

Reformulating the Contract Formats of Islamic Financial Institutions in Indonesia toward *Maqâshid al-Syarî'ah*-Based Contracts

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Abstract:

This research aims to reveal the legal facts regarding the substance of the contract clauses in Islamic financial institutions such as Islamic banking, sharia pawnshop, and *takâful* (sharia insurance) which show the nuance of capitalistic contract clauses. Based on the purpose of this paper, the scope of this study is limited to the normative contracts in several Islamic financial institutions in order to reflect the purity of the sharia norms as well as to produce a format of sharia contract that puts forward *maqâshid al-syarî'ah* as the basic orientation. To sharpen the analysis framework, this study applies normative legal method with a conceptual approach. It is found that several contracts in Islamic financial institutions use money as the object of the agreement (contract). Of course, if it goes uncontrolled, it could potentially trap other parties in the contracts into the practice usury (*ribâ*). In conclusion, it is necessary to reformulate the contract format of the Islamic financial institutions in order to make it in line with the *maqâshid al-syarî'ah* so that it could benefit the costumers of the sharia economy.

Keywords:

Sharia contract, Islamic financial institutions, Islamic banking, sharia pawnshop, sharia insurance, *maqâshid al-syarî'ah*

Abstrak:

Penulisan ini bertujuan mengurai fakta hukum berkenaan substansi klausul kontrak yang berlangsung di lembaga keuangan syariah, seperti perbankan syariah, pegadaian syariah, dan asuransi syariah, yang masih terjebak klausul kontrak bernuansa kapitalistik. Berdasarkan tujuan penulisan tersebut, ruang lingkup penulisan ini hanya pada studi normatif kontrak pada beberapa lembaga keuangan syariah, agar tetap mencerminkan kemurnian norma-norma syariat yang sekaligus dapat menghasilkan format kontrak syariah yang memang mengedepankan *maqâshid al-syarî'ah* sebagai orientasi dasarnya. Untuk mempertajam kerangka analisisnya, penulisan ini secara konsisten menggunakan metode penulisan hukum normatif dengan pendekatan konseptual. Hasil penulisan secara ringkas, menemukan beberapa kontrak di lembaga-lembaga keuangan syariah yang masih menjadikan uang sebagai objek perjanjian yang tentu saja bila tidak diwaspadai, kemungkinan dapat berpeluang menjebak para kontraktan ke praktik yang menjurus ke riba. Kesimpulannya, perlu penataan kembali format kontrak pada lembaga keuangan syariah dimaksud, agar tetap mencerminkan kemurnian syariat guna menghasilkan format kontrak syariah yang memang mengedepankan *maqâshid al-syarî'ah*, sehingga memberikan kemaslahatan bagi para pihak yang berkontrak.

Kata Kunci:

Kontrak syariah, lembaga keuangan syariah, perbankan syariah, pegadaian syariah, asuransi syariah, *maqâshid al-syarî'ah*

Introduction

The presence of Islamic financial institutions in Indonesia, such as Islamic banking, Islamic insurance, and shariah pawnshop, should be welcomed especially by the majority of the Muslim community. This is because it is to meet the needs of the Indonesian Muslim community, which involves the needs related to faith and sharia. This is a very basic need for every Muslim in Indonesia in order to organize any activities related to financial and business transactions based on Islamic faith and sharia. However, within the framework of the Islamic faith, every Muslim is not allowed to do any activities against sharia guidelines, which are an integral part of the implementation of Islamic faith itself.

Implementing sharia, which is a part of the implementation of Islamic faith itself, as well as a mandate of Allah to mankind to realize the purpose of life or creation, is solely devoted to Allah, as Allah says, "And I (Allah) created not the jinn and mankind except that they should worship Me (Alone)."¹ This provision is a general reference for all mankind to always realize his devotion to Allah through the application of Islamic law in all aspects of life. In this context, the Muslim community in Indonesia, has also a transcendental consciousness to a make commitment to run Islamic law in all aspects of life, not only in the life of

individuals and families but also in social and economic life.

