



HYBRID CONTRACT AND COMMERCIAL INTERESTS; AN ANALYSIS OF AL-QARDH AS BASIS CONTRACT IN FATWA DSN MUI INDONESIA

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Abstract

This paper analyzes the DSN MUI fatwa associated with *al-Qardh*. The paper also analyzes the hybrid contract law as the basis of the fatwas issued by DSN by combining *al-Qardh* and other contracts. This paper was based on qualitative research using a literature review to analyze multiple contracts that are needed and indications of *hilah*. The results show that the majority of scholars allow hybrid contracts in Islamic banking. But some scholars underline the hybrid contract aims to legalize usury, it is strictly forbidden. To issue a fatwa there needs to be a moderate *manhaj* in using *syariah* texts and *maqashid syariah*.

Keywords: Hybrid Contract; Combination of Contract; *al-Qardh*; Fatwa DSN MUI

Introduction

Islamic economy is growing rapidly with increasing public interest to have account in Islamic bank. Generally, they are attracted by the campaign of no usury and profit loss sharing. With this growth certainly raises several problems, that cause an impasse for experts to find a solution. Islamic banking requires a contract to be legally and accepted by *sharia* law, both classic contracts that existed since the time of the prophet and the new contract of innovation from Islamic jurists who concentrated in Islamic banking. With such a rapid development, the practitioners are expected to be able to make product innovation, while the regulator performs product supervision conducted by practitioners. Here again, the DSN must be active towards the development of product innovation by issuing fatwas as a guide, academics certainly required to conduct research to provide enlightenment and escort transactions that do not deviate from the principles of *sharia*. (Agustianto, 2014)

MUI (Majelis Ulama Indonesia) as a factory produce fatwas to become a guideline for Indonesian society. Through the DSN (National Sharia Council), MUI publishes fatwas related with Islamic banking. The National Sharia Council was formed in 1997 and was the result of the workshop's recommendation of Sharia Mutual Workshop in the same year. (Antonio M. S., 2001, p. 32) DSN have issued 109 of the fatwa, one of them is the fatwa NO: 19 / DSN-MUI / IV / 2001 about *al-Qardh*. Although the fatwa of *al-Qardh* is considered an 'old school' fatwa and we seem to have tried to analyze the fatwa theoretically and contextually in relation to its methodology, content, application, and benefits to the audience.

At the beginning of Fatwa's fatwa no. 19 / DSN-MUI / IV / 2001, the DSN provides a brief overview of the factors under which the *al-Qardh* fatwa is issued using a points that the Sharia Financial Institution (LKS) as well as a commercial institution must be able to act as a social institution that can maximize the economy. Fund of *al-Qardh* can be sourced from: 1- Part of LKS capital; 2- Profits of LKS set aside; and 3- Other institutions or individuals who entrust their *infaq* distribution to LKS. (Fatwa No.19/DSN-MUI/IV/2001) Regarding the source of funds, DSN re-clarifies the classification of social funds and customer funds used in accounts payable in the fatwa No: 79 / DSN-MUI / III / 2011 on *Qardh* by Using Customer Funds. Terms of Fund Distribution *Qardh* with Customer Fund, 1- *al-Qardh* in the LKS consists of two kinds: A- *Qardh* stand alone for the sole social purpose referred to in the DSN fatwa on *al-Qardh*, not as completeness for other

transactions in products for the purpose of obtaining profit; 2- Akad Qardh is performed as completeness for other transactions using *mu'awadhah* contracts (exchange and can be commercial) in products intended to benefit. (Fatwa No:79/DSN-MUI/III/2011)

The following is *al-Qardh* contract that serves as a complement to other contracts in the DSN-MUI fatwa, on *Qardh* using customer funds:

- Rahn Gold; this contract is using three combination contract, *rahn*, *qardh*, and, *ijarah*.
- Financing of Islamic Haj Financial Institution Arrangement; this contract used *qardh* dan *ijarah*
- Debt Redirects; there are four alternative combination, *qardh* and *murabahah*, *qardh* and *ijarah*, *qardh* and *ijarah muntahiya bi tamlik*.
- Sharia Charge Card; consist of three contracts, *kafalah*, *qardh*, and *ijarah*
- Sharia Card; consist of three contracts, *kafalah*, *qardh*, and *ijarah*
- Factoring of Sharia Accounts.

