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The Urgency of the Codification of Islamic Law on Contracts in Indonesian Banking Business to Anticipate the Development of Islamic Economy and Globalization Era

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Abstract: As the Movement of Islamic Economy (GRES) was launched since the year 2013 by the President of the Republic of Indonesia, the sharia economy is rapidly accelerated. However, the human resource who can support the system is not adequate enough due to the lack of education, especially in legal base on Islamic contract law. This paper is intended to contribute ideas towards the codification of Islamic Law on Contracts and Obligations, as an effort to educate and to improve the certainty and legal protection for the Islamic banking business doers in Indonesia. The certainty and legal protection are also needed by the whole society to anticipate the development of Islamic economy in the globalization era. The point is to give an overview of the concepts and problems solving in Islamic banking business dispute resolution. This paper also shows the point of view of the policy holders about the urgency to codify the Islamic contract law to be enacted into positive law in Indonesia. By using normative and comparative methods of research, this paper led to the conclusion.

Keywords: codification, Islamic law, Islamic contract law, globalization.

I. INTRODUCTION

Indonesia as a country which has majority population of Muslims, needs the involvement of Muslims people on its national development.[1] Starting by this decade, Indonesia will enter a cycle of so-called "demographic bonus", a condition when the productive population (aged 15-64 years) dominate the national population.[2] Indonesia has performed remarkably well during the past decade, emerging as a vibrant democracy, a strong economy, and a serious player on the international stage. Within Asia, Indonesia is the fifth most important economy behind China, Japan, India, and South Korea, and an established member of the G-20 leading economies. Indonesia's economy has enormously promising. Already the 16th-largest economy in the world, this dynamic archipelago has the potential to be the seventh biggest

by 2030.[3] This condition will be a challenge for the muslims will they be a productive people in anticipating the new era of Globalization? In this era, money, technology and raw materials move ever more swiftly across national borders. Along with products and finances, ideas and cultures circulate more freely. As a result, laws, economies, and social movements are forming at the international level. Many politicians, academics, and journalists treat these trends as both inevitable and should be anticipated. Otherwise the majority of muslims in Indonesia only become the market for other countries products in dealings with the growth on that decades.

On the other side, the growth of Islamic economics activities in international business relations, nowadays many banks, insuranace and other financial institutions in Indonesia following the trend of using islamic system which is called as "Shariah based principles". In the 17th of November 2013, the Movement of Islamic Economics (GRES) was launched by The President of Republic of Indonesia. The President said that the Islamic economic system must be strengthened in Indonesia against the current global economic turmoil, in which Islamic banking had shown the survived. However the basic strength of Islamic Economic is Sharia the real system of economy which avoid the action of speculators that often cause turmoil in the world financial system. Further more if Indonesia continues to work toward a fair economic system by using shariah principles of contracts and ethics, then the welfare of the people will exist.[4]

However, in fact is that the human resource who can support the system is not available enought due to the lack of education, especially in legal base on Islamic contract law. Eventhough Indonesia has Law Compilation of Islamic Economics (Kompilasi Hukum Ekonomi Syariah or KHES) issued by Mahkamah Agung (Indonesian Supreme Court), this regulation can only be accessible by judges of Religious Courts for the decision making. Other dispute settlements or decision makers does not obliged to use KHES for their verdicts. The parties on sharia cotracts nowadays only use the fatwas of the National Sharia Boards of the Majelis Ulama Indonesia (Indonesian Ulama Council) for guidance of contract drafting which does not have strength for dispute setlements, since it does not obligatory to use fatwa for dispute setlements. So when there is dispute, especially in banking business, the parties will have choises either to go to Religoius Courts or to Arbitrations according to the contract stipulation. Whenever they go to the court since there is lack of principles for the law of obligations some how judge may use the principles come from the Burgerlijk Wet Boek (BW) which is applied in this country through concordance rules. In this condition, it is difficult to use the Islamic contract law as the basis while applying secular legal basis. So this is the weakness of this regulation, and the suggestion that Indonesia still need Codification of Islamic law on contract. This paper is intended to contribute ideas towards the codification of Islamic Contract Law in an effort to improve the certainty and legal protection for the whole of society in anticipation of the development of Islamic economics in the Era of Globalization.

II. THE HISTORY OF ISLAMIC CONTRACT LAW CODIFICATION IN INDONESIA

The history of the codification of Islamic law has passed a long time since its first proposal, especially in the field of muamalah (Islamic civil), mainly in the contract law. Since the formation of contract law in the fiqh of muamalah around the 10th to 11th Hijriyah, the sharia contract law is getting more developed.[5] Today, with the development of sharia economy in Indonesia, the codification of Islamic contract law is

needed to avoid a--ny dispute between the doers of sharia economy who are not only muslims, but also the non-muslims who bind themselves in sharia contracts as they are the customers of Islamic financial institutions in Indonesia. The importance of this thought of codification is caused by the existed dualism of legal sources in dispute resolution of sharia economy in Indonesia's courts and arbitral institutions which currently refer to different legal provisions, between the Civil Code and the Compilation of Islamic Economy Law. The Compilation of Islamic Economy Law itself has passed a quite long stages until its formation. In the early drafting of national contract law, sharia law is excluded as one of the sources of reference.[6] This compilation itself was insufficient, so that this Compilation of Economc Law was corroborated with the Supreme Court Regulation No. 2 of 2008, but this is also insufficient. Partially the content of Islamic contract law is already existed in some laws which specifically regulate in some particular economic sectors, such as Law No. 21 of 2008 on Sharia State Securities and Law No. 21 of 2008 on Sharia Banking, but these two laws technically doesn't relate with sharia transaction and only mention a few forms of contracts used in both fields of economy activity.