In terms of organizing the Islamic sharia in the aspect of economy, some Islamic financial institutions such as Islamic banking, Islamic insurance, and shariah pawnshop have appeared in the reality of life of the majority of Indonesian Muslims. However, it should be of a major concern that the arrangement of Islamic financial transaction should refer to the texts of the Qur'an and the traditions of the Prophet Muhammad. One of fundamental and important aspects that is set in the Qur'an and the traditions of the Prophet in the framework of an economic relation, is that it must not be based on usury (*ribâ*), because in sharia perspective *ribâ* is something that is strictly prohibited. It can be observed in the Qur'an: "...Whereas Allah has permitted trading and forbidden *ribâ*..."² Also, in the hadiths of the Prophet Muhammad in the Book of *Shahîh Muslim*, it is narrated from Jâbir, he said, "The Prophet curses the eater of usury (who take it), who pays usury, who takes notes, and two people who become witness, and the Prophet said, 'They are all the same'."

Thus, the fundamental principle of the financial transaction activities in the perspective of sharia and in the context of making a profit, is to be based on trading, in the form of both goods and services, and lease transactions which are within the framework justified by Islamic Sharia. It means that, fundamentally, it is forbid-

¹ Qs. Al-Dzâriyât (51): 56.

² Qs. Al-Baqarah (2): 275.

den to build an economic transactions for profit based on the activity of usury.

Based on the aforementioned statement, according to sharia, basically, economic relations is not allowed to take place on the basis of mainstream usury. It is decided by sharia that usury is an accursed act and is considered like a demon-possessed man, and included in the category of the seven deadly sins. Therefore, the sharia arrangement regarding financial transactions, which should not be based on usury, certainly has the intent and purpose of benefiting mankind. This is what is meant by *maqâshid al-syarî'ah*, meaning that each of sharia laws sent down by Allah, surely contains the benefit to all humankind, so that Islam has the mission of spreading out a mercy to the universe (*rahmah li al-'âlamîn*).³

The discussion in this paper tries to explore the sustainability of various sharia contracts which have become a fact of law in some Islamic financial institutions in Indonesia through the consideration that a few nomenclature of the sharia contracts are still contaminated by usury. One of the examples is the contract of *mudlârabah* which takes place in one of the Islamic banking institutions in Indonesia. The clause of the *mudlârabah* contract has positioned *mudlârib* (customers) in the position of sub-ordinate under *shâhib al-mâl* (Islamic bank), it also appears that some agreements seem to impose money as the object of the agreement while in the *mudlârabah* contract, it is the *nisbah*, which refers to an agreement of loss and profit sharing between the cus-

tomers and the bank, which should be the object of an agreement. Similarly, based on the observation of the author, other contracts occur in sharia pawnshops and Islamic insurance, give a strong impression to put money (capital) as the object of an agreement behind the contract of *ijârah* as additional contracts for a profit, whereas the spirit contained in contracts that take place in the sharia pawnshop or islamic insurance, is the principle of mutual help (the principle of *ta'âwun*), not solely for profit.

Of course, if the substance of the sharia contract clauses is not controlled and reconstruction is not made as soon as possible, it will trap the parties involved into the capitalistic contracts of transaction which deviate from the sharia principle. It is because each sharia contract is not designed simply to follow the will of subjectivity (desire) of humans, but runs on the basis of sharia aimed at realizing *maqâshid al-syarî'ah*. The concept of *maqâshid syarî'ah* to be enforced is to bring the benefit of each party (contracting parties), both in terms of customers' interests and the interests of the Islamic financial institutions (banks, pawnshop, and insurance). The meaning of the benefits from the perspective of Islamic economics is to prevent a chance of one party to take the properties of other parties illegitimately (violating the sharia norms).⁴

³ Ro'fah Setyowati, "Karakter Khusus Penyelesaian Sengketa Perbankan Syariah di Indonesia", *Jurnal Hukum Respublica* 13, no. 2 (May, 2014): 1-10.

⁴ Qs. Al-Nisâ` (4): 29-30 states "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you. And whoever commits that through aggression and injustice, We shall cast him into the Fire, and that is easy for Allah." Muhammad Muhsin Khân and Muhammad Taqî al-Dîn al-Hilâlî, *Interpretation of the Meanings of the Noble Qur'ân* (Riyad: Dâr al-Salâm, 2007), 124.