Transactions consists of 2 contracts or more in *fiqh* treasures are called hybrid contract. The scholars differ on the legal matters of hybrid contract. Although the majority of scholars allow multiple contracts, the prophet forbade transactions consisting of *ba'i* and *salaf*. (Al-Baihaqi, 1989) Islamic financial institutions prefer to *qardh* as complementary to other contracts than *al-Qardh* as an independent contract. Since *al-Qardh* is a social contract without multi-covenants it will not bring significant profit. From here we need to discuss the essence of *al-Qardh*, Multi Akad, and the combination of social and commercial contracts in the DSN MUI fatwa.

Research Method

This research type is qualitative research which produces descriptive data. In this study, the author use the juridical approach, the data obtained are arranged in detail systematic, logical, juridical which is then used to study regarding the taking of law in the DSN-MUI fatwa on guidelines general application of sharia principles. (Zulqarnain, 2012) a literature review conducted on hybrid contract's book as the primary sources and other writings related with *fiqh*, *qardh* and fatwa as secondary sources. The collected data will be analyzed using descriptive method qualitative with a juridical approach that is data obtained selected according to quality and correctness then analyzed with appropriate articles of law to obtain the conclusions of the results of the research are further presented descriptively and qualitatively analyzed.

Results and Discussion

Al-Uqud (contracts) distinguished in various kinds seen from several points of view. There are two contracts, *uqud tijarah* or *mu'awadah* and *uqud tabarru'*. *uqud tijarah* is a contract which aims to gain profit in a business transaction (profit oriented). For example, contract based on the principle of sale and purchase (*murabahah*, *salam* and *istishna'*), a contract based on the principle of profit and loss sharing (*mudharabah* and *musyarakah*), a contract based on the principle of lease (*ijarah* and *ijarah muntahia bittamlik*). *Uqud tabarru'* is a type of contract related to non-profit transactions and aims to help others. Like a *qardh*, *rahn*, *hawalah*, *wakalah*, *kafalah*, *wadiyah* etc. (Zarqa, 2004) (Ghazaly, 2010)

Al-Qardh is part of *tabarru'* contract. Loan or known as *Al Qardh* is divided into two, the first, *Al-Qardh* is lending something to others with the obligation to return the principal to the person who lends. Second, *Qardh al-Hasan*, that is lending something with no obligation to return. (Anshori, 2006) This is to help other people who are in need of money. A person who gives *qard al-hasan* to others can get a reward from Allah. (Abdul Jalil dan Rahman, 2010) *Qard al hasan* is an unique product of Islamic Banking, which is a zero profit. (Asiyah, 2013)

Al-qardh used by IDB when providing soft loans to the government. The cost of these services is generally not more than 2.5 percent and has been around 1-2 percent. In its application in sharia banking, *qardh* is commonly used to provide bailout funds to prime customers and to contribute to the small business or micro sectors, as well as to support the social sector. (Ascarya, 2011) The application of *al-Qardh* is applied in several ways: first, to finance people who need immediate bailouts with short time. Secondly, financing products to contribute very little or assist the social sector that is usually used *al-Qardh al-Hasan's* contract.. (Antonio M. S., 2001) Furthermore, Wahbah Zuhaili's noted distinguishes between *dain*

and *qardh*, *dain* is more common than *qardh*, its included material and non-material (abandon a prayer or fasting, it is called *dain*). While *al-Qardh* is more specialized in financial terms. (Zuhaily, *al-Muamalah al-Maliyah al-Muashirah*, 2002)

Hybrid contract in the fiqh treasure are known as *al-uqud murakkabah*, *al-uqud* is a plural 'from *aqdun* which means bond (Faris, 1411 H), whereas *murakkabah* means level. Akad in terms of a meaningful relationship between two parties. *Tarkib* means *jam'u* (assembled) associations of several things into one unity (al-Imrani A. M., 2006) There are many names of hybrid contracts in fiqh, First, *uqud al-Mutaqabilah* in the classical fiqh is called with *isytirat aqd bi al-aqd*. Second, *Al-'Uqud al-Mujtamiah* (accrued contract). *Al-'Uqud al-Mujtamiah* is a multi-cadre collected in one transaction, two aqad or more who gather in one contract. third, *Al-'Uqud al-Mutanaqidah*, *al-Muta'addidah wa al-Mutanafiyyah* (opposite contract), Fourth, *Al-'Uqud al-Mukhtalifah* (different contract). *Mukhtalifah* multi-agreement is defined as the collation of two or more contracts which have differences in legal consequences between the two contracts or part of it. Fifth, *Al-uqud al-Mutajanisah* (al-Imrani A. M., 2006)

