

MONOPOLY PROHIBITION ACCORDING TO ISLAMIC LAW: A LAW AND ECONOMICS APPROACH

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Abstract

Islamic law prohibits monopoly. The issue had arose since the advent of Islam, whereby it's used as a strategy to maximize profit, has experienced rapid developments. This article assess the extent of Islamic law in prohibiting monopoly using law and economics approach. The result is that the exercise of caution shall apply in prohibiting monopoly. There are three steps needed in exercising the rule of caution: (1) defining monopoly as the absence of competition and lack of pricing options; (2) providing criteria of what causes monopoly in form of agreements between business competitors who can go against allocative efficiency effectively; and (3) direct the prohibition on monopoly towards agreement on explicit horizontal mergers and very large horizontal mergers which disregards quick mergers.

Keywords: monopoly, islamic law, law and economics

Intisari

Hukum Islam melarang monopoli. Isunya adalah sejak kedatangan Islam strategi pelaku usaha untuk memaksimalkan keuntungan telah berkembang pesat. Tulisan ini menentukan jangkauan hukum Islam untuk melarang monopoli dengan pendekatan hukum dan ekonomi. Hasilnya kehati-hatian dalam melarang monopoli. Tulisan menguraikan tiga langkah yang dibutuhkan: (1) memaknai monopoli sebagai ketidakhadiran persaingan dan ketiadaan pilihan harga; (2) memberikan kriteria monopoli berupa kesepakatan antar pelaku usaha pesaing yang mampu melawan efisiensi alokasi secara efektif; dan (3) mengarahkan larangan monopoli pada perjanjian horisontal eksplisit dan penggabungan berukuran besar.

Kata Kunci: monopoli, hukum islam, hukum dan ekonomi

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A. Introduction

Around 500 C.E. the communities of merchants in the city of Mecca were already familiar with the concept of monopoly. At that time however, the vast economic development in Mecca did not result in the welfare of its society as certain clans had hoarded foodstuff resulting in the high price of goods. This action is known as *ihtikar* (or monopoly).¹

If traced further back, the issue of monopoly has been an issue in different civilizations whose economy is supported by trade. The Zeno Roman Empire, for example, had prohibited the stock piling of foodstuff and textiles, where such rule would even apply to businesses who stock piles in order to accommodate purchases from other regions.² Even in Ancient Greece, Aristotle had already illustrated that monopoly happens when there is the stock piling of goods in order to raise prices.³

Back to 500 C.E. Mecca. It is clear, that even before arrival of Islam, Mecca was an area whose economy was supported largely by the trade sector. With the arrival of Islam around 700 C.E., the act of monopoly was specifically prohibited, as shown in the following Hadith:

1. Only the errant monopolize (H.R. Muslim, Abu Dawud, dan at-Tirmidzi);⁴
2. A person that monopolized foodstuff for forty days has disowned Allah The Almighty, and Allah The Almighty has Disowned him. (H.R. Ahmad);⁵
3. Whoever withholds food (in order to raise its price), has certainly erred (HR. Ibnu Majah dan Abu Hurairah);⁶
4. Whoever strives to increase the cost (of products for Muslims, Allah, the Exalted, will seat him in the center

of the Fire on the Day of Resurrection (HR. at-Tabrani).⁷

In looking at the development on the prohibition of monopoly, we cannot disregard the main objective of Islamic Law in prohibiting monopoly is for the prosperity of mankind. However, since the advent of Islam up until the present day, business strategy in profit finding has continuously developed, in forms such as price fixing agreements, binding products, market division, loss selling, vertical integration, mergers, etc. Such development warrants further justification for Islamic law's prohibition towards monopoly as issues has become more and more complex.

In relation to the above, this writing will analyze the scope of the Islamic law prohibition towards monopoly through a law and economics approach. Law and economics is a school of law which uses economic theories to examine the economic formation, composition, process and influence in the applicability of a certain law or legal institution.⁸ Law and economics pushes law to achieve efficiency,⁹ until it is fitting with the objectives of Islamic Law in prohibiting monopoly.

Based the above description, the research question will focus on the following: (1) how does Islamic law prohibit monopoly; (2) what is the economic rationale towards the existence of monopoly; and (3) what matters need to be given attention to in carrying out the Islamic Law prohibition towards monopoly.