In this context, it is important to reformulate every contract made in sharia base financial institutions to make sure that it is in accordance with sharia rules which come from Allah the Almighty. Moreover, all contracts which are consistent with sharia, must contain the purposes which can benefit economic actors, the purposes in which there is the intended desire of sharia (*maqâshid al-syarî'ah*), among others; the benefit intended by sharia to maintain the property through distribution of goods and services, not through illegitimate ways in the perspective of the law of sharia economy such as bribery, the practice of usury, and other ways of economic goods acquisition which are not in line with the sharia norms.

Research Method

This paper applies the writing of law method with sharia conceptual approach, namely analyzing the topic of discussion conceptually using sharia arguments to produce legal argument justified by sharia. Thus, it is a qualitative descriptive analysis which is the most suitable for this study in order to draw a conclusion that can be justified scientifically referring to the opinions of the ulema (Islamic scholars).

The Results and Discussion

The Principles of Sharia Economy in the Perspective of *Maqâshid al-Syarî'ah*

Basically, economic system in Islam is built on two main frameworks, the first is about how to obtain economic resources to meet human needs both the primary and secondary needs, and the second is about how to distribute the economic resources, which may be done by

the state, society, and individuals. Thus, in the perspective of sharia the main economic problem faced by mankind is not the problem of scarcity of goods as claimed by the capitalist economic system, but the imbalance of the distribution of economic resources so that human beings are not able to meet their basic needs (primary needs), which includes the needs for food, clothing, housing, and health, as well as security and educational needs. So the main point relating to economic problems faced by humanity, according to Islam, is the inequality of distribution of economic resources in terms of satisfying basic human needs so that the gap between rich and poor is getting wider and wider.⁵ It is stated by Allah, in the Qur'an:⁶ "And Allah gave as booty (Fai') to His Messenger (Muhammad saw.) from the people of the townships –it is for Allah, His Messenger (Muhammad saw.), the kindred (of Messenger Muhammad saw.), the orphans, al-Masâkîn (the needy), and the wayfarer, in order that it may not become a fortune used by the rich among you. And whatsoever the Messenger (Muhammad saw.) gives you, take it; and whatsoever he forbids you, abstain (from it). And fear Allah; verily, Allah is Severe in punishment."

Based on the explanation above, the solution to get out of the economic slump faced by mankind is applying the perspective of sharia to overcome the problems of economic resources distribution in which, so far, large amount of economic resources are controlled by capital owners, who stores up their wealth for their own interests and their cronies, whi-

⁵ Taqiyuddin An-Nabhani, *Membangun Sistem Ekonomi Alternatif Perspektif Islam*, trans. Maghfur Wachid (Surabaya: Risalah Gusti, 1999), 5.

⁶ Qs. Al-Hasyr (59): 7.

le on the other hand, the state seems to ignore strategic efforts to distribute the economic resources fairly and equitably so that each individuals (people) can meet their basic needs.

This is the main solution offered by Islam which is about how to distribute economic resources fairly as well as how to acquire wealth as a source of economy in the point of view of sharia. This is the basic paradigm underlying the economic principles in Islam. In Islam, the economic principles can not be separated from the philosophical framework according to the perspective of sharia, which is the objectives of the creator of the sharia itself, Allah the Almighty. The desired objectives, then, are conceptualized as *maqâshid al-syarî'ah*.

Basically, the concept of *maqâshid al-syarî'ah* has become indepth discussion among Islamic scholars and thinkers, both classical and contemporary scholars, such as al-Ghazâlî who defines *maqâshid al-syarî'ah* as the purposes and objectives of sharia which contain the intention to prevent damages and encourage the establishment of well-being of human including the sustainability of life.⁷ Jasser Auda⁸ describes the meaning of the *maqâshid al-syarî'ah* concept, stating that the term *maqshûd* (plural: *maqâshid*) refers to a purpose, objective, principle, intent, goal, end, *telos* (Greek), *finalite* (Frech), or *zweck* (German). *Maqâshid* of the Islamic law are the objectives/purposes behind Islamic