Indeed, it will take a lot of effort to construct appropriate codification of Islamic contract law. This effort began since 1983 and not finished yet until now. The former Minister of Justice of the Republic of Indonesia, Mr. Ali Said, SH, gave this speech in the workshop of national contract at BPHN:

> We have agreed and determined to prioritize the construction of the drafting of contract law; not only because it is neutral, but it is because the importance of the meaning of engagement in the development of contract law; and also because the acceleration of national and international contracts in the name of the upcoming economy development. [7]

He also emphasized that the work of constructing law codification is not an easy one, especially in the field of civil law, commercial law and criminal law; considering the changes that always happen in the society that demand new conceptions of law which oftenly different with the conception known in our current legal culture. That's why this kind of construction must be done carefully by considering the changes happen in the society and the implication on public perception about the existing values and norms.[8]

III. CONCEPT OF CONTRACT IN ISLAMIC LAW

Contract in Islamic law is known as *al-Aqd*. Etymologically, *'aqd* or contract is used for a lot of meaning, which is fully back to the form of bond or linking of two things. Bond itself could mean concrete, in its true meaning, such as said in Arabic "I tied the rope" which means I bind and connect the two ends of the rope. That bond itself could also mean abstract meaning, such as bond of selling and buying. It could also used for things that required by a person to himself, such as a specific job in the future.[9] According to the terms, 'aqd or contract is a bond of self desire with something else in way that elicits a certain commitment implied.[10] Buying and selling is a contract, Everything that required people to himself, such as nadzar, self promise etc is also 'aqd or contract.[11]

The word 'aqd in Arabic has the same meaning with the word contract in English. The plural form of *'aqd* is *'uqud*. The literal meaning of *'aqd* is to bind, knot, to merge, to lock, to hold, to contract. Contract is the merge of proposal (offer) or *ijab* and *qabul* (acceptance).When there is a linking between offer and acceptance, contract is formulated.

Contact in Islamic law has various kinds when it is viewed from different angles. According to the validation, *'aqd* consists of:

1. Valid contract. This contract prescribe fundamentally and applicatively since this contract meet the pillars and application simultaneously; so that the valid consequences applies, such as buying and selling, renting and leasing etc.
2. Invalid contract or illegal contract. Valid consequences don't apply to this contract because this kind of contract if forbidden by sharia, such as the contract made by madman or immature child and venture contract on illicit goods such as carcass, blood, pig meat etc, or perfunctory contract (tis contract is not forbidden by sharia but it is not applicative in the contract execution) such as contract made by a person under duress or contract made for unknown goods [12]

Hanafiyah distinguish between invalid contract and perfunctory contract. They called the invalid one as vanity contract (bathil)[13], and the perfunctory contract as broken contract (*fasad*).[14] Perfunctory contract might caused by the goods transfer that cause any loss/disadvantage, *gharar*, perfuntory requirements and riba (interest).

Based on the distiction, there are some practical consequences of the vanity contract, such as:

1. The transfer of ownership in the broken contract with the submission of goods with the willing of the seller. The buyer may operate the goods freely with the same worth of compensation, not with the pronouncation of certain price.
2. The broken contract of buying and selling is still able to be corrected as long as the damage is not caused by the core of the contract, such as the kind of the goods and compensation of the goods.

The parsons besides Hanafiyah didn't distinguish between vanity contract and perfunctory contract. They said that those two have the same essence which is invalid contract. In the case the invalidity relate to forbidden objects, the contract is void by law and considered not exist. In the case the invalidity relate to the fulfillment of pillars and requirements, the cancellation of that contract may be requested.[15] In the Islamic contract law, there are 4 requirements of contract validity:

1. *In'iqod* (the requirements of contract validity).

There are general and special requirements of *in'iqod*. The general requirements must always available in the contract doers, contract objects and *shighah 'aqd*, contract made on something not forbidden, and contract on something useful. The special requirements are available in certain contract, such as requirement of at least 2 witnesses in a marriage contract.

2. *Shihah* (the legitimate requirements of contract)

These requirements are needed to make the contract take effect, such as in the trading contract which must clean from any faulty.

3. *Nafadz* (the requirements for contract realization)

These requirements consist of 2. They are ownership (the goods own by the doer and he has the right to use them) and territory.