B. Discussion

1. Islamic Law Prohibits Monopoly

a. Source of Islamic Law

Islamic law or sharia law refers to

¹ Mahmood Ibrahim, "Social Economic Conditions in Pre-Islamic Mecca", *International Journal of Middle East Studies*, Vol. 14, No. 3, August 1982, p. 347.

² Adam D. Moore, 2009, *Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues*, Transaction Publisher, New Jersey, pp. 10-11.

³ Henry William Spiegel, 1991, *The Growth of the Economic Thought (Third Edition)*, Duke University Press, North Carolina, pp. 33-34.

⁴ Sri Nurhayati, 2013, *Akuntansi Syariah di Indonesia (Third Edition)*, Penerbit Salemba, Jakarta, p. 81.

⁵ Muhammad Saifullah, "Etika Bisnis Islami dalam Praktik Bisnis Rasulullah", *Walisongo*, Vol. 19, No. 1, May 2011, p. 154.

⁶ Sri Nurhayati, *Loc.cit.*

⁷ *Ibid.*

⁸ Nicholas Mercuro and Steven G. Medena, 1999, *Economics and the Law from Posner to Post Modernism*, Princeton University Press, New Jersey, p. 3.

⁹ Richard A. Posner, 1992, *Economic Analysis of Law (Fourth Edition)*, Little Brown & Company, Nevada, pp. 3-4.

the set of rules applicable to an individual (regulating his/her behavior, worship, and morals) and varies from rules that are obligatory until rules that are *haram* or forbidden in character. These set of rules can be divided into two categories, regulations on *ibadah* (or ‘worship’, an individual’s relationship with Allah) and *muamalah* (individual’s relationship with other individuals in the society).¹⁰

There are two primary sources in sharia law, namely the Quran and the Hadith. Other than the primary sources of law, the sharia law system is build through *ijtihad*, which interprets the two primary sources of law with instruments and methodologies such as *ijma* (consensus) and *qiyas* (analogy) to solve concrete legal problems of the society. This becomes the secondary source of law in Islamic Law (*ushul fiqih*).¹¹

The development of Islamic law from its secondary source of law had started since the death of the last prophet, Muhammad.¹² Because of this event, non-fundamental differences between Islamic law experts (*faqih*) became unavoidable. Presently, there are four legal schools in Islamic law, namely Maliki, Hanafi, Syafi’i and Hambali.¹³

The four schools are concentrated in different geographical locations. The legal school of Maliki is dominant in the northern and western parts of the African continent, Hanafi is dominant from western Asia up unto northern Egypt, Syafi’i is dominant in southern Asia, and lastly Hambali is dominant in the Arabian Peninsula.¹⁴ Although the

needs of the society in each region has an influence on the development of each school of thought adding to the dominance of each legal school –this explains the non-fundamental differences between them– the most important thing is that this factor enables Islamic law to work in the societies’ lives.¹⁵

Besides the four large legal schools, there is also *talfiq*, which attempts to collect the opinions of two or more legal schools in parts that are interrelated for a particular action. It systematically compares two or more legal schools and integrates them into a single line of thought for a particular problem.¹⁶ Although not all Islamic law experts agree on the existence of *talfiq*,¹⁷ *talfiq* has the potential to complement Islamic law in solving concrete legal problems. This also proves the Islamic law system is pragmatic, and therefore it is flexible in adjusting the need of the society throughout time..

b. The Prohibition on Monopoly

Muhammad Baqer as-Sadr states that there are three basic principles in economic activity in Islamic law, namely:¹⁸

- 1) Multifold property. Islamic law divides property ownership into three forms: private, public, and state.
- 2) Limited economic freedom. Two limits hamper the absoluteness of private property, subjectively and objectively. Subjective limits derives from an individual’s internal orientation, thus there is no need for state coercion towards the individual. This first limit is in the form of the individual’s generosity towards their community. The second limit, which is *muamalah*

¹⁰ Ahmed Akgunduz, 2010, *Islamic Law in Theory and Practice: Introduction to Islamic Law*, IUR Press, Rotterdam, p. 19.

¹¹ *Ibid.*, p. 22

¹² *Ibid.*, p. 25.

¹³ Knut S. Vikør, 2005, *Between God and the Sultan: A History of Islamic Law*, Oxford University Press, New York, p. 10.

¹⁴ *Ibid.*, p. 11.

