

Overview of Islamic Law on “Leasing” Implementation in The Indonesian Civil Code

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Abstract: Leasing agreement is a mixture of agreements on purchasing, selling, and renting. In leasing, when a buyer can't buy goods in cash, then the agreement is held in which the buyer is allowed to repay with several installments. The goods will be owned by the buyer by the time the installments have been paid. During the payment of installments, as long as it is not paid completely, the buyer is still a tenant. As a tenant, the buyer is only allowed to take advantage of the goods and does not have the right to transfer the goods to another person. If the transfer term is broken before the payment of installments is completed, then the buyer will be subjected to criminal accusations because he/she makes the others' property lost. Then, the leasing agreement here is likely to lead to a form of a purchase agreement rather than of a renting, for the main point is all about the transfer of property rights. The different status over the ownership of goods will also have different legal consequences. In terms of purchase, a buyer becomes the owner of the goods, which makes him feel free to do over the things possessed, such as leasing them as rental, mortgage, and so on to another party. In terms of leasing, whereas the buyer has not become the owner of the goods, he could not act lawfully over them. While Islam has the basic law upon leasing agreement, it is necessary to implement this law in leasing agreement towards the Indonesia Civil Code.

Abstrak: Perjanjian sewa beli merupakan percampuran antara perjanjian jual beli dan sewa menyewa. Oleh karena itu jika pihak pembeli tidak dapat membeli barang sekaligus atau lunas, maka diadakan sarana perjanjian dimana pihak pembeli diperbolehkan mengangsur dengan beberapa kali angsuran. Sedangkan hak milik baru akan berpindah tangan pada saat pembeli sudah membayar semua angsuran dengan lunas. Dan selama angsuran tersebut belum dilunasi maka pembeli masih menjadi penyewa. Sebagai penyewa, maka ia hanya berhak atas pemakaian atau mengambil manfaat atas barang tersebut dan penyewa tidak mempunyai hak untuk mengalihkan atau memindah tangankan barang tersebut kepada orang lain. Jika hal tersebut dilakukan oleh pembeli sewa, maka ia akan dikenai sanksi pidana karena dianggap mengelapkan barang milik orang lain. Perjanjian sewa beli lebih cenderung mengarah atau menjurus pada bentuk perjanjian jual beli dari pada sewa menyewa. Karena dalam perjanjian sewa beli, peralihan hak milik adalah yang menjadi pokok

utamanya. Jadi tujuan sewa beli adalah untuk menjual barang, bukan untuk menyewakan atau menjadi penyewa barang. Akibat dari perbedaan atas kepemilikan itu, maka berbeda pula akibat hukumnya. Dalam jual beli, oleh karena pembeli sudah menjadi pemilik barang, maka ia bebas bertindak hukum atas barang, misalnya: menjual, menggadaikan, menyewakan, dan lain-lain, sedangkan dalam sewa beli karena pembeli belum menjadi pemilik barang, maka ia tidak boleh bertindak hukum atas barang tersebut. Pada akhirnya diperlukan dasar hukum Islam yang jelas tentang pelaksanaan sewa beli dalam hukum perdata.

Kata Kunci: *hukum Islam, hukum perdata, sewa beli*

Introduction

Among the Islamic principal teachings is that the position of human in this world is regarded as the caliph of God (al-Baqarah: 30) who spreads His message (al-Ahzab: 72) to create prosperity to human (Hud: 61). The keyword "prosperity" has, however, been transformed into Islamic concept of economics which widely emphasizes on principle of freedom and honesty in business, labor productivity, and so forth. We can assume that Islamic teachings are all talking much about how a business can give "more than just a business", prosperity among people.

Leasing is an agreement of leasing goods, which a buyer does not become the owner of the goods but merely a user. Only when the rent goods have been paid completely, equal to the cash price of purchase, a buyer's status changes from a tenant or a user to an owner.¹ Leasing agreement or *Huurkoop*² is a derivative agreement which is not yet stipulated in Book III of *Burgerlijke Wetboek* (BW). However, it is recognized as a legal practice. It is because the Book III of BW that governs the engagement is a *Van Vullenrecht* in character. The natural character of *Van Vullenrecht* in Book III of BW has juridical consequences that every person may hold any agreement, even though the law has no regulation on it. *Van Vullenrecht*, as basic principle on

¹ Wirjono Prodjodikoro, *Hukum Perdata tentang Persetujuan-persetujuan Tertentu*, cet. ke-7 (Jakarta: Sumur Bandung, 1981), hlm. 63.