4. *Lazim* requirements

Lazim means that contract must be implemented if there is no faulty.[16]

The end of contract in Islamis law caused by the fulfillment of contract purposes *(tahqiq gharadh al-'aqd*), termination of contract (*fasakh*), terminated by itself (*infisakh*), death and no permission obtained from the authority party in *mauquf* contract.[17]

1. The Fulfillment of Contract Purposes

A contract is over at the moment of the contract purposes fulfilled. In the contract of buying and selling, the contract is over when the goods has overhanded to the buyer and the price of the goods has owned by the seller. In the contract of mortgage and insurance *(kafalah)*, the contract is over when the debt has been paid.

2. Termination of Contract (*fasakh*)

Termination of contract might be caused by:

a) Forbidden things in sharia, such as a damage in the contract (*fasad al-'aqdi*). For example, the sale of unknown goods (*jahalah*) and temporary goods (*mu'aqqat*).

b) The existence of *khiyar*, including *khiyar rukyat*, *khiyar 'aib*, *khiyar syarat,* or *khiyar majelis*.

c) There is regret of one party (*iqalah*). One of the parties in the contract make a cancellation since he regret the contract he just made. This is based on hadith narrated by Baihaqi from Abi Hurairah that Rasulullah preached that anyone who grant the cancellation request made by a man who regret the sale contract he just made, will be granted by Allah with loss of difficulties in the upcoming Judgment Day (*man aqala naadiman bai'atahu aqalallahu 'atsratuhu yaumal qiyamah*).

d) There is unfulfilled requirement done by the parties in the contract (*li'adami tanfidz*).

e) The end of contract duration, such as in the renting and leasing contract with certain duration and could not be extended.

3. The Death of the Party

The death of one of the parties in the contract cause the termination of the contract, such as contract of custody, representation etc.

4. No Permission

In *mauquf* contract (contract which its validity depend on other party, such as *bai' fudhuli* contract and contract made by immature kids), the contract could be terminated if no permission obtained from the authority party.

IV. ISLAMIC CONTRACT LAW IN INDONESIA'S LAW POLICY

Throughout the history of Indonesia's law policy, Islamic law is given with space and position adjusted with the interest of the authorities. During the period of Dutch colonial, Indonesian people is free to implement religious laws and proceed in religious courts, since the Dutch thought that it would be unpleasant and might lead to resistance of Dutch colonial if they compel Indonesian people to use the

Dutch laws. Base on this thought, article 75 of *Regering Reglement* then became the basic of Dutch governed in Indonesia, by instructed the courts to use religious laws, institutions and habits as long as it didn't contradict the principle of fairness and general justice. Article 78 (2) RR drove the Dutch government to establish Religious Court (*Priesterrad*) in Java and Madura which realized in the year 1882 with the issuance of D. 1882 No. 152.[18] After the independence (proclamation) of Indonesia, the position of Islamic law in Indonesia constitution divided into 2 periods. They are the acceptance period of Islamic law as a persuasive source and the acceptance period of Islamic law as an authoritative. Persuasive source is the source that must be sure and accepted by anyone, and authoritative source is the source that has powers (authority). [19]

Indonesia's law politic that based on Pancasila require the development of religious life and religious law in the life of national law. On the basis of the theory of Friederich Julius Stahl and Hazairin, Tahir Azhary put forward his theory about Concentric Circle that shows the close relationship between religion, law, and state.[20] This theory could be used to see Indonesia as a country based on law that aspire the law of Pancasila in the future, so the state will protect the religions and the religion believers, even try to incorporate religious teachings and laws into the life of the nation and state.

Article II Transitional Regulation of 1945 Constitution shows that the current national law system derived from several law systems. They are (1) Islamic law, (2) colonial law products, (3) traditional law, and (4) laws constructed by national legislation.

A. Gani Abdullah said that the chosen system of law construction is unification system rather than differentiation system. This is because ethnic diversity in the society which cause diversities of law, religious belief (subjugation of lawin accordance with religion), and segments of society in Indonesia; then applied the legal norms applicable to the entire society; but system of differentiation system is still used for national laws because there is religious plurality.[21] Some of the laws made by the differentiation system are:

    1. Law No. 3 of 2006 on the Change of Law No. 7 of 1989 on Religious Court, that made for muslims.
    2. Law No. 21 of 2008 on Sharia Banking that regulate about the banking which refer to the principle of Islamic economy.
    3. Law No. 19 of 2008 on Sharia State Securities.

Syamsul Anwar explained in his book about the development of sharia contract law in Indonesia since the period of Dutch colonialism until the period of Indonesia independence. From the explanation, we could see that Islamic law, especially the contract law has historically and sociologically prevailed in Indonesia for a long time. Since the last decade, Islamic contract law got a new impetus to develop due to the birth of sharia financial and business intitutions, especially the Islamic banks. Some forms of 'aqd has been formalized in the form of Regulation of Bank Indonesia.[22]

Indonesia's national system of law has given the guarantee of freedom for everyone to determine the law that could applied to him, especially if it is related to civil activity. This freedom include the freedom in determining the materials agreed by the parties in any legal linking, ways of implementation, and dispute resolutions. Hence there is no obstacle at all for muslims if he wants to implement sharia law in any civil linking among them.[23]

Broadly speaking, the economic relation based on Islamic law is determined by the contract relation that consists of 5 concepts of contract. With the source of these 5 basic concepts, found the types of contact that could be used in the operational business of bank and non-bank financial institutions. These 5 concepts consist of:

1. Principle of saving
2. Principle of the distribution of revenue
3. Principle of buying and selling
4. Principle of leasing
5. Principle of service.