¹⁵ John. R. Bowen, 2003, *Islam, Law, and Equality in Indonesia: An Antropology of Public Reasoning*, Cambridge University Press, Cambridge, pp. 14-15.

¹⁶ Fauzi Saleh, “Problematika Talfiq Mahzab dalam Penemuan Hukum Islam”, *Islamica*, Vol. 6, No. 1, September 2011, pp. 66-67.

¹⁷ *Ibid.*, pp. 68-69.

¹⁸ Chibli Mallat, 2003, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi’i International*, Cambridge University Press, Cambridge, pp. 114-115.

- in character, prohibits economic activities such as *riba* (usury) and *ihtikar* (monopoly). The second limit requires state coercion; and
- 3) Social justice. Solidarity is emphasized in Islamic law, and such is done through instruments such as *zakat*, *infaq*, and *shadaqoh*. Acts towards social justice is similar to that of subjective limits, namely that it does not need state coercion

In relation to the definition of monopoly, there are differing views on the four legal schools in Islamic law. The legal school of Maliki defines monopoly as an act of hoarding goods to gain profits when prices increase, however hoarding foodstuff is not included within this definition. According to the legal school of Hanafi, monopoly is the act of buying foodstuff from the market or neighbours and holds on to it for forty days to wait until the prices increase. The legal school of Syafi'i opines that monopoly is the act of buying food when the society needs it and resells them with a higher price. Lastly, the legal school of Hambali states that monopoly is an act of buying goods needed by society, which results in the society's detriment.¹⁹

From the four legal schools above, Al-Robi directs attention to the three primary elements:²⁰

- 1) The basic notion of monopoly indicates both the goal and the result of monopoly;
- 2) The goods which caused harm to the consumers are necessary and the consumers do not have any other alternative in terms of the quality or

price; and

- 3) The goal of the monopolising person is to buy the goods from the market and withhold them to create scarcity.

There are several concepts in Islamic law to explain why Islam prohibits monopoly, this include *maslahah*, *saddu zara'i*, *ta'assuf fi al-Isti'mal al-haq*, *maqasid al-syariah*, *qawa'id fiqhiyyah*, and *tauhid*.²¹ **The first concept** is *maslahah*, where in essence it uses the profit and loss approach.²² The three requirements for *maslahah* for it to be used as legal basis are the following:²³

- 1) Prosperity is in line with the will of Islamic law and is supported by *nash*/ general clarity;
- 2) Prosperity that is both rational and certain in character resulting in prosperity and avoidance of misery; and
- 3) Prosperity involving the interests of people, and not just certain groups or individuals.

Through this approach, Islam prohibits individuals from taking profits which results in the detriment of the public economic interests.

The second concept is *saddu zara'i*, is the prohibition of evasive legal devices.²⁴ There are three classifications in this concept:²⁵

- 1) An act where in the normal circumstance it is undertaken, prohibited actions will also be carried out;
- 2) An act if not conducted will end in carrying out prohibited actions and

¹⁹ Musaed N. Alotaibi, 2010, *Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment*, Thesis, Doctor of Philosophy Degree University of Central Lancashire, pp. 37-38.

²⁰ *Ibid.*, p. 38.

²¹ Zulkifli Hasan, "Islamic Perspective on Competition Law and Policy", *International Conference on Law and Commerce*, International Islamic University Malaysia and Victoria University, Australia, 29 September 2005, pp. 4-13.

²² H. Said Agil Husin Al-Munawar, "Konsep al-Maslahah sebagai Salah Satu Sumber Perundangan Islam", *Islamiyyat*, Vol. 18 & 19, 1998, pp. 60-61.

²³ Abu Ishak Al Syathibi, 1973, *al-Muwafaqat fi Ushul al-Syari'ah*, Dar al-Ma'rifah, Beirut, pp. 8-12.

²⁴ M. Hasbi Ash-Shiddieqy, 1990, *Falsafah Hukum Islam*, Bulan Bintang, Jakarta, p. 320.

²⁵ A. Basiq Djalil, 2010, *Ilmu Ushul Fiqih 1 dan 2*, Kencana, Jakarta, p. 166.

- 3) An act if conducted after considerations has the same possibility to end in carrying out prohibited actions.

The concept of saddu zara'i is taught in Islam to avoid monopoly, because monopoly harms the public economic interest.