The fiqh scholars, both contemporary and classical, differ on the legal status of hybrid contract between the forbid and justify. Scholars from *Syafi'iyah*, *hanabilah*, majority of scholars *Hanafiyyah* and some scholars of *Malikiyyah* view that hybrid contract is allowed. The basis of their thinking departs from that the original law in muamalah is permitted as long as there is no proposition that forbid it or cancel it. Then, scholars from *Dhahiriyyah* noted that the original of contract is forbidden (al-Imrani A. M., 2006) According to Ibn Taymiyyah and Ibn al-Qayyim argue that the original law of the contract is allowed, except that canceled or prohibited by syara '. (Taimiyyah, 1985). *Al-Ashlu fi muamalah ashahah* (the original of the transaction is allowed) in *mausuah qawaid al-fiqhiyyah* which is texted by (Ramadhan, 2007) and *al-Ashlu fi al-Muawadhat al-Ibahah* (the original of the profit transaction is permitted) (Ramadhan, 2007). Although multiple contracts are permitted, al-Imrani (al-Imrani A. M., 2006) added that there are limitations that must be understood and obeyed in order not to fall into the contracts or practices that are forbidden.

There are several factors that cause the emergence of hybrid contract practices, among others:

- Promotion and marketing of products, through a tying arrangement system in which unloved or unused products are sold because of their association with other products that are preferred or even required by the buyer.
- Administrative hilah. with hybrid contract business man intend to avoid from pay a certain guarantee, double tax, compensation, and forth.
- Creating a legal solution (*makhraj syar'i*) to avoid a forbidden transaction.
- Hilah and avoid prohibited transaction that this hilah can justify certain transactions become permitted and halal. Like the practice of buying and selling manipulations that clearly contain usury or the element of obscurity
- Minimize the risk

Alaudin Za'tary stated that hybrid contract are legitimate, although the contract consists of a combination of commercial and social commitments. Za'tary added except *qardh* contract is permitted, the combination between *al-Qardh* and others caused *riba*. ('Ala'Uddin Za'tary, 2010) All contracts containing sale are forbidden to be combined with *al-Qardh* in one transaction, such as *ijarah* with *al-qardh*, greetings with *al-qardh*, *sharf* with *al-qardh*. But it is not forever prohibited as long as it does not profit from one with the existence of certain conditions at the beginning. (al-Imrani A. M., 2006)

Ibn Qayyim states that the Prophet Mohammed forbade multi-covenants consisting of sale and loan (*qardh*), although the two contracts stand alone. This is to avoid the usury, suppose someone to give debt to another 1000 dirhams, then the person sells goods worth 800 dirhams for 1000 dirhams, then he will get an additional 200 dirhams. Wahbah Zuhaily (1985) noted that the difference between *Qardh* and *Ba'i* that *qardh* aims to preserve the human good and facilitate them by lending, it should not be when *qardh* aims to benefit others. The scholars prohibit the *qardh* contract that *jarra manfaah* (whitdraw profits), because *qardh* is *aqd irfaq* which bring benefit to the given debt, if there requirements the upcoming profit for the debt-feeding this thing has been out of context. Nevertheless, Rasulallah advised to pay with the best payment. Inna khairakum ahsanukum qadha'an.

It can be concluded that hybrid contract that contains the sale element is prohibited when combined with *qardh* in one transaction, such as *ijarah* with *qardh* contract, *salam* contract with *qardh* contract. (Mihajat, 2015) There are three hadith prophets which denote the prohibition of the hybrid contract scheme, the first prohibition of combining *ba'I* and *salaf*, the

two baiatain baiatin prohibitions, the third ban on shafqatain fi shafqatin. (Al-Baihaqi, 1989) In the other hand, Alaudin za'tary ('Ala'Uddin Za'tary, 2010) allows to collect many covenants in a contract, whether the contract is the same law or different law (type). As long as it has been fulfilled all the requirements and conditions. The contract contains two things:

- Sharia does not prohibit the merger of the two contracts
- The merger of the contracts is not an intermediary of usury.