The legal basic of the existing sharia contract nowadays can be found in various types of regulations, such as laws, Regulation of Bank Indonesia, the decree of DSN, dan the regulations of Bapepam & LK; that enable the Islamic financial institutions to offer more varied products to public, compared to conventional financial institutions.

The current law that regulate about sharia contract law are the Law No. 21 of 2008 on Sharia Banking and the Law No. 19 of 2008 on Sharia State Securities. With the existence of Law on Sharia Banking, then the operationalized product of sharia contract is getting more varied. Here is an illustration of the operationalized sharia products and contracts in sharia banking.[24]

No	*Product/Contract Implementation*	*Revenue Received by Customers*	*Distribution of Funds*
1	Giro	Al Wadi'ah	a. Funds security b. Sharia-based wealth allocation c. Bonus
2	Saving	Al Wadi'ah	a. Funds security b. Sharia-based wealth allocation c. Distribution of revenue that can be calculated daily
3	Documents deposit	Al Wadi'ah	Documents security (safety box)
4	Depositor of zakat, infaq, and shadaqah (ZIS)	Al Mudharabah	a. Funds security b. Sharia-based wealth allocation c. Distribution of revenue that can be calculated daily
5	Acceptance of financing	Al Wakalah	a. Funds security b. Sharia-based wealth allocation c. Utilization report of ZIS funds
6	Musyarakah	Al-Musyarakah	a. Funds/working capital, goods capital b. Distribution of revenue c. Management participation
7	Buyer of finished goods	Al Murabahah	Goods, capital, materials, equipments
8	Buyer with deferral payment (deferred sale)	Al Bai' Bitsamanajil	The easiness of installment payment

9	Buyer with deferall acceptance	Bai'u salam	Goods, capital, materials, equipments
10	Buyer with order	Bai'u isti'na	Goods, capital, materials, equipments
11	Contract of periodic buying	Bai'u istijar	Finished goods, materials, equipments
12	Renting	Al Ijarah	a. Funds b. Distribution of revenue
13	Working capital	Al Murabahah	Funds for project work
14	Leasing that will endwith ownership	Al Bai'u al Takjiri	The utilization of goods that will end with the transfer of ownership from the lessor to the lessee
15	Buying and selling of foreign currency	Al Sarf	Currency
16	The insured	Al Kafalah/ AlDhamanah	Bankguarantee
17	Receiver of mortgage financing	Al Rahn	Funds
18	Diversion of debt(factoring)	Al Hiwalah	Diversion of debt
19	Funds delivery, transfer	Al Wakalah	Service
20	Letter of credit	Al Wakalah	Guarantee of payment to the funds delivery, deposit-based
21	Letter of credit	Al Musyarakah	Guarantee of payment to the funds delivery, based on musyarakah
22	Letter of credit	Al Murabahah	Guarantee of payment to the funds delivery, based on murabahah
23	The need of bounty financing credit	Al Qardhul hasan	Funds, management guidance

The regulation of sharia contract law in Regulation of Bank Indonesia has started since 2004. As the further explanation of Regulation of Bank Indonesia, the Central Bank also issue Form Letter of Bank Indonesia (SEBI). Since 2004, the Central Bank has issued about 88 Regulation of Bank Indonesia and SEBI that related to sharia banking.[25] Usually the material in Regulation of Bank Indonesia is taken from the materials in the decree of DSN, for example, Regulation of Bank Indonesia No. 7/46/PBI/ 2005 about the contract of funds accumulation and distribution for the bank with sharia-based operational. Meanwhile the DSN itself has issued 14 decrees that related to sharia capital market since the year 2001. The latest one is Decree No. 80/DSN-MUI/II/2011 on the Implementation of Sharia Principles in the Mechanism of Equity Stocks Trading in Regular Market of the Stock Exchange.

There are only 3 Regulation of Bapepam & LK that regulate sharia securities since the year 2006. They are Regulation of Bapepam & LK No. IX.A.13 on Issuance of Sharia Stocks, No. IX.A.14 on Contracts Used in the Issuance of Sharia Stocks, and No. II.K.1 on the List Criteria and Issuance of the Sharia Stocks. In the Decision of the Head of Bapepam & LK, Kep-181/BI/2009 on the Issuance of Sharia Stocks – Rule No. Ix.A.13, explained the definition of sharia contract. Sharia contract is a contract that corresponding with sharia principles in the Capital Market as regulated in the Regulation of Bapepam & LK No. IX.A.14 and/or other contracts which not contrary with sharia principles in the Capital Market. Based on the Decision of the Head of Bapepam & LK No. Kep.-430/BL/2012 about the Regulation

No. IX.A.14, there are 6 contracts used in the issuance of sharia stocks in the Capital Market. They are *ijarah, istishna, kafalah, mudharabah (qiradh), musyarakah,* and *wakalah.*