² Subekti, *Aneka Perjanjian*, cet. ke-7 (Bandung: Alumni, 1985), hlm. 51.

Book III of BW, is developed in section 1338 of BW and known as "the freedom of making contract".³

Subekti states that the freedom principle of contract in section 1338 article 1 concludes an important notion that law of treaties adopt an open system known as *Beginsel der Contracts Vrijheid*. As we all know, the article says that, "All agreements made are legally valid as a law for those who make it." It is clear, then, the word "all" that lies in front of the word "agreement" implies a very important notion that: in contract, we are free to make any kinds of agreement and, as the consequence, it will surely be binding us tight, just like legal law does to people. The freedom toward making the agreement is absolutely limited to the so-called "policing and decency" in public sphere.⁴

Suryodiningrat also mentions that leasing agreement is a derivation of buying and selling agreement, which is not set yet in BW. Nevertheless, the agreement is recognized and justified as correct in the practice of an agreement, considering the agreement is agreed by those who are involved in it. Therefore, the agreement has fulfilled "the principle of consensus" which is contained in section 1320 of BW that implies the willingness of two or more parties to mutually participate. The word "participate" means that both parties have great willingness to be bound to each other. The willingness is truly a positive indication that such agreement can be met.⁵

The principle of consensus in section 1320 of BW has a close relationship with the freedom principle of contract and the principle of "to be bound to each other". The first is related to the content of agreement, while the second is to whom the agreement was held. Concerning to leasing agreement, section 1320 of BW determines that both the one who leases goods and the buyer could be an individual or legal entity.

From the description above, the author intends to deeply make reviews on Islamic law upon the implementation of a leasing agreement in Civil Code. The importance of this review lies on the status "new" upon the absence of Kitab Undang-Undang Hukum Perdata (KUHP/Indonesian Civil Code) and Kitab Undang-Undang Hukum Dagang (KUHD/Indonesia Commercial Code) in the

³ Abdulkadir Muhammad, *Hukum Perikatan*, cet. ke-1 (Bandung: Alumni, 1982), hlm. 84.

⁴ Subekti, *Aneka...*, hlm. 5.

⁵ Suryodiningrat R.M., *Perikatan-perikatan Bersumber Perjanjian*, cet. ke-2, (Bandung: Tarsito, 1991), hlm. 8.

regulation of leasing agreement. The urgency also rises from the fact that the two main references of *Fiqh Mu'amalah* (al-Qur'an and Hadis) have no specific discussion towards the leasing agreement.

The Characteristics of Leasing Agreement

Civil Code, as stated in the BW, does not actually have any regulations on institutions of leasing. The institutions grow and develop during leasing practice in field. The most important legal issue in leasing institution is a matter of who bears the risk of goods leased-purchased when there is an accident happening toward goods. That there are no written rules in leasing makes the arrangement of risk management has also no written rules. In the perspective of law, in fact, there is a big difference between a leasing agreement and selling-buying agreement with installments. The main difference lies on the transfer of property rights on goods traded. Any differences will have implications on different regulations. Nevertheless, leasing agreement was later recognized by the jurisprudence.

Selling-buying with installments, from the law perspective, is actually an ownership transfer upon goods traded, although they are not fully paid yet by the time goods are handed to the buyer. Meanwhile, in the leasing, the ownership transfer will be set only after the settlements are completed. Unfortunately, in everyday practice, both institutions are often confounded.

The origin of leasing agreement is the inability of a person to buy goods in cash. The payment with installments begins to develop gradually. It is monthly payment that usually takes place. This payment method, however, is beneficial to both seller and buyer, as like mutualism symbiosis in Biology. A buyer needs goods but inability to afford them in cash, and at same time the seller wants the traded goods to be sold out soon. In such agreement, as commonly admitted, there is a risk towards the loss of the goods in the middle of the installment payment or towards the incomplete payments during the installment. Moreover, if the traded goods are sold to a third party, the seller will suffer bigger loss, for its complexity in payment and status of the traded goods. Here is the example. When the goods are not completely paid by the buyer, they have been transferred to another party. In this mechanism, the seller suffers losses because the goods can't be returned by the first buyer to him, while the first buyer can't pay the

rest of the installment either, proven from the fact he sell the traded goods while the installments are completely paid.⁶