Nazih Hamad stated that as long as the contract stand alone is permissible, there is no proposition prohibiting the existence of the contract, when the contract is combined with another contract then it is considered valid. (Hammad, 2005) Al Imrani discusses the ijarah and qardh covenants that are gathered, the status like ba'i and qardh which is forbidden (haram). In accordance with the hadith of the Prophet that the gathering of *tabarru* 'contract and *mua'wadah* is not allowed. The most dominant reason is *dzariah* not fall into usury. (al-Imrani A. M., 2006) Nevertheless, agustianto underlines the dominant reason of the prohibition of the combination between the *tabarru* ' contract and the *mu'awadhah* is usury, the hybrid contract which does not lead to usury is still permissible (Agustianto, 2014) In the work of al-Imrani . (2006) and Nazih Hammad (2005) added that not only being careful of the prohibited *hilah* and anticipation of usury, hybrid contract can also be a *makhraj al-syar'i*, where hybrid contract can be a solution to the deadlock of contract innovation.

From the above description of hybrid contract can be grouped into two, namely: hybrid contract allowed and forbidden. Hybrid contract contract that is prohibited when in it contains *hilah* to avoid from things that are forbidden. Legal implications hybrid contract also not necessarily the same legal status one by one of the contract build it. However, banks are commercial institutions that need *tijarah* contract to still exist. Other than that, From the point of risk that must be faced by LKS, using the principle of *Al-Qardh* LKS will face a big enough risk that the possibility of uncollected funds used by customers. On the one hand the risks to be faced are quite large, but on the other hand LKS can not get income. This fact is very inconsistent with the concept of risk and return that many believed economic actors. This concept states that the higher the risk faced then the results to be gained also greater. This problem will indirectly encourage LKS to dodge in such a way, in order to earn revenue to cover such a big risk. (Widyarini, 2011), the sharia bank is more inclined to use the qardh contract as a complement to independent al-Qardh as social contract. The LKS need legitimate from the fatwa to do it and DSN have issued fatwa about *al-Qardh* as complement to other contract.

Meanwhile Muhammad Maksum considers that the DSN MUI fatwas are loose. On the one hand it allows the opportunity to enlarge the number of Islamic financial products, but on the other hand tend to be predominantly put forward the aspect of legality rather than morality. Maksum saw that it was done by DSN-MUI in three ways: to legalize some form of combination of contracts (hybrid contract), to validate the model of income revenues in the usage of usury, and to enforce the addition of conditions disputed by fiqh scholars. (Muhdzar, 2014) Oni Syahroni in (Mudzhar, 2014) noted the method in *ijtihad*, there are *madrasah al-mutaattilah li an-nusus* (ignoring texts) with the emphasis of *maslahah*, *Madrasah zahiriyyah* (literalis) rigid hold text 3. *Madhab al-wasatiyyah* (moderate or middle way) that consider nash with *maqashid shari'ah*.

Furthermore, al-Qahtani added there are three methods of ulama in the fatwa, first, *tadhiyiq wa tasdid*, this group is fanatic towards madhab and certain scholars, second, *tasahul and taisir*, third, *manhaj al-wustha*. (al-Qahtani, 2000) Ma'ruf amin states that if the fatwa is only stipulated based on needs (*alhajah*) or (*maslahah*), or *maqashid shariah* without using *nusush syar'iyah* then it is too far (*ifrati*). Demikan vice versa when deciding fatwa based on *nusush syar'iyah* text without involving *maslahah* and *maqashid syar'iyah* then fatwa will seem stiff and possibly will many new problematics which can not be answered by fatwa. (Mudzhar, 2014) DSN used the middle way in fatwa, so there are many innovation of contracts and transactions in Indonesia Islamic banking.

Conclusion

This study shows that in contracts there are social and commercial, both of which show that fiqh muamalah not merely discuss the benefits but also discuss the principle of help please. Al-Qardh is essentially a social contract as a human bridge to help each other.

Hybrid Contract is allowed by the scholars with the condition does not become an intermediary of usury, or deceive for the occurrence of usury (*hilah*). Even hybrid contract which consists of a combination of social and commercial contracts is permitted as long as not lead to usury.

DSN MUI in issuing fatwas associated with *al-Qardh* as a complement to other contracts using a moderate *manhaj*, which is balancing between syariat texts, banking needs, and maqashid shariah itself. Because in muamalah muamalah issue provides a lot of room for innovation. Sharia banks as perpetrators who must obey the fatwa signs are commercial institutions, meaning that banks also do not want to lose by continuing to run transactions that are social. Nevertheless, Islamic banks do not have to abandon at all social transactions to help the community.