Lastly, in the Regulation made by the Authority of Financial Services (OJK). This OJK is an independent agency which has the functions, duties, and authority of regulating, monitoring, examining, and investigating, based on the Law No. 21 of 2011. Related to sharia law, OJK will issue any regulation about interconnection of sharia financial institution, so that hopefully there will be 35%-40% asset gain of the sharia financial institutions in the next year. In a bid to enhance monitoring on Indonesia's financial services sector, to deepen financial markets, and to widen people's access to financial services, this year the Financial Services Authority (OJK) has introduced 20 new rules ranging from corporate governance to microfinance. The institution also revised Islamic banking rules involving asset quality and capital adequacy in an effort to increase the role of Islamic banking (sharia banking) in Indonesia's financial system. Authorities target that Islamic banks hold more than 15 percent of the market by 2023.

V. THE URGENCY OF THE CODIFICATION OF ISLAMIC LAW ON CONTRACT AND OBLIGATION IN INDONESIAN BANKING BUSINESS

1. The Relevance of A "*Kaffah*" Islamic Banks with Nation-Building Efforts

Islamic goal to create social welfare is supposed to be the soul and spirit to the Islamic banking industry as the institution itself to attribute a sharia. Thus, Islamic banks are not banks just concerned with the formal-legal aspects that are formulated with the ban "maghrib"-which is an acronym of *maysir* (gambling), *gharar* (speculation) and *riba* (usury). But more than that, Islamic banks are the financial industry too *shibghah* the spirit of social welfare as the embodiment of universal human values (*habl minannâs*) in the context of worship and devotion to Him (*habl minallâh*).[26]

If we see the principle in Islamic banking system which avoiding the collection of interest on which in the conventional bank practice as the core of their business, simply because Islamic law prohibits the payment and collection of interest, which also commonly called as riba (usury). The main argument against interest is that money is not used as a commodity to make profit via providing lending and borrowing facilities. Money is considered as medium of exchange. However, profit can be earned by entering into contracts of exchange such as dealing in goods and services or via an investment such as contracts of partnership. With this system Islamic banking can be operated in the concept of *murabaha* (sale contract), *mudharaba* (partnership) and *ijarah* (leasing) principles.

Thus, Islamic banks avoid speculation (*gharar*) which causes the bubble economy, so it has a tendency to deliver financing to the real sector. This has contributed positively to the increase in Gross Domestic Product (GDP) and social welfare in the country.

Another thing that was carried by Islamic banks in an effort to improve the social welfare is concerned about the Small and Medium Economy (SME) sector which is the bottom of the pyramid in the economic sectors in Indonesia. Toughness of the SME sector in the face of changing economic conditions has been proven. The sector continued to grow during the crisis. From year to year, the number of employers who engage in this sector continue to increase so that SMEs and the main drivers of the Indonesian economy.

As a contribution to the development welfare of the economy, we can see the profile of Islamic banking system in compare to the conventional banking system as follows.

On the mobilization of funds in Islamic banking system, shown in the form of togetherness for the results obtained from the banking business, either at the time of the economy and the economy is sluggish passionate, automatic savings account holders and deposits mudaraba, mudaraba follow the ups and downs along with the ups and downs of revenue for banks operating results, because the situation economy prevailing at that time. On the other hand, the holders of savings accounts and fixed deposit accounts at conventional banking system should be giventhe agreedrate, although banksare actually experiencing difficulties.

On the distribution side in Islamic banking shown in the form of community between banks and customers to obtain the results of the business,which of coursecould notfree himself from the influence ofthe national economy. Customer financing recipient, and the recipient of*Musharaka* financing is not subject to any fixed charges, except share proceeds in accordance with the agreement that has been agreed upon. Of course, only the results that the execution should bein accordance with the results actually obtained. Thus, the amount ofrevenue thatthe bank give, will be small at the time of lethargic, and great at passionate times. Meanwhile, clients receiving a conventional bank loan to pay interest on the loan is fixed and on time despite its lethargic. Delays in paying interest on the loan at the time set will be an additional burden, since interest on loans that are not paid will creates interest (compound interest).

Theother thing that is obviously as the diference between islamic banking than the conventional bank is the existance of *Qard al Hassan* product. This product prepare business for its customers using the charity fund that is collected by the bank during the day by day transactions with its customers. In case the bank got permition by the government, the bank also can accept cash waqf to be managet. In Indonesia, this product helpful to solve the unpayed debt problems caused by force major or catastrophy, to create continuation of payment by the customer. In malaysia, Qardhul used as a lending by the country's citizens totheir Government.[27] In Iran, *Qard al- Hassan* product used in a form of bank grant, for the purpose of; 1) manufacturing and service companies (other than commercial and mining) whose activity create jobs and meets the essential needs of society; 2) those directly engaged in agriculture and animal husbandry; and 3) to meet the needs of people in case of: marriage expenses, dowry preparation, treatment, housing repairs, scholarship, help to build houses in the country side.[28]

From what has explained above we can see the relevance of Islamic Banking for the development of this country, if we understand the basic difference between Islamic Bank and conventional bank is on the contract used as the foundation of the activities in both sides. Islamic banks which avoiding riba system in their business activities use other alternative contracts than loan agreement based on debt. Here the creativitivity of muslims in making inventions of the new contracts based on the "*Kaffah" (in totality)* in folowing the rules of Islam in banking business will resulted in the prosperius to the country in the long run.

