of Ijarah. after it is approved customer will pay *ujroh* up-front.
4. Customer go to Ministry Religious Affair of Republic Indonesia to get "Hajj Travel Warrant"
5. Ministry of Religious affair approved the customer application of hajj and give "Hajj Travel Warrant"
6. Customer go to Islamic Bank and give the "hajj travel warrant"
7. Islamic bank as an agent of customer will administer the hajj procedure, with *ijarah a'mal aqd*.
8. Customer will pay the debt

In the "hajj loan" there are three important parties, namely Customer, Islamic Bank and Ministry of Religious affair. The rule of ministry of religious affair is as the party that has the right to give the "hajj" seats to go to Hajj, since its right is controlled by government.

2. Shariah Problems in Financing Product of "Hajj Loan"

Al-Qord and Al-Ujroh

Hajj Loan Financing Product is actually consist of two contracts namely contract *Al-qord* and contract *Al-ijarah*. There are some arguments about the permissibility of this combination of two contracts. Some Islamic scholar said that it is permissible and the other said it is impermissible (Ilyas, 2012).

Generally, those which forbid this practice argue that in practice there is such a hidden element of *riba* that is the rent (*ujroh*) received by the creditor. They also argue that combining the two contracts in one transaction were not allowed in Shariah. However, some researchers argue that "if we return to the example above, the transaction had not contained any element of *riba*". They argued that the contract *qord* the transaction will not require additional reward the customer simply returns the principal amount of loan he received. While the cost of administration / *ujroh* charged to customers for services in the maintenance of hajj, as it is known that *al-ijara* there are two types: *Ijarah Al-maal* and *ijara d'mal*. Therefore, the contract, whether or *ijara* and *qard* in practice there are no problem, because it was proper with principle of *ijara* and *qard* (Ilyas, 2012).

However, from this point still appears a problem related to the two contracts in one. The contract of *bai'* and *ijarah* is more popular with the hybrid contract. This contract that always used by the Islamic bank to design their contract of financial instrument including in case of hajj loan that very popular in Indonesia. To analyse this contract we will discuss the some hadits and opinion of ulama about the definition of two in one contract.

- The prohibition of bay' and salaf (Imam Malik:tt: II:657).

ان رسول الله صلى الله عليه وسلم نهى عن بيع وملك

- The prohibition if Bai'atani fi bai'atin (At-Tirmizi, III: 533)

عن أبي هريرة قال : نهى رسول الله صلى الله عليه وسلم عن بيعتين في بيعة

- The prohibition of Syafqotaini fi Syafqotin (al-Bashri: 1998: V: 384)

نهى رسول الله صلى الله عليه وسلم عن صفتين في صفقة

The three hadits above is the main reference of consultant and shariah bankers related to the prohibition of two in one contract. Although some Islamic scholars said that the hybrid contract in hajj loan is shariah compliance since it cannot be categorized as *bai'atani fi baiatin*, but they must be noted that the implication namely right and obligation of both contract (*qord* and *ijarah*) cannot be separated.

In term of Hajj Loan Contract which applied in Islamic bank in Indonesia, this contract combine two contract namely *aqd bai'* and *aqd ijarah*. The two contracts absolutely have different objectives which is *qard* is *aqd tabarruat* and *ijarah* is *aqd muawadhot*. *Tabarruat* contract is the contract which has social orientation and no exchange of counter value. However, *muawwadhot* contract is the exchange contract which is the main objective to get profit. If the two contracts are combined, potentially will cause *riba*, since will damage the objective of each other. Therefore, from this domain the opinion of majority of Hanafiyyah scholars, some opinions of malikiyyah, syafi'iyah and Hambali prohibited hybrid contract since it will support *riba*.