rulings. For a number of Islamic legal theorist, it is an alternative expression to people interests (*mashâlih*). For example, 'Abd al-Mâlik al-Juwaynî, one of the earliest contributors to *al-maqâshid* theory as we know it today (an as will be explained shortly used *al-maqashid* and public interests (*al-mashâlih al-'âmmah*) interchangeably. Abû Hâmid al-Ghazâlî elaborated on a classification of *maqâshid*, which he placed entirely under what he called unrestricted interests. Fakhr al-Dîn al-Râzî and al-Âmidî followed al-Ghazâlî in his terminology. Najm al-Dîn al-Thûfî, who gave *al-mashlahah* precedence even over the direction implication of the specific script defined *mashlahah* as, what fulfils the purpose of the legislator. Al-Qarâfî linked *mashlahah* and *maqâshid* by a fundamental (*ushûlî*) that stated a purpose (*maqâshid*) is not valid unless it leads to the fulfillment of some good (*mashlahah*) or the avoidance of some mischief (*mafsadah*). These are a few examples that show the close link between *mashlahah* and *maqâshid* in the *ushûlî* conception.

Based on the explanation, the concept *maqâshid al-syarî'ah* aims to bring goodness and avoid evil, or to take benefit (*mashlahah*) and refuse the disadvantages. The term which is similar to the substance of the *maqâshid al-syarî'ah* is benefit since the establishment of the Islamic law should be geared towards the benefit. Keep in mind that Allah as the shari' (who sets the sharia) does not create the laws and rules without any purposes. The laws and rules are created with a certain purpose and intent. Ibn Qayyim al-Jawzîyah, as cited by Khairul Umam,⁹

⁷ Ika Yunia Fauzia and Abdul Kadir Riyadi, *Prinsip Dasar Ekonomi Islam Perspektif Maqashid Syariah* (Jakarta: Kencana Prenada Media Grup, 2014), 41.

⁸ Jasser Auda, *Maqashid al-Shariah as Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2010), 2-3.

⁹ Khairul Umam, *Ushul Fiqh* (Bandung: Pustaka Setia, 2001), 127.

states that the purpose of the sharia is the benefit of a servant in the worldly life and the life in the hereafter. All sharia is fair, all are filled with grace, and all contain wisdom. Each *mashlahah* deviating from justice, mercy, benefit, and wisdom is certainly not the provision of the sharia.

However, the concern of the study of *maqâshid al-syarî'ah* is that it should be positioned within the framework of understanding according to sharia, and should not be based on the free rationality of human. It means that *maqâshid al-syarî'ah* is the purpose of the whole sharia rather than the purpose of each sharia laws. At this point, Taqîy al-Dîn al-Nabhânî¹⁰ explains his views on the *maqâshid al-syarî'ah* stating that *maqâshid al-syarî'ah* is the result that would be obtained by humans when sharia law is applied appropriately, as the word of Allah in the Qur'an¹¹ surah al-Anbiyâ': 107, "And We have not sent you, [O Muhammad], except as a mercy to the worlds." Al-Nabhânî argues based on this verse that sharia law will basically provide benefit for mankind as a whole, it does not mean that the *maqâshid al-syarî'ah* become the cause of or a specific justification for the revelation of the sharia by the lawmaker (Allah).

According to us, the view of al-Nabhânî is a protection against the context of meaning of *maqâshid al-syarî'ah* which should not be extended to cover up the meaning outside the sharia, for example attaching the meaning of *mashlahah* to the view of secular capitalism. The understanding of the *maqâshid al-syarî'ah*, of course, should be returned to the view-

point of sharia, and not to human logic. Based on the arguments put forward by al-Nabhânî, it can be concluded that any sharia law sent down by Allah, there must benefit (*mashlahah*) for all beings, without having to sue the benefit itself based on human desires. There may be a sharia law, which in the view of the human desires, which does not provide benefits but, in the view of Allah, it must contain benefits for mankind. The Qur'an states:¹² "Jihâd (holy fighting in Allah's Cause) is ordained for you (Muslims) though you dislike it, and it may be that you dislike a thing which is good for you and that you like a thing which is bad for you. Allah knows but you do not know."