2. The Relevance of Codification of Islamic Law on Contract and Obligations Needed in Banking Business

Based on the feedback obtained by the author from the interviews with several informants, we see an indication that the policy holders[29] (i.e. Badan Pembinaan Hukum Nasional/BPHN (National Law

Development Agency) as the planner of National Contract Law in Indonesia and Dewan Syariah Nasional/ DSN (National Sharia Board) as the planner of Islamic contract law) seem have less interest to construct the Islamic contract law into the form of a formal codification to be enacted.

In the academic draft of law made by BPHN, it was only the national contract being discussed, since changing the entire Book III of Civil Code will take a long time,[30] meanwhile there is an urgency in 2015, that is the existence of ASEAN *Economy Community* (AEC). In that year, contract law would be an important issue since the global trade would be more advance., meanwhile our law products, especially the contract law, are still outdated. For example, the law about e-commerce.

In the interview, our informant also explained that the academic draft of national contract law is not finished yet and still being discussed.

In the draft of national contract law would eventually embrace several legal principles, including (1) traditional law, which is taken from Pancasila. This is because Pancasila is the crystallization of traditional laws, so it is becoming the main source and foundation of this law in the future. And then (2) the principles contained in the book of civil code since this book is still valid and also the ideas of this law are a lot taken from the book of civil code. And then (3) the Islamic principles, although until now there is no party in the team who is expert in the field of Islamic contract. And then (4) international law, especially in international trade law. This draft of national contract law is embraced many principles of common law because the current international trade law also embraced many principles of common law. Nevertheless, this draft of national contract law will also embrace some principles of civil law.

In this draft of national contract law, the word contract refers to trade contract. In this draft will also regulate about the requirements of valid contract, performance, formal matters in contract, the end of contract, memorandum of understanding, pre contract, e-commerce, and the things used in current international trade law which not existed yet in the book of civil code. This draft of law would give more regulation about the formation of contract, the operating time of contract, default, interest, penalties, and abolishment of contract.

This draft would only regulate the general provisions *(lex generalis)* of contract materials, so it could be applied to all kind of trade contract. The issue of dispute resolution itself will not be regulated in this draft since it is not a material issue, but formal issue. Besides the sharia principles like interest and *gharar* that forbidden in Islam would use another specialized law which used the principles of Islamic contract law.

On the other hand, National Sharia Board (DSN) has no plan to construct a draft of law of Islamic contract. Although there has been suggestion to construct the Law on Applied Act in Religious Court in Contract Field, in many seminars, workshops and research conducted by Islamic university in cooperation with DSN; but in fact the feedback from those activities are not used to construct any draft of law, but only as a part of the work program of DSN in the science field. Currently, the Compilation of Islamic Economy Law is considered enough to fulfill the need of regulation in the field of contract law.[31]

From the explanation so far, we can conclude that the codification of Islamic contract law is not considered urgent yet, although the Compilation of Islamic Economy Law and DSN are not parts of the sort order of regulations in Indonesia, so they have no force of law when law is violated.

Similarly, in the discussion by the drafting team of the academic draft of national contract law said that the principles in the Islamic law are not so much different from the contract principles of common law and civil law, so that they are not considered to be contrary with the Islamic principles. But we have known that this general character in the draft of national contract law will regulate about the imposition load of interest and another regulations that might be contrary with the sharia principles. If this contrary happen in the future, there will be constraints in the practical area, in addition if we also remind that in the Law on Sharia Banking No. 21 of 2008, article 55 (b) which enable the parties to use the choice of law in the contract they agreed together. The explanation of this article enable the parties in certain contracts to choose another court besides the religious court for their dispute resolution, such as sharia arbitral in BAMUI or national arbitral in BANI or just district court. Although the explanation of that article has been cancelled by the decision of Contitutional Court this year, the decision itself doesn't give any effect to the article, so that the article remain valid since only the explanation of the article being cancelled. Nevertheless with that cancellation of the article explanation, nowadays the dispute resolution of sharia economy become the absolute competence of Religious Courts, to accept, process, and decide any cases of sharia banking.

From the facts above, we can see there are challenges for the judges of the Religious Courts to be more vigilant and deepen their knowledge in the field of sharia contract law due to the complexity of the cases of sharia economy law which under their authority, that covers 11 fields including banking, insurance, capital market, sharia business that always evolve. If there is no detailed guidance, then the judges of religious courts that used to be family court, now must be more assertive in deciding the contractditoir cases of the parties which relate to billions money and will also effect to the lives of many people.

On the other hand, the doers of sharia business need detauiled guidances in tha making of sharia transactional documents that corresponding with the provisions of Islamic contract law. So the urgency of the codification of Islamic contract law is not only needed in case any dispute happen and bring to the court, but also to anticipate the contracts made by the parties will not get cancelled by the decision of religious court since their contraries with sharia, so lets call it as a anticipation to protect benefit (*mashlahah*) and to save individual property of the doers of sharia business which the amount of them are greater than the possibility of happening cases.