As a result, combine two contacts in Hajj Loan contract, tend to be prohibited. Ibnu taymiyyah said:

فَجَمَاعٌ مَعْنَى الْحَدِيثِ أَنْ لَا يُجْتَمَعُ بَيْنَ مَعَاوَضَةٍ وَتَرْجِيحٍ ؛ بَأَنَّ ذَلِكَ الشَّرْعُ بِمَا كَانَ لِأَخْلِ الْمَعَاوَضَةِ لَا تَنْبَغُ مُطْلَقًا ؛ فَيَصِيرُ حُرْمَةً مِنَ الْبُيُوعِ فَإِنَّا اتَّفَقْنَا عَلَى أَنَّهُ لَيْسَ بِبُيُوعٍ حَتَّى يَنْقُضَ بَيْنَ الْمُتَرَبِّعِينَ ؛ فَإِنَّ مَنْ اقْتَرَضَ رَجُلًا أَلْفَ دِرْهَمٍ وَبَاعَهُ بِسَلْعَةٍ تُشَابِهُ حَتْمًا بِالْقَبْلِ ثُمَّ يَرْتَضِ بِإِقْرَاضِهِ إِلَّا بِالشَّمَنِ الرَّابِعِ لِلشَّامَةِ ؛ وَالْمَشْفُورِي ثُمَّ يَرْتَضِ بِتَدْلِ ذَلِكَ الشَّمَنِ الرَّابِعِ إِلَّا لِأَخْلِ الْأَقْبَابِ الَّتِي اقْتَرَضَهَا ؛ وَلَا هَذَا بَيْعًا بِالْقَبْلِ وَلَا هَذَا مَرْتَعَمٌ

The conclusion from this hadith that: "Not allowed to combine Social contract with commercial *aqd*. That is because both of them (those parties) establish social *aqd* because of the commercial *aqd* between them. Thus, the social *aqd* is not entirely social. Even, the social *aqd* indirectly become part of the transaction value in commercial *aqd*." (Ibn Taymiyyah, 1987:39).

We have explained according to the law of *al-qardh*, that *al-qardh* follow the *taklifi hukm* that can change, it is start from recommended until prohibited. The changes are based on practices that do *aqd*. In the Islamic Bank in Indonesia Such as Bank Syariah Mandiri with *al-qardh* contract was in practice still incorporate *aqad qardh* with *al-ijara*, although not presented in writing. This is evidenced from the practice, that Islamic bank still take administration fee of 1.5 million in services Management of Hajj without detailing the cost of administration. Even the customer service of the bank testified that the administration is based on *ijara contract*. Therefore, although in writing its contract is *al-qardh* but in practice it still combines with *aqd al-ijara*, while the merger of two *aqad* is not allowed as we describe above.

On the banks using this *aqd*, such as BSM, which use *ijarah* contract is not actually pure *ijara*. Because banks are still lending money to customers with the additional (represented with the different administration fees). The bank did not admit that these loans as *al-Qardh* but as a support service for people who want to perform Hajj in order to get a seat (seat) faster. At first glance this practice is no problem, especially with the intention of helping people, but according to the author of this practice is not justified because the service is basically money in this context should be the principle of *al-Qardh* because it aims to help other people (social *aqad/ tabarruat*) are not may specify additional costs. If there are additional costs it will cause the ban according to *fiqh Qaeda Qudamah* presented in Ibn al-Mughni:

كل قرض شرط فيه أن يزيده فهو حرم بغير خلا

Ijarah Fee Problems

Hajj financing is a loan (*qardh*) of Islamic banks to customers to cover the shortfall of funds in order to gain seats (seat) at the time of redemption BPIH pilgrimage (Hajj Travel Expenses). Then the customer must return the borrowed money was in a certain period. The legal basis for the practice of financing this loan is Fatwa DSN (National Sharia Board) No.29/DSN-MUI/VI/2002 about the hajj financing arrangements by Islamic Financial Institution said that Fees of *al-ijarah* should not be based on the number of *al-Qardh* hajj loan given to the customer of IFI

However, in the real practice of Islamic bank in Indonesia have different feature of *Ujroh* based on the amount of hajj loan taken by customer. Therefore, it is actually contradicts with the general requirement from National Shariah Advisory (Majlis Ulama

Indonesia) that the *ujroh* cannot be based on the number of Loan. The table below describes *ujroh* fee, first initial deposit for customer to get the Hajj Loan from Islamic bank in Indonesia.