The third concept is *ta'assuf fi al-Isti'mal al-haq*, the misuse of rights. There are two reasons why an individual is prohibited from misusing their rights:²⁶

- 1) Each person cannot exercise their right arbitrarily to the detriment of others, both individuals and society; and
- 2) The use of personal rights is not just for personal use but can also be used to support the rights of the society.

Through the concept of *ta'assuf fi al-Isti'mal al-haq*, Islam prohibits individuals from misusing their rights to monopolize, as this would result in the economic loss of individuals and other members of society.

The fourth concept is *maqasid al-syariah*, conceptualizes that the end goal of Islamic law is to achieve the prosperity of mankind.²⁷ K. Prosperity, which is Islamic law's objective, is limited to five separate matters: religion, soul, jiwa/*nafs*, intellect, lineage and property. All matters related to the protection of the aforementioned five subject matters are called *maslahah* and matters which endangers the five elements are called *mafsadah* (pain).²⁸ Within this context, Islamic teaching prohibits monopoly because its consequences harms other individuals (loss of property due to involuntary exchange).

The fifth concept is *qawa'id fihiyyah*, which represents the union of laws which are closely related.²⁹ *Qawaid fihiyyah* solves practical legal problems that arise with the implementation of *istimbath* from the Quran. For example, the rule where all persons must be kept out of hardship (*ad-Dhararu yuzalu*)³⁰, such is applied through the prohibition in conducting monopoly.³¹

The last concept, *tauhid*, is to devote themselves only to Allah purely and consequently complies with the obligations and avoid the restrictions imposed by Him.³² The concept of *tauhid* provides spiritual encouragement to Muslims to achieve the prosperity of mankind and in accordance to Islam's objective, which among others include not to monopolize.

2. **The Economic Rationale for Monopoly**

a. **Price as Indicator of Efficiency**

The subject of monopoly is a seller (or groups who act as if they are individual sellers) who can manipulate the price of products by changing the quantity of the product being sold.³³ The subject of monopoly has been studied intensively over the years by economists using their economic knowledge, independent from the involvement of legal studies. Economic study shows that the competition process in the market can allocate scarce limited resources optimally in order to meet the unlimited human needs.³⁴ It is the key to explain existence of monopoly and becomes an integral part in justifying the prohibition to monopolize.³⁵

²⁶ Nasroen Haroen, 1996, *Ushul Fiqh*, Logos Publishing House, Jakarta, pp. 10-11.

²⁷ Muhammad Khalid Mas'ud, 1995, *Filsafat Hukum Islam dan Perubahan Sosial (Islamic Legal Philosophy, trans: Yudian W. Asmin)*, Al Ikhlas, Surabaya, p. 225.

²⁸ Zaenudin, "Hukum Islam dan Perubahan Sosial (Menyelaraskan Realitas dengan Maqashid Al-Syariah)", *Media Bina Ilmiah*, Vol. 6, No. 6, December 2012, p. 20.

²⁹ Ahmad Sudirman Abbas, 2004, *Sejarah Qawa'id Fiqhiyyah*, Pedoman Ilmu Jaya, Jakarta, p. 61.

³⁰ Abdul Haq, et al., 2006, *Formulasi Nalar Fiqh, Telaah Kaidah Fiqh Konseptual*, Khalista, Surabaya, p. 177.

³¹ Djazuli, 2007, *Kaidah-Kaidah Fiqh*, Kencana, Jakarta, p. 68.

³² Syekh Muhammad bin Abdul Wahab, *Kitab Tauhid (trans: Yusuf Harun, Islamic Propagation Office in Rabwah)*, Riyadh, pp. 4-5.

³³ Richard A. Posner, 1976, *Antitrust Law: An Economic Perspective*, The University of Chicago Press, Chicago, p. 8.

³⁴ Thomas J. Miceli, 2004, *The Economic Approach to Law*, Stanford University Press, California, p. 6.

³⁵ Louis Kaplow and Carl Shapiro, "Antitrust", in A. Mitchell Polinsky and Steven Shavell, 2007, *Handbooks in Economics 27: Handbooks of Law and Economics*, North Holland Elsevier, Amsterdam, p. 1213.