Currently there are already a lot of cases of disputes brought to the court due to the deviation of the provisions of sharia contract in the making of the contract. Most of these cases happened in the field of banking. We can take the example cases that have been upheld in the Supreme Court, even higher until the Reconsideration (PK) level. For example, Decision of Reconsideration No. 0048 PK/AG/2009 about the dispute of take-over contract between BRI and Sharia Bukopin (Bukit Tinggi branch). Both parties agreed to make a murabahah contract (which has buying and selling as the basic contract) but in fact there was no traded goods since the contract is take-over contract (which is essentially a transfer of receivables (*hiwalah*). The case get worse because of the uncertainty of the laws. In the Law No. 3 of 2006 on the Change of the Law No. 7 of 1989 on Religious Courts, the dispute of sharia economy is an absolute competence of Religious Court. In the first level of Religious Court, the murabahah contract was being cancelled with the issuance of Decision of Bukit Tinggi Religious Court No. 284/Pdt.G/2006/PA.Bkt, since the contract didn't meet the basic pillars of murabahah because there was no goods traded between the parties. But at the time, Religious Court didn't have the competence to decide on

sharia economy cases yet, therefore at the second level in the Religious High Court, the decision of previous court was cancelled with the issuance of the Decision of Padang Religious High Court No. 32 and No. 33/Pdt.G2007/PTA/Pdg. This issuance was also considering the fact that this cases has been resolved through the District Court with Decision No. 08/PDT.BPH/2004/PN.BT with the method of mediation as evidenced by Certificate of Peace No. 02/PDT.EKS/2004/PN.BT and District Court Act No. 03/DT.EKS/2006/PN.BT that justified the Bank to conduct an auction of the customer's asset through a state auction in order to cover the growing interest imposition which is not transparant. And then the customer was defeated again in the appeal level in Supreme Court with the issuance of the Decision of Supreme Court No. 292/K/AG/2008 which strenghtened the Decision of Padang Religious High Court, only with consideration that court procedural not concerned with the core of the contract. Up untill the Reconsideration level, the customer was defeated.

If at that time, there has been a law with the force of law as a transaction guidance using the appropriate sharia contract, then there will be different court verdicts.

Hence one day, the codification of Islamic contract law will be an urgent matter, as it will be the guidance for the parties in doing their transactions and avoiding any loss, so that it will be the responsibility of the State to prepare the forming, although the political will of the policy holders nowadays is still questionable.

VI. CONCLUSION

From the above explanations about the thought toward the appropriate codification of Islamic contract law to anticipate the development of sharia economy in the globalization era, we see that the matter of codification is an urgent matter to do. This is because:

a) The effort to form the Law on National Conrtract Law has been proposed a long time ago, including the portion of Islamic contract law which should be contained in it, to make sure and protect the rights of the muslims as the majority in Indonesia, especially as the form of religious obedience and activity that has been guaranteed in the Consitution article 29. Even so the policy holders of the law making (legislator) in BPHN Ministry of Justice and Human Rights, DSN-MUI, nor BAPPENAS still have no desire to make that kind of codification which could give law enforcement for the sharia transactions that seems to be more accelerated and developed, seen from the trends where sharia getting more using in Indonesia.

b) The position of Islamic Contract Law in the sort order of Indonesia Regulations is still straggle in many forms of regulations based on any level of practical need in several certain economy fields. About the validity of a contract in the view of sharia, the regulation on shariah compliance only available in the level of fatwa (legal opinion) or the Compilation of Sharia Economy (KHES) which the practice of them are submitted to the hand of the courts to decide with various possibilities of decision made. Thus there is no legal certainty.

c) On the other hand, there are many deviations happen in the making of sharia contract that might cause loss for the business doers if there is any faulty happened that caused the contract to be brought to the court and then the contract might get cancelled and give benefit to one party only.

d) With no desire of the policy holders in Government body that illustrated from no plan or ideas to form the Draft of Islamic Contract Law, neither from the DSN nor the BPHN Ministry of Justice and Human Rights, it reminds us to have the consciousness of law, that the existence of appropriate regulation is needed to guarantee and protect the rights of the parties and to avoid any loss in the future.

Based on the reasons above, the following suggestions may be considered.

a) Appropriate regulation is any regulation which content and making returned to the nation's will and identity; or the regulation made based on the history and relate to the current political and religious condition of the society. Since muslims are majority in Indonesia, the policy holders should be more earnestly desire to explore and observe the richness of muslims in Indonesia, by involving the muslims in the law drafting.

b) In the law drafting, policy holders should involve competent person and informant, such as the related experts, in order to make more qualified laws.

c) The codification of Islamic contract law is an urgent to face the globalization era, hence its forming is necessity.