1. For Rp.18 millions Hajj Loan, the customer must make an initial deposit amounting to 4.048 million, with a minimum deposit of detailed 2,000,000 for the pilgrimage payment up front, *Ujroh* Rp1.5 million for the bank, a savings of at least Rp.500,000 to minimum balance Saving Account "*Mabrur*", 48,000 for the cost of stamp duty. The amount of *ujroh*/ fees set by BSM on the type of this loan is equal to 8.3% of the large amount of the proposed bailout. With the calculation: $(1.500.000/18.000.000) \times 100 = 8.3\%$

Table 1. Hajj Loan Structure

LOAN	INITIAL DEPOSIT				Total First Initial Deposit
	Hajj Min. Deposit	Fee Ujroh	Min. Balance For Saving Account " <i>Mabrur</i> "	Stamp	
Rp. 18,000,000	2,000,000	1,500,000	500,000	48,000	4,048,000
Rp. 15,000,000	5,000,000	1,500,000	500,000	48,000	7,048,000
Rp. 10,000,000	10,000,000	900,000	500,000	48,000	11,448,000

Source: Bank Shariah Mandiri, and another source

2. For Rp.15 million Hajj Loan, the customer must make an initial deposit amounting to Rp. 7.048 million, with details to deposit a minimum of five million pilgrimage payment up-front, *Ujroh* 1.5 million for the bank, a savings of at least 500,000 to balance Saving Account "*Mabrur*", 48,000 for the cost of stamp duty. The amount of *ujroh* / fees set by BSM on the type of this loan is equal to 10% of the large amount of the proposed loan. With the calculation: $(1.500.000/15.000.000) \times 100 = 10\%$
3. For Rp.10 million of = hajj loan, customers must make an initial deposit amounting to Rp.11.448 million, with the details for the deposit of at least 10 million pilgrimage, *Ujroh* 900,000 to a bank, a savings of at least 500,000 to balance Saving Account "*Mabrur*", 48,000 for the cost of stamp duty. The amount of *ujroh* / fees set by BSM on the type of this loan is equal to 9% of the large amount of the proposed loan. With the calculation: $(900.000/10.000.000) \times 100 = 9\%$.

Problems when Hajj Loan is Default

Hajj Loan is based on contract of *al-qord* with the combination to *al-ijarah* contract. Meaning that in this contract (*qord* basis), Islamic bank will not take some additional and will only take the principle amount from the customer. From this point they argue that hajj loan is permissible since no *riba*.

However, the problems appear when this hajj loan is default, means that the customer cannot pay the principle amount of loan at the certain time stated in the contract. As stated in the chapter 2 point 1 of hajj loan contract which is based on *qord*, the duration of contract is one (1) year. However, in the point 5 from same chapter the contract said that: "in the event of late payment of the hajj loan, the customer hereby promise and bind themselves to pay a late fee payment of hajj loan to the Islamic Bank of $0.00069 \times$ number

of outstanding fund of hajj loan (per day) for each day of delay, starting from the time such payment obligations due to the date of execution of repayment”

From this point of chapter in case of default, we will make simulation, as follows:

Table 2. Penalty when default

Days Late	Outstanding Balance	Total Penalty
30	20,000,000	41400
60	20,000,000	82800
90	20,000,000	124200
120	20,000,000	165600
150	20,000,000	207000
160	20,000,000	220800
180	20,000,000	248400

As our literature study, Prof sayyid taher said that penalty clauses or any other conditions leading to increase payment obligations of the debtors cannot be inserted in the contract leading to the creation of debt. His argument is based according to Al-Baqoroh 2: 279 that Alloh SWT directed that neither the creditors do zulm on the debtor nor be subjected to zulm by the latter. In addition, in Al-Baqoroh 2:280 He SWT directed the creditors to give grace periods to debtors in a tight position without additional charge.

In addition, there is another model to solve problems when the customer defaults. If the customer cannot pay off hajj loan at maturity, then the bank will give policy by allowing customers to make an extension of Hajj Loan payment for another year with the agreement of customers will pay *ujrah* which the amount is same with the amount have paid the in the previous year when the customer apply hajj loan at the first year. Moreover, the extension can also be done on a monthly basis if customers want it, with a monthly *ujroh* of Rp.125.000.