Economics explains that human beings as economic beings will always act based on self-interest in order to maximize profits and benefits; this is often referred to as methodological individualism and rational action (MIRA).³⁶ MIRA is used as a framework to optimize social welfare within the competitive market under the following premises: (1) the individual's welfare can only be measured personally through the said individual, whereby cross comparison does not apply; (2) optimal benefit is defined as Pareto-efficiency, where an individual's maximum profit exist without putting other individual to suffering, in which in the circumstance this is cannot be achieved, the Kaldor-Hicks efficiency is used; the economic efficiency stresses that an outcome is more efficient if those that are made better off could in theory compensate those that are made worse off; and (3) that there are no externalities in economic competition, and when businesses compete to maximize profit, all exchanges on the product market and production factors will bring the price proportional to the marginal costs, which means that the exchange ratios will optimize social welfare.³⁷

The results of economic study has shown that prices can be a valid starting point to explain the absence of an efficient market mechanism in allocating limited resources. Prices are formed from the competition process and not from the number of actors

in the market,³⁸ this is because price levels correlate with the supply-demand position, and such is a natural characteristic of products within a market.³⁹ Price serves as guidelines to determine where resources are most needed, and also presents an incentive for people to follow these guidelines. In addition, price works on the product distribution function whereby other costs, namely production costs, can work on its standard-setting and production organization function.⁴⁰

b. Formal Analysis of Monopoly

From the elaboration of previous sections, an initial question that needs to be answered is that if prices provide information on the efficiency of a market, how would such apply to prices set by actors who monopolize. Would consumer suffer from this?

Monopolists are assumed to sell their products at a price. However, to maintain their position, monopolists can make variations so that consumers will still want their products. Monopolists attempts to use the difference in high priced items for low quality substitute products, and use the difference of low priced items for high priced replacement goods. For example, suppose the monopolist can undertake price discrimination perfectly and holistically: all sales will be made at a price equal to the value consumers want. The result is the comparison between price discrimination (a) and price monopoly (b) as illustrated in the following:⁴¹

³⁶ Lance Taylor, 2004, *Reconstructing Macroeconomics: Structuralist Proposals and Critiques of the Mainstream*, Harvard University Press, Cambridge, p. 44.

³⁷ Jeffrey M. Perloff, 2012, *Microeconomics (Sixth Edition)*, Addison-Wesley, Boston, pp. 316 – 317.

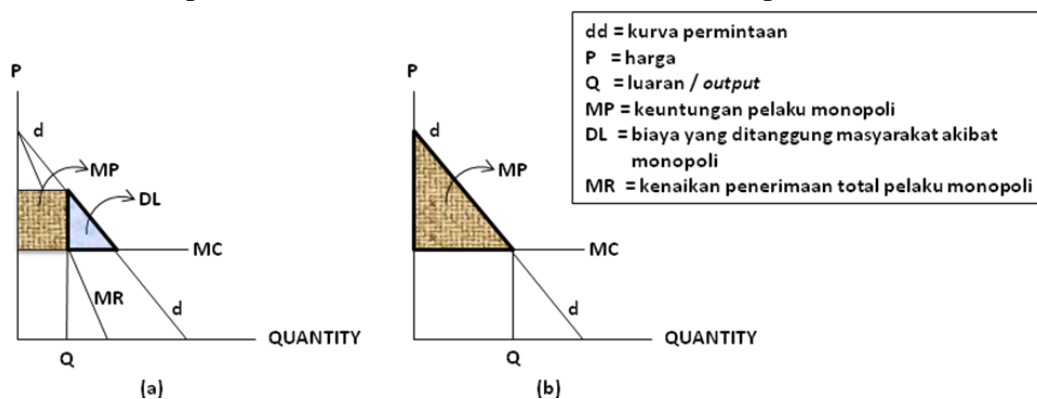
³⁸ Robert H. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II", *The Yale Law Journal*, Vol. 75, No. 3, 1965, p. 377.

³⁹ George J. Stigler, "The Kinky Oligopoly Demand Curve and Rigid Price", in J. Strigler dan Kenneth E. Boulding, 1952, *The Series of Republished Articles on Econom: Vol. IV*, George, Richard D. Irwing Inc., Chicago, p. 419.

⁴⁰ Milton Friedman, 2008, *Price Theory*, Transaction Publisher New Brunswick, New Jersey, p. 9.

⁴¹ Richard A. Posner, 1976, *Op.cit.*, p. 242.