NOTES

1. According to the statistical data of the Indonesian Statistics Center (Badan Pusat Statistik) from the 2010 demography sensus, the total of muslims population are 205 million people, it is about 88.1 % out of the total population of Indonesia.
2. Investor daily Indonesia, Thursday, 11th October 2012|11:31 *http://www.investor.co.id/tajuk/zero-growth-demi-bonus-demografi/46624*.
3. McKinsey Global Institute, "*The Archipelago economy: Unleashing Indonesia's potential*", Mckinsey & Company, September 2012, pg. 11.
4. *http://jambi.antaranews.com/berita/302079/presuden-sby-canangkan-gres. accesed on accessed on November 28th 2013.*
5. Noel J. Coulson, *Commercial Law in The Gulf States The Islamic Legal Tradition,* (London: Graham & Trotman, 1984).
6. Based on an interview conducted by our researcher team, with Mr. Subianta Mandala on September 2nd 2013 at the office of Ministry of Justice and Human Rights, Jakarta.
7. Excerpts of briefing speech conducted by the Minister of Justice of the Republic of Indonesia in the workshop of national contract law that was held by BPHN (Agency of National Law Making), Department of Justice, on November 17th-19th 1983, Jakarta.
8. *Ibid.*
9. Prof. Dr. Abdullah al-Mushlih, *Fikih Ekonomi Keuangan Islam,* 2nd print, (Jakarta: Darul Haq,2008), page 26.
10. *Ibid.*
11. *Ibid.,* page 27.
12. See: Samsul Anwar , Hukum Perjanjian Syariah, (Jakarta: RajaGrafindo Persada, 2007), p. 79-80.
13. According Hanafiyah, vanity contract defined as "contract which is invalid based on sharia in its subject and nature". Vanity meaning useless, empty, no substance and essence. In KBBI (Indonesian Dictionary), vanity means void, vain, not true" and "void means not applicable, invalid, useless."
14. *Fasid* is contract that valid by sharia but invalid in the application and nature.

15. *Ibid*, P. 101.
16. Ibid, P. 97-105.
17. Al-Zuhaili, *Op. Cit*., page 276-286 and Muhammad Yusuf Musa, *Op. Cit*., page 486-497.
18. Further explanation, see: Sajuti Thalib, *Receptio A Contrario*, (Jakarta: Bulan Bintang, 1988).
19. Ismail Suny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia" in the *Dimensi Hukum Islam dalam Sistem Hukum Nasional,* (Jakarta: Gema Insani Press, 1996), page 133-134.
20. Muhammad Tahir Azhary, *Negara Hukum. Suatu studi tentang Prinsip-prinsipnya dilihat dari Segi Hukum Islam, Implementasinya pada periode Negara Madinah Masa Kini*, 1st volume, (Jakarta: Bulan Bintang, 1992), page 39-44.
21. Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia*. (Jakarta: Gema Insani Press, 2004), page 26-28.
22. Syamsul Anwar, *Hukum Perjanjian Syariah Studi Tentang Teori Akad dalam Fikih Muamalat*, (Jakarta: RajaGrafindo Persada, 2007), page 32 – 40.
23. Adiwarman Karim, *Bank Islam Analisis Fiqh dan Keuangan. Ed.3*. (Jakarta: PT. RajaGrafindo Persada, 2007).
24. Neni Sri Imaniyati, "Asas dan Jenis Akad dalam Hukum Ekonomi Syariah: Implementasinya pada Usaha Bank Syariah" *Mimbar, Vol. XXVII, No. 2 (Desember 2011)*: page 151-156.
25. *http://www.bi.go.id/web/id/Peraturan/Perbankan/default.htm?Page=31&Year=0;,* accessed on November 28th 2013.
26. This is relevant with the principles of Islamic Banking according to The Islamic Banking Law No. 21 Year 2008 on Article 2 Islamic Banking in conducting its business activities based on Sharia Principles, economic democracy, and the principles prudence. The Explanation of this article elaborate the bans on banking business activities, which including.*riba, maysir, gharar, haram* (illegitimate), and *zhalim (despotic).*
27. Bank Islam Malaysia Berhad, *Islamic Banking Practice From The Practitioner's Perspective*, (Kuala Lumpur: bank Islam Malaysia Berhad, 1995), pge. 35.
28. Dr. Sayyid Abbas Mousavian, *Usury-Free Banking (The Case of of Iran)*, Paperpresentedon"Symposium onRole ofHigher EducationinProvidingInnovationand Solutions", University of Indonesia Campuss, 30 January, 2012, pge. 35.
29. In this ocation we had interview the representative of the National Law Development Agency of the Ministry of Law and Human Right of Republic of Indonesia (BPHN) and The National Sharia Board member in finding this conclution.
30. Based on interview with Subianta Mandala,S.H.,LL.M as the secretariat of the drafting team of academic draft of National Contract Law, on September 2nd as secretary of the editorial team of national contract law academic texts BPHN on September 2, 2013 in the office of the Ministry of Law and Human Rights.
31. From an interview with Prof. Dr. H. Jaih Mubarok, M.Ag., Professor of IAIN Sunan Gunung Jati and members of the National Sariah Board (DSN) of The Indonesian Ulama Council (MUI) on November 5, 2013 in the office of DSN in Jakarta.

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