Therefore in the perspective of *Ijarah* contract which its *ujroh* was based on Loan (*qord*), we absolutely agree that hajj loan is impermissible. Although, Islamic Financial Institution use this instrument argue that they use *ijarah* contract. but we have some opinion base:

1. There are two different *aqd* objectives between *al-qord* and *al-ijarah*. *Qord* is *tabarruat* contract, while *ijarah* is *muawwadhat* contract. Combination of two contracts is just trick to get the profit from loan. Since the objective is different both of them. *Qard* combined contract status and *ijara* products are very vulnerable in a crash in the practice of usury in disguise. Whereas usury is denounced by religious, or at least still a doubtful thing that was ordered by Allah to be shunned in his saying (Imam Muslim);
 حَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ اللَّهِ بْنِ نُمَيْرٍ الْهَمْدَانِيُّ : حَدَّثَنَا أَبِي : حَدَّثَنَا زَكَرِيَاءُ عَنْ الشَّعْبِيِّ
 عَنِ النَّعْمَانِ بْنِ بَشِيرٍ ، قَالَ : سَمِعْتُهُ يَقُولُ سَمِعْتُ رَسُولَ اللَّهِ يَقُولُ : وَأَهْوَى النَّعْمَانُ بِإِصْبَعِيهِ
 إِلَى أذُنَيْهِ «إِنَّ الْخَلَالَ بَيْنَ وَإِنَّ الْخَرَامَ بَيْنَ وَبَيْنَهُمَا مَشْتَبِهَاتٌ لَا يَعْلَمُهُنَّ كَثِيرٌ مِنَ النَّاسِ ، فَمَنْ
 اتَّقَى الشُّبُهَاتِ اسْتَبْرَأَ لِدِينِهِ وَعِرْضِهِ ، وَمَنْ وَقَعَ فِي الشُّبُهَاتِ وَقَعَ فِي الْخَرَامِ
2. In addition, the combination between contract of *Qord* in Hajj Loan, and *Ijarah* is not permissible. Since the main objective of two contracts is Hajj Loans, and *Ijarah* contract only as a trick to justify the benefit from loan (Al-Qudamah: almughni, 432).

كل قرض شرط فيه أن يزيد فيه حرم بغير خلا

3. *Ijarah* contract that used in this contract is not permissible in shariah perspective since the value of *ujroh* was based on the loan value given to customer.
4. It is has a condition that create more additional charge when the debtor default. This reflects the nature of *riba an-nasih* that prohibited in shariah.
5. If you see a sense of obligation is a requirement *isthita'ah* of the hajj, the actual loan of people who use the services of the pilgrimage cannot be said to qualify, so he is not liable for Hajj. Precisely when he forced himself to owe to the Islamic Bank, it is possible he will trouble himself when God himself gives the load (*taklif*) to His servant according to the ability servant, Allah says:

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

6. Although it has benefits for some Muslims, Hajj Loan turned out to contain quite a bit of harm, whether viewed from the aspect of syar'i and social welfare aspects. So in these circumstances to prevent harm takes precedence over bringing benefits in accordance with the rules:

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7. If there is an argument that allowing yet another forbidden, then the safest way out is to follow and reassuring opinion against it. In the book of al-asybah wan-Nazhair mentions a rule of jurisprudence (as-suyuthi: 1983):