Comparison of Price Discrimination and Monopolized Price



The demand curve (dd) are each coupled to become $a - bQ$, where a is the vertical axis and it is reduced by b , because it is assumed that the demand for output, Q , always declines. The demand curve creates a price, thus $P = a - bQ$. Marginal costs, C , is assumed constant. Since the total revenue is proportional with price, and since the total costs is proportional to the marginal costs, and since profit is the difference between total revenue with total costs, it can then be written π as the profit of a monopolist and ϵ as the demand elasticity of the monopolist.⁴² Thus, it can be formulated as follows:⁴³

$$\pi = (a - bQ)Q - CQ, \text{ because } C = (a - bQ) - (a - bQ)/\epsilon, \text{ thus } \pi = (a - bQ)Q - ((a - bQ) - (a - bQ)/\epsilon)Q$$

π = profit

Q = product quantity where the monopolists sells to gain maximum profit (π)

C = marginal cost

a = price discrimination

b = monopoly price

ϵ = demand elasticity towards the monopolist's products.

From the above formula, it is known that monopolists cannot stand on their own, monopolists rely on the demand elasticity of the products they offer. In addition, if marginal costs are low, then maximum profit for a monopolist can be achieved by making marginal costs proportional to total revenue, this will result in the large quantity of products bearing low prices. This means that consumers prosper as much as monopolists do.⁴⁴ Which means that allocative efficiency is achieved.

The above elaboration shows that monopolists does not need to worry about raising prices by reducing the quantity of production, as this will give incentives to other businesses to enter the market. Even though other businesses may not have anticipate a move such as this (i.e. not entering the market), monopolists will only have enjoyed the increase in prices temporarily. Consumers are rational creatures, which means that when the current price level is not in accordance to their preferences,⁴⁵ consumers will steer away from the product.

For example as a simple way to illustrate this: a monopolist receives a profit

⁴² *Ibid.*, p. 243.

⁴³ *Ibid.*, pp. 243, 244 and p. 246.

⁴⁴ Robert H. Bork, 1978, *The Antitrust Paradox: A Policy at War with Itself*, Basic Books Inc. Publisher, New York, p. 101.

⁴⁵ An economic approach towards a behaviour depicts that an individual's motivation to act is always supported by a logical calculation of the profit (incentive) and loss (disincentive) gained. This is what is referred to as preference, for further discussion on this matter see Uri Gneezy and John A. List, 2013, *The Why Axis: Hidden Motives and the Undiscovered Economics of Everyday Life*, PublicAffairs, New York, p. 3.

of 20 billion rupiahs for the sale of product X in the amount of 20 million units. He expects an additional profit of 5 billion rupiahs, whereas quantity of X only amounts to 15 million units.

In the case where X has a substitute product from other businesses, then the monopolists will try to win consumers: the price of X is slightly cheaper than the high quality substitute product, and that it is much cheaper than the low quality substitute products. If they reduce production by 5 million units in the market, then this will become an incentive for other businesses to increase productions, either for high or low quality. The purpose of other businesses is to meet X shortages in the amount of 5 million units in the market. The shift of consumers to substitute products restores balance to the market.

If X does not have a substitute product, this in effect there is no need for variation in prices, or in other words monopolists sells X at one set price. If they reduce production by 5 million units in the market, then the increased price of X will be considered not proportional to the benefits received by the consumer. It is possible, the cause to the consumer's preference lead by the price of goods is simple, as long as the price gives more benefit than losses, only then consumers will keep on consuming. Instead, consumers can easily leave the consumption of a product, when the available price gives more losses than benefit.

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3. Matters that Need to be Paid Attention to in Carrying Out the Islamic Law Prohibition on Monopoly

Islamic teaching strictly prohibits monopoly. Legal scholars of Islamic law from the four legal schools (Maliki, Hanafi, Syafi'i and Hambali) has proven that the monopoly prohibition is categorized under *muamalah*. The four openly mentions the prohibition on monopoly is based on consequentialism, that is that the prohibition exist because of potential losses the society might bear. Similar position is also shown in several concepts, which answers why Islam prohibits monopoly, namely: *maslahah*, *saddu zara'i*, *ta'assuf fi al-Isti'mal al-haq*, *maqasid al-syariah*, *qawa'id fiqhiyyah*, and *tauhid*. Thus, it can be concluded that the prohibition on monopoly is an Islamic legal instrument used for the welfare of mankind.