The preventive action not to make a seller lost can be set by a leasing agreement or *Huurkoop*. In this mechanism, a buyer is none other than a user that takes an advantage of traded goods. Unless completely paying all lease payment with amount of money equal to the purchase payment, the user remains a tenant (Subekti, 1985). By applying this mechanism, the seller is protected. The practice of leasing states that it is the buyer's complete responsibility toward the risk of lost goods or goods that's re-sold to a third party. It means that when the buyer has pretext that the goods are sold or lost and was not willing to pay the remaining installments, then he can be punished as a criminal upon embezzlement as arranged in section 372 of Civil Code.⁷

Here are the characteristics that distinguish the leasing agreement from other agreements:

Table 1: The Differences of Leasing Agreement from Other Agreements

Leasing Agreement	Selling-Buying	Loan Contract	"Common" Leasing	Rental
Payment of goods can be set in installments. The goods are handed over to the buyer after the first down payment. The seller has the ownership of the goods. During the time the buyer pays the installments periodically, he is considered to be the one who rents the goods. By the	The main obligation of the seller is to hand over the goods, to ensure that the buyer gets the goods in good condition, and is responsible for hidden defects. The buyer's obligation is	The goods are items that remain. Neither the quality nor the quantity is reduced. The goods remain the property of the lender (section 1741 of BW). By the time the loan duration expires, the borrower must return the	The ownership remains with the lessor. Lessee merely has the right to benefit the goods, nothing more.	No aims of ownership transfer. Goods are benefited for limited period, shorter than the time of loan and leasing agreement.

⁶ Akh.Munif, "Kontrak Standard dalam Perjanjian Sewa Beli Rumah dan Akibat Hukumnya", *Jurnal Yustitia*, Fakultas Hukum Universitas Madura, *Volume 8, No.1, Nop 2008*, hlm. 8-9.

⁷ Soesilo R., *Kitab Undang-undang Hukum Pidana (KUHP) serta Komentar-komentarnya lengkap Pasal demi Pasal*, (Bogor: Politeia, 1996), hlm. 258.

time the buyer paid completely all payments of the installment, he has the ownership of the goods.	to complete the payment according to conditions agreed by both sides.	goods in its first condition.		
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In purchase agreement with installments, according to law, the buyer is the owner of the goods although the installment has not been fully paid. Therefore, when the buyer sells the purchased goods before all installments are fully paid, he can't be prosecuted as a criminal upon embezzlement. It is because the goods that he sold are really under his ownership, for he is neither a tenant nor a user.⁸ Embezzlement over goods is a crime that is almost the same as crime of theft in section 362 of Indonesian Civil Code. The only difference is that in crime of theft the goods that are taken to be owned was not in the hands of the thief in the first time. But, in the crime of embezzlement, the goods that are taken to be owned was already in the hands of the thief, being entrusted to him for the first time, and then taken completely with no aggressive crime at all.⁹

Freedom Principle of Contract

In general, leasing agreement has freedom principle of contract that allows the parties involved put themselves in a certain position which is balanced and mutually beneficial to both sides. The freedom is indeed a basic foundation in leasing agreement; it is the idea of freedom of act, part of Human Rights. The freedom principle of leasing can be referred to the book of Civil Code section 1338 article 1 that says: *All treaty made officially legal is valid as law to who makes use of it.* Focusing to the word *all*, the article 1 contains an explicit statement that all citizen is allowed and valid to make any kinds of treaty. The treaty will surely bind all who are involved just like the way the law does.

The basis of the freedom is limited to points that are coercive, so that the involved ones should obey any rules unconditionally as an implication of the coerciveness of law. Nevertheless, Subekti highlights that the content of a treaty should not be in contradiction to principles

⁸ Akh.Munif, *Kontrak...*, hlm. 10.

⁹ Sugandi R., *KUHP dan Penjelasannya* (Surabaya: Usaha Nasional, 1980), hlm. 390.

of law, morality, and public peacefulness.¹⁰ From the Islamic law perspective, the freedom principle of contract lies in 'aqd that allows *ijab* and *qabul* is set by mutual profit for both parties, as long as *syara'* approves it.

Implementation of Leasing Agreement

Selling-buying rule is an agreement of two obligatory mandates to both sellers and buyers; the first is to hand over the goods, the other is to do the payment over them. In other words, selling-buying is a consensus of will (*wils overeenstemming*) between seller and buyer on goods and their prices.¹¹

The selling-buying rule is determined in book of the Civil Code section 1457. Since such agreement is well arranged, the terms of buying will only be valid when validity of arrangement is achieved. It is mentioned in the Civil Code section 1320 that there are 4 elements to make an agreement valid: 1) both sides should agree to bind themselves to each other; 2) the good capacity of agents who are involved making the engagement; 3) there is a certain thing to trade; and 4) a lawful reason that makes the agreement allowed.