إذا اجتمع الحلال و الحرام غلب الحرام

IV. "HAJJ LOAN" PRODUCT AND MAQOSID SHARIAH: THE WAY FORWARD

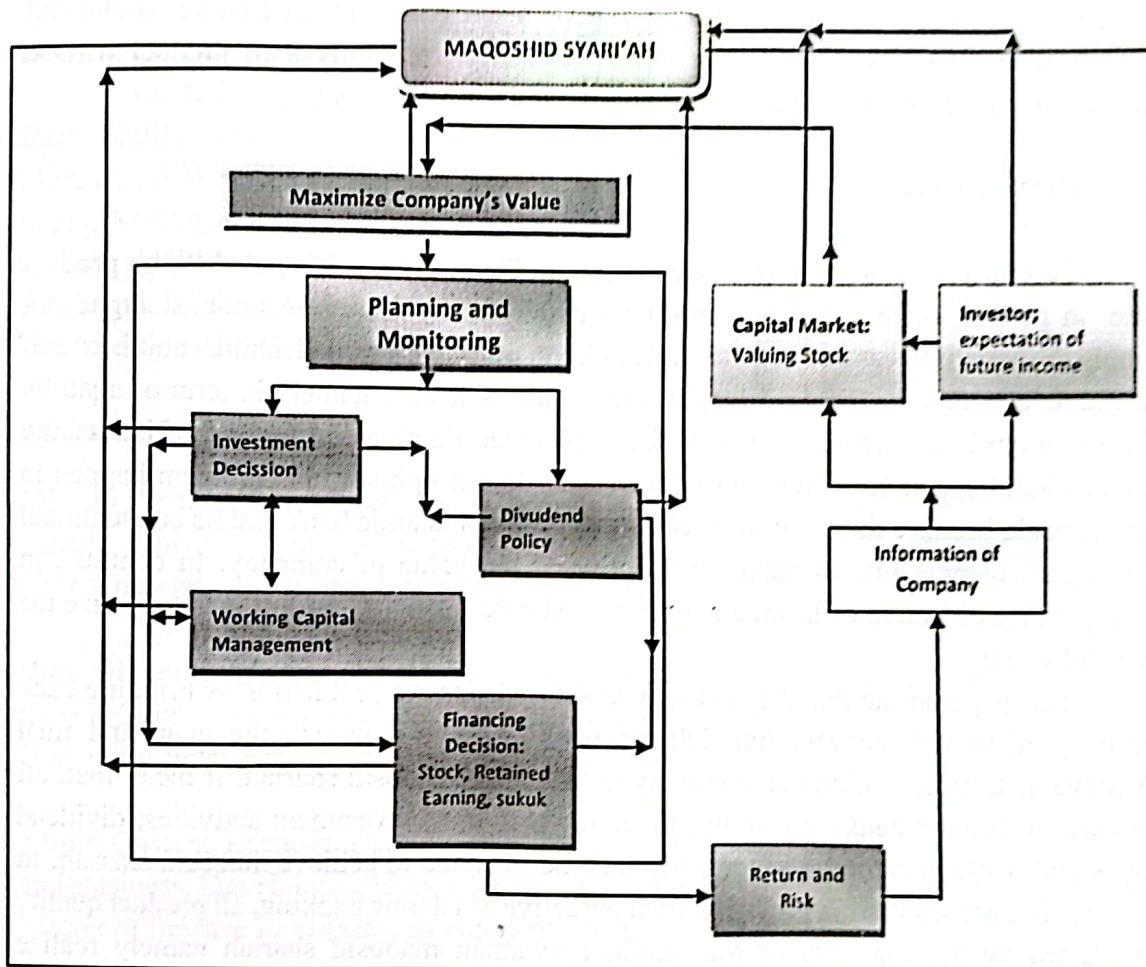
As the company, Islamic banking has many objective. Conventionally, there are some objective of company namely; maximize profit and maximize the wealth. Based on this objective, all activities conducted by company will be addressed to attain the maximum value of stockholder wealth. Even, in many cases, this objective tend to bring the company into materialistic motives. Thus, it will contradict with islamic worldview that well known as main pillars of islamic finance.

In Islamic worldviw, muslim has different poin of view pertaining to the concept of universe, concept of man and concept of live objective. In this perspective, universe is belong to Alloh, and created by alloh. Thus, the real ownership is to Alloh, while people is just get amanah from Alloh. According to Al Faruqi (1992 and 1995) the main objective of people is to achieve *salah*. As stated above, achieving *salah* is the definitive purpose of human life. In order to be truly successful, according to Islam, one must live a life according to the rules set by one's Creator, as specified in the *Shari'ah*. Thus, based on the Islamic worldview, all three, i.e., the concept of the universe, the nature of human beings and the purpose of human life leads to mankind following the *Shari'ah* (Ibrahim, 2012).