References

- Abdul Jalil dan Rahman, M. K. (2010). Financial Transactions in Islamic Banking are Viable Alternatives to the Conventional Banking Transactions. *International Journal of Business and Social Science*, Vol. 1 No. 3; December,, 223.
- Agustianto. (2014). *Reaktualisasi dan Kontekstualisasi Fikih Muamalah Ke-Indonesiaan*. Ciputat: Iqtishad Publishing.
- 'Ala'Uddin Za'tary. (2010). *Fiqh al-Muamalat al-Maliyah al-Muqaran*. Damaskus: Dar al-Asma.
- Al-Baihaqi. (1989). *al-Sunan al-Shagir*. Mansoura: Dar al-Wafa.
- al-Imrani, A. M. (2006). *al-Uqud al-Maliyah al-Murakkabah*. Riyadh: Dar al-Kunuz Eshbelia.
- al-Qahtani, M. (2000). *Manhaj Istikhraj Ahkam al-Fiqhiyyah li al-Nawazil al-muashirah*. Makkah: Umm al-Qurra University.
- Anshori, A. G. (2006). *Pokok-Pokok Hukum Perjanjian Islam di Indonesia*. Yogyakarta: Citra Media.
- Antonio, M. S. (2001). *Bank Syariah; Dari Teori ke Praktek*. Jakarta: Gema Insani Press.
- Antonio, M. S. (2001). *Bank Syariah; Dari Teori ke Praktek*. Jakarta: Gema Insani Press.
- Ascarya. (2011). *Akad dan Produk Bank Syariah*. Jakarta: Rajawali Pres.
- Asiyah, B. N. (2013). Source Of Fund Pembiayaan Qardh; Upaya Mewujudkan Keseimbangan Antara Kesejahteraan dan Keadilan Sosial di Perbankan Syariah. *Ahkam*, Vol. 1 No. 2 November, 197.
- Faris, I. (1411 H). *Mu'jam Maqayis al-Lughah* (Vol. IV). Beirut: Dar al-jail.
- Fatwa No.19/DSN-MUI/IV/2001. (n.d.).
- Fatwa No:79/DSN-MUI/III/2011. (n.d.).
- Ghazaly, A. R. (2010). *Fiqh Muamalat*. Jakarta: Kencana Prenada Media.
- Hammad, N. (2005). *al-Uqud al-Murakkabah fi al-Fiqh al-Islamy*. Damaskus: Dar al-Qalam.
- Mihajat, M. I. (2015). Hybrid Contract in Islamic Banking and Finance; A Proposed Sharia Principles and Parameters for Product Development. *EJBM-Special Issue :Islamic Management and Business*, 7, 94.
- Mudzhar, M. A. (2014). Revitalisasi Maqashid al-Syari'ah dalam Pengembangan Ekonomi Syariah di Indonesia. *Indo-Islamika*, Vol 4 No 1, 4.
- Muhdzar, A. (2014). Revitalisasi Maqashid al-Syari'ah dalam Pengembangan Ekonomi Syariah di Indonesia. *Indo Islamika*, 4 No 1, 5.
- Ramadhan, A. A. (2007). *Mausu'ah al-Qawa'id al-Fiqhiyyah*. Alexandria: Dar al-Iman.
- Taimiyyah, I. (1985). *Jami' al-Rasa'il*. Jedah: Dar al-Madani.
- Widyarini, S. H. (2011). Dana Talangan Haji; Fatwa DSN dan Praktik di LKS. *Syir'ah; Jurnal Ilmu Syari'ah dan Hukum*, 1486.
- Zarqa, M. A. (2004). *al-Madhal al-Fiqh al-Am*. Damaskus: Dar al-Qalam.
- Zuhaily, W. (1985). *Fiqh al Islam wa Adillatuhu*. Damaskus: Dar Fikr.
- Zuhaily, W. (2002). *al-Muamalah al-Maliyah al-Muashirah*. Beirut: Dar al-Fikr.
- Zulqarnain. (2012). Penetapan Hukum dalam Hukum Islam; Analisis Metologi Pengambilan Hukum dalam Fatwa DSN MUI tentang Pedoman Umum Penerapan Prinsip Syariah. *Al-Risalah; Jurnal Kajian Hukum Islam*, Vol 12 No 1 Desember, 223.