The certain requirement that binds a relationship between both sides is called an engagement. This engagement rises shortly after all requirements are determined and agreed by both sides, including the characteristics of goods and types of installment. It is the buyer who decides the engagement to happen, by agreeing the requirements proposed by the seller. Furthermore, Subekti said that in Western Civil Code an engagement is also valid shortly after all requirements are dealt, by agreement of buyer towards requirements proposed by the seller (*verkoop*/to sale and *koop*/to buy).¹²

System of sale in leasing practice is accepted in two ways: cash and credit. The price of cash is likely different from the credit. The cash sale needs no more discussion further because it is clearly legal, lawful, allowed, and is set up in detail both in *fiqh mu'amalah*, the Civil Code, and Code of Commerce, including details of the regulations. While the cash sale is clear, the credit sale needs to be discussed further

¹⁰ Subekti, *Aneka Perjanjian* (Bandung: PT Citra Aditya Bakti, 1995), hlm. 4-5.

¹¹ Yahya Harahap, *Segi-segi Hukum Perjanjian*, (Bandung: Alumni, 1986), hlm. 181.

¹² Subekti, *Aneka Perjanjian*, hlm. 1-2.

because of its different price from cash that sometimes makes it disputable.

Sale of goods on credit, in practice, is often handed over to a finance company. The mechanism is that finance company becomes the funder, while the seller is the stockist. By this mechanism, an item of property belongs to the finance company, which is leased-purchased to the buyer with payment in installment. The installment requests a down payment in the first time of the transaction. This mechanism is called a leasing agreement, where the payment has not been fully paid in full the buyer is considered as a tenant only. The amount of rental price is equal to the remaining payment of the goods. By the time the lease payment is completed the installment is fully paid, then the buyer lawfully has the ownership of the goods.

The fact that until now there are no any rules governing leasing agreement in detail both in the Civil Code, Commerce Code, and *Fiqh Mu'amalah*, it is no surprise that uniformity in the regulation in this agreement is questionable. Nevertheless, many basic principles of them are indeed alike, such as the case on the end of leasing agreement as explained by Guntoro:¹³

- a. The last payment of installment is paid fully by the buyer.
- b. The buyer passed away and none of the inheritor will take over.
- c. The buyer is confirmed bankrupt, then the leased good is recalled and resold by the seller. Right after the good is sold, a calculation is made to see if there is any gap for the price. Any surplus is returned to the buyers.
- d. The buyer is confirmed tort, then the leased good is recalled and resold by the seller. Right after the good is sold, a calculation is made to see if there is any gap for the price. Any surplus is returned to the buyers.
- e. There will be coercive recall for the good by the seller when the leased good is transferred to another party without the privity of the buyer.

¹³ Heru Guntoro, Aspek Hukum Perjanjian Sewa Beli Kendaraan Bermotor, *Jurnal Ilmiah Progressif*, Vol.7 No.20, Agustus 2010, Fakultas Hukum Universitas 17 Agustus 1945 Banyuwangi, hlm. 10

Review of Islamic Law upon Leasing Agreement

Islam has so many teachings that's already been sent down completely (QS al-Maidah: 3). But in the further application of economic activity; the Islamic teachings require wider interpretations in order to get adjust with the development of economics. At later stages, the mixture between ideas in Islamic teachings and economics, that is Islamic economics, will prove that this "new kind of economics" is better in many aspects. It's because the spirit of Islam is none other than providing mercy to anyone (*rahmatan lil 'alamin*).

The Fatwa of Dewan Syariah Nasional No. 71/DSN-MUI/VI/2008 and No. 72/DSN-MUI/VI/2008 on *Sale and Lease Back* says that it is "allowed" to apply *Sale and Lease Back*. The settlement used in this agreement is *ijarah*. Etymologically, *ijarah* means commission, replacement, or payoff. *Ijarah* at large means commission paid over utilization on good or over activity.¹⁴

Word *ijarah* is derivation of *ajr* which means reward (for moral conduct). In Islam, system of rent (*ijarah*) is an agreement focusing on utilization (of good) as basis for the commission. The benefit can be in any form, such as (1) over good, (2) over certain work, and (3) over person dedicating his effort for the sake of the benefit. The owner of the good is called *mu'ajir*, while the benefit taker as well as the payer over benefit is called *musta'jir*. The rent good is called *ma'jur*, while the fee or commission is called *ajr* or *ujrah*.¹⁵ *Ijarah* is basically defined as right to utilize and take benefit over good or certain work by paying it in certain amount of commission.¹⁶