The main issue regarding the pragmatism product of Islamic finance is actually affected by the similar objective of Islamic bank with its conventional counterparts. Therefore, in case of Hajj loan product, all model used in this product is totally pure-like conventional product. Based on thus issue, the most important effort is by changing the view of Islamic banking on their objective.

As we can see from graph 2 above, the main and final objective of Islamic banking is to realize *maqosid syariah*. *Maqosidus syariah* are the objectives and the rationale of the Shariah. A comprehensive and careful examination of the Shariah's rulings entails an understanding that the Shariah aims at protecting and preserving *maslahah* in all aspects and segments of life. Many Shariah texts state clearly the reasoning behind certain Shariah rulings, suggesting that every ruling in Shariah comes with a purpose, namely, to benefit the mukallaf. For example, when the Qur'an prescribes *qishos* (retaliation), it speaks of the rationale of it, which applies retaliation to prevent further killing "There is life for you in *qishos*".

Graph 2. Objective of Islamic Banking



According to Al-Ghazzali (1937) and Shatibi (1388), the objective of the Shariah is to promote the well-being of all mankind, which lies in safeguarding their faith (*din*), their human self (*nafs*), their intellect (*aql*), their posterity (*nasl*), and their wealth (*maal*). Whatever ensures the safeguard of these five, serve public interest and is desirable. Therefore, the *maqosid assyariah* is created, which has the *siyasaah syariah* that is very valuable in promoting the objectives of syariah.

Maximizing the value of company (islamic bank) is acceptable as long as not contradict with *maqosid syariah*. In addition, since the main objective is to realize *maqosid syariah*, thus all activities in Islamic banking namely; Investment activities, Financing

activities; dividend policy; working capital management etc. will follow the shariah rule and addressed to maximize the *maqosid shariah*.

Moreover, in term of information, if islamic bank use maqosid syariah as their paradigm, all information will be shared to all stakeholder. In other word, there is no asymmetric information in Islamic banking, meaning all stakeholder will know all activities conducted by the company.

In current practice, the use of hajj loan product in which pure-like conventional product is due to the lost of maqosid shariah in Islamic banking. The paradigm of islamic banking is merely to maximize the value of company. Therefore, in term of product model, ujroh fee, and default case, all model used is like conventional and contradict to shariah rule. To solve this problem, *maqosid shariah* must be bringing back by Islamic scholar and internalized by Bankers. Therefore, all their activities, especially their product will be intended to realize maqosid shariah, and not maximize profit per se.

V. CONCLUSION

Currently, Islamic banking face crucial problem, especially related to the product issue. In practice, there are many product whereby many islamic economist argue not comply to shariah. In case of Indonesia, Hajj Loan offered by some Islamic bank is one of the example of this matter. Hajj loan product with its feature namely in term of aqad by combining qord and ijarah, in term of fee/ujroh determination and in term of its penalty when default happen are contradict with shariah. In our opinion, this problem happen in Islamic bank, because there are same objective between Islamic bank and its conventional counterpart, namely just to maximize profit and the value of company. In contrast, in philosophy, the objective of Islamic banking as Islamic financial institution is to realize the maqosid shariah.

This paper argue that the best way to solve the above problem is by bringing back the maqosid shariah concept into Islamic banking. In this model, the main and final objective of Islamic banking as company is to realize maqosid shariah. It mean that, all activities of Islamic banking namely; financing activities, investment activities; dividend policy and working capital management must be intended to achieve maqosid shariah. In addition, if maqosid shariah is used as final objective of Islamic banking, all product quality will tested by the capability of this product to attain maqosid shariah namely realize *maslahah*, and *hifz al-diin*, *hifd al-aql*, *hifz al-nasl*, *hifz al-nafs* and *hifz al-maal*. In current practice, this paper recommend the need of *maqosid* index applied in Islamic banking, regulated by Financial Service Authority (OJK) is very important.

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