Parameters such as hoarding, price increase, and scarcity directs to what is truly meant by the welfare of mankind in this context is actually the welfare of consumers. Formal analysis of monopoly clearly shows that price discrimination and monopoly does not necessarily harm consumers. This is where we need caution in carrying out the Islamic law prohibition toward monopoly.

Islamic law does not want businesses to take advantage of consumers without a reasonable explanation to it, Islamic law definitely does not want to have consumers blaming businesses over

⁴⁶ Such concern is shown by Edward Chamberlin. See Don Bellante, "Edward Chamberlin: Monopolistic Competition and Pareto Optimality", *Journal of Business & Economic Research*, Vol. 2, No. 4, 2004. See also Alum Simbolon, "Kedudukan Hukum Komisi Pengawas Persaingan Usaha Melaksanakan Wewenang Penegakan Hukum Persaingan Usaha", *Mimbar Hukum*, Vol. 24, No. 3, October 2012, p. 530.

price increase in products without reasonable explanation.

Explicitly, Islam encourages fairness. This stated within the Quran *Surah Al Maidah*: 8:

O you who believe! Stand our firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next Piety, and fear Allah For Allah is well-acquainted with all the you do.

Reiterating the opinion of Muhammad Baqer as-Sadr⁴⁷ who states that Islamic law's prohibition towards monopoly requires state intervention, then courts (as a form of state intervention) is obliged to uphold justice. The court's obligation is elaborated in the Quran *Surah An-Nisaa*: 135 as follows:

O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kind, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do.

It is clear, the primary source of law in Islam emphasizes on the obligation to be just. Therefore, the 'exercise caution' argument in carrying out the Islamic law prohibition in monopoly becomes relevant. This argument leaves out a question: if price discrimination and monopoly does not necessarily result in the detriment of consumers, thus in what situation is monopoly justified for prohibition?

Monetary losses is a form of suffering due to the consequence of inefficiency in the process of exchange with other parties. Pareto-efficiency is not achieved and neither is Kaldor-Hicks efficiency. Within this context, consumer's monetary losses happen when exchanges with businesses are not done voluntarily.⁴⁸ Consumers do not want to

accept prices based the availability of the product they need. Such situation arises when there is no competition among businesses at the time leading up to the exchange. Thus, the absence of competition is not understood as a situation where there is only one business acting as the sole seller (or groups who act as though they are individual sellers) who goes against the allocative efficiency.

As described within the formal analysis of monopoly, market balance will recover naturally if there is only one business (or groups who act as though they are individual sellers) who goes against allocative efficiency. The natural recovery of the market cannot occur if there is an agreement amongst businesses to go against allocative efficiency. This raises another question: why does the focus of the prohibition to monopolize directed only to allocative efficiency? when in addition to the allocative efficiency, there is also productive efficiency?

As previously elaborated, the price of goods are indicators of allocative efficiency and productive efficiency. Allocative efficiency relates to the appropriate use of limited resources, whilst productive efficiency refers to the standard and organization of products. As explanation of why the prohibition of monopoly is directed toward acts against allocative efficiency, a simple illustration will be provided.

For example for businesses selling product X. Taking X from the distributor is done by businesses by using a 25-year old land transport. Because the fleet of land transport is already quite old, it is quite wasteful in terms of its fuel and its expensive maintenance. This results in high production costs, thus the selling price of X also becomes high. Businesses who are not willing to replace its fleet, and due to the decrease in machine function with age, year by year the cost of production gets higher, and this will end up being directly proportional to

⁴⁷ Chibli Mallat, *Loc.cit.*

⁴⁸ Voluntary exchanges will certainly produce efficiency, independent from what the law thinks. Therefore, inefficiency exists in involuntary exchanges, see Ronald H. Coase, "The Problem of Social Cost", *The Journal of Law and Economics*, Vol. III, October 1960, p. 18.

the selling price of X.

From the illustration above, the high price of X is not caused by the decrease in quantity, but is caused by the inefficiency of the business in organizing production. Therefore, the prohibition of monopoly need not apply to this business, even if they have agreement with fellow business owners to keep on using the 25 year old fleet. It is unnecessary, because the productive efficiency is not within the same limits as consumer losses due to monopoly.⁴⁹ As stated by Al-Robi, the four Islamic legal schools underlines that the element of manipulation in the increase in demand is an absolute requirement on the prohibition on monopoly.⁵⁰ It can be concluded that what is intended by the legal experts of Islamic law simply refers to acts which goes against allocative efficiency.