According to the fatwa of Dewan Syariah Nasional (DSN) No. 9/DSN-MUI/ IV/2000 on Finance on *Ijarah* (rent), *Ijarah* is an agreement on right transference of benefit over good in certain time by paying commission without ownership transference over the good. *Ijarah* is allowed according to the statement of the Qur'an, Hadis, and Fiqh principles (*qawa'id fiqhyyah*). In the Qur'an, there are at least 2 statements over *ijarah*: (1) QS Al-Baqarah 2:233; and (2) QS Al-

¹⁴ Helmi Karim, *Fiqh Muamalah*, Ed. 1, cet. ke-3 (Jakarta: PT. RajaGrafindo Persada, 2002), hlm. 29.

¹⁵ Sayyid Sabiq, *Fiqhus Sunnah*, terj. Mujahidin Muhayan, cet. ke-1 (Jakarta: PT. Pena Pundi Aksara, 2009), hlm. 149.

¹⁶ Adiwarman A. Karim, *Bank Islam Analisis Fiqih Dan Keuangan* (Jakarta: PT. Raja Grafindo Persada, 2010), hlm. 138.

Qashash 28:26-27. In Hadis of Prophet Muhammad, many statements are found:

- a. "The Prophet and Abu Bakr employed (*ista'jara*) a (pagan) man from the tribe of Bani Al-Dail and the tribe of Bani Abu bin 'Adi as a guide. He was an expert guide and he broke the oath contract which he had to abide by with the tribe of Al-'Asi bin Wail and he was on the religion of Quraish pagans. The Prophet and Abu Bakr had confidence in him and gave him their riding camels and told him to bring them to the Cave of Thaur after three days." (www.sahih-bukhari.com, vol. 3, book 36, number 464.)
- b. "We used to rent out farmland at the time of The Prophet in return for what grew by streams and what was irrigated with water from them, but the Prophet forbade us to do that and permitted us to lease it for gold or silver." (Musnad Ahmad, Hadis number 1582.)
- c. It was narrated from 'Abdullah bin 'Umar that The Prophet said: "Give the worker his wages before his sweat dries." (Sunan Ibnu Majah, Hadis number 2443.)

Meanwhile, Fiqh principles (*qawa'id fiqhiyyah*) does strengthen the legality of *ijarah* agreement, by saying: "In principle, all kinds of business is allowed unless there is statement forbidding it." Therefore, renting good is allowed, according to most of *ulama'*. Once the agreement is made valid by both parties involved, none may cancel it. It contains a note that any excuse (*'udzur*) is unacceptable, unless there is a significant reason that forces it to a cancellation.

Closing

Considering that there is no any rules governing the leasing agreement, in both the Civil Code, Code of Commerce and *fiqh mu'amalah*, therefore, there is no certain pattern in the regulation of the agreement. In the other hand, the leasing agreement itself has many benefits to both parties involved. So, it is a necessary to soon formulate the pattern of leasing agreement regulation. Islam teaching that has many noble principles on economy should participate in the formulation, in order to maintain the noble values behind economy life among human. The absence of statement forbidding the selling-buying is quite enough to be the basis that leasing agreement is allowed.

In closing statement, it is necessary to understand that the economic activity, associated with *mu'amalah* among human, should be collaborated with nature that's created to "serve" human (QS al-Baqarah: 29 and QS al Jatsiyah: 13). The collaboration is important to do because human are also asked to struggle for life (al-Ra'd: 13) by utilizing the nature actively. The economic activity or *mu'amalah* should be *halal*, not prohibited by law, done with honesty, and the parties involved are longing to do it with '*an taradhin* principle that lies as a main principle in leasing agreement in the light of Islamic values (QS al-A'raf: 85, QS al-Nisa: 29, and QS al-Maidah: 3). Although it is free to people to get bigger benefits from business, they have to pay attention to the social life in which a benefit should be allocated in the name philanthropy or *shadaqah* for those who are poor and who need help in financial aspect (QS al-Hasyr: 7, QS al-Taubah: 34, and QS al-Rum: 30). In addition, they who enjoy bigger benefit should also be economical and efficient in spending their wealth (QS al-Isra: 26 and QS al-Furqan: 67).

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