Back to the subject of restoring market balance naturally, it may not work if there has been an agreement amongst businesses to go against allocative efficiency. The word “may” is used, which means that not all agreements between businesses can go against allocative efficiency effectively. There are only two acts that can effectively go against allocative efficiency.

The first act is the act between businesses to undertake an agreement on a set of price (horizontal price fixing). Judging from its goal, there are two types of agreements: (1) an explicit horizontal agreement intended solely to reduce the quantity of products;⁵¹ and (2) ancillary horizontal agreement not intended solely for the purpose of reducing the quantity of products and pro-competitive reasons still exists.⁵²

The prohibition on monopoly is directed towards horizontal agreements which are explicit, and not ancillary in character. The argument for this is that the first form of agreement harms

competition and consumers, whilst the second form of agreement still supports competition as well as providing benefits for consumers.⁵³

The second form of behavior is in the act between competitive businesses to merge in a large percentages (very large horizontal merger). It is important to note that when a horizontal merger becomes the cheapest way to achieve the amount needed to achieve efficiency, and the cost of growth falls on the consumer, then the cost of large size growth will prevent us in achieving efficiency. The measure of what constitutes as very large percentage is the control of 95% or more of market share.⁵⁴

Even though there is not much dispute in businesses who conduct price discrimination and price monopoly, the combining of two or more businesses into one business who retains a minimum of 95% market share control can draw the prohibition on monopoly. The reason for this is that very large horizontal mergers undertake the act of eliminating competitors and price fixing (through the merger, price is fixed).⁵⁵ Though this act can be a form of derogation prohibition on monopoly, that is not always necessarily the case.

The before and after conditions of the merger need to be paid attention to as well. The condition before the merger takes out a lot time, whereby costs covering this need for time is borne by the consumer. Whilst post-merger conditions, even if the businesses conduct price discrimination and price monopoly, this does not matter much, because market balance will recover naturally.

The focus of the prohibition on monopoly towards very large horizontal mergers is directed to limit the time needed for the businesses to merger, thus the merger can be conducted quickly and consumers do not have to wait long for the natural recovery of the market post merger.⁵⁶

⁴⁹ Robert H. Bork, 1978, *Op.cit.*, p. 106.

⁵⁰ Musaed N. Alotaibi, *Loc.cit.*

⁵¹ Robert H. Bork, 1978, *Op.cit.*, p. 263.

⁵² Ernest Gellhorn and William E. Kovacic, 1994, *Antitrust Law and Economics in a Nutshell*, West Group, Minnesota, p. 172.

⁵³ *Ibid.*, p. 169.

⁵⁴ Robert H. Bork, 1978, *Op.cit.*, p. 222.

⁵⁵ *Ibid.*, p. 264.

⁵⁶ *Ibid.*, p. 222.

C. Conclusion

Based on the above discussion, it is known that Islamic law prohibits monopoly. The flexibility of Islamic law gives rise to non-fundamental differing views between the four Islamic legal schools in defining monopoly. However, the uncontested principle within the Islamic prohibition on monopoly is that this prohibition is directed towards acts which goes against allocative efficiency. This principle is in line with the law and economic approach, which brings back law to the principle of efficiency.

The law and economics approach towards monopoly goes to show that price acts as a guideline indicating the efficiency of the market at a given time. It also shows price discrimination and price monopoly does not necessarily harm consumers. These two explanations are worth considering, so that the standing of businesses and consumers are proportional in carrying out the Islamic prohibition

on monopoly. Proportionality (justice) has been an obligation emphasized in Islamic law.

Islamic law does not want businesses to take advantage of consumers without a reasonable explanation for it, as Islamic law does not want consumers to blame businesses over increase in product prices without reasonable justification. Therefore, exercising caution becomes important in carrying out the Islamic law prohibition on monopoly.

Caution is exercised through: (1) defining monopoly as the absence of competition and lack of pricing options; (2) providing criteria of what causes monopoly in the form of agreements between business competitors who can go against allocative efficiency effectively; and (3) direct the prohibition on monopoly towards two forms of behavior: agreement on explicit horizontal mergers, and very large horizontal mergers which disregards quick mergers.

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