Thus, the benefits that would be achieved by *maqâshid al-syarî'ah* being discussed here, are those according to the view of the sharia lawmaker (Allah). We should not recklessly calculate those benefits solely based on the reason that is based on human desires. Based on this thought, Ahmad al-Mursî Husayn Jawhar,¹³ describes that all the benefits that would be achieved within the framework of *maqâshid al-syarî'ah*, will lead to the five main things as quoted by Ahmad al-Mursî Husayn Jawhar from the opinion of al-Ghazâlî and al-Syâthibî, include:

1. Keeping Religion; it is mandatory to fight when it is intended to weaken the enemies who intend to impede the propagation of Islam or because it comes under attack for the sake of self-defense.
2. Keeping the Soul; the law of *qishâsh* is mandatory in order to protect the glo-

¹⁰ Taqîy al-Dîn al-Nabhânî, *al-Syakshîyah al-Islâmîyah Juz III (Ushûl al-Fiqh)* (Al-Quds: Min Mansyûrât Hizb al-Tahrîr, 1953), 98.

¹¹ Qs. Al-Anbiyâ' (21): 107.

¹² Qs. Al-Baqarah (2): 216.

¹³ Ahmad al-Mursî Husayn Jawhar, *Maqashid Syariah*, trans. Khikmawati (Jakarta: Amzah, 2013), xv.

ry and the killings committed unlawfully according to sharia.

3. Maintain Intellect; it is prohibited to consume all intoxicated things because it can damage sense, like khamr and narcotics.
4. Protecting properties; Usury and bribery as well as taking someone else's property illegally are prohibited.
5. Maintain descendants; it is prohibited to commit adultery and accusing virtuous woman of committing adultery.

Within the framework of the discussion of *maqâshid al-syarî'ah* associated with economic principles of sharia, specifically, according to the focus of this discussion, will be associated with a variety of transactions which take place in several Islamic financial institutions in Indonesia. Of course, all the transactions that take place in several Islamic financial institutions is a transactional activities as part of economic activities based on the the sharia principles. As for the financial institutions, they include Islamic banking, sharia pawnshop, and sharia insurance. All financial institutions that portray themselves as Islamic financial institutions, of course, are obliged to carry out all their activities based on the principles of sharia economy. It means that it is forbidden for Islamic financial institutions to run all their activities by transplanting other than islamic economic principles such as the economic principles of capitalism.

Basically, the economic principles of capitalism and Islamic economic principles, have very different philosophical basis. The economic principles of capitalism concern with capital raising as much as possible without paying attention to business ethics, for example inflicting a fi-

nancial loss on either party. On the contrary, the Islamic economic principles concern with business ethics which are intended to keep the rights and obligations of each parties balance without harming other parties according to sharia restrictions. It in this context, the linkage between the implementation of sharia economy principles with what is contained in the *maqâshid al-syarî'ah* seem to be obvious.

As has been described with regard to the *maqâshid al-syarî'ah*, one of the wisdom of sharia revelation is to maintain the property. Management and control of wealth is an integral part of an economic activity in general including sharia-based economic activities. Thus, any economic activities that are based on sharia, certainly contain aspects of *maqâshid al-syarî'ah* which is mainly to maintain the property. In the perspective of sharia it means setting the limits for the managers of businesses to avoid running their business activities in the way that is illegitimate, such as usury, or bribery.

The practice of usury and bribery is prohibited in Islam.¹⁴ Perpetrators can be threatened with a very severe punishment from Allah namely, grievous torments of hell. The practice of usury is categorized by the Prophet Muhammad as one of the seven deadly sins. This is the philosophical meaning of maintaining the property in the context of *maqâshid al-*

¹⁴ Trisadini Prasastinah Usanti, "Akad Baku Pada Pembiayaan Murabahah di Bank Syariah", *Perspektif: Jurnal Kajian Masalah Hukum dan Pembangunan Perspektif* 18, no. 1 (2013): 46-55, accessed on 2nd March 2014, ejournal.uwks.ac.id/myfiles/201303002803143006/5.pdf.

syarî'ah, namely acquiring property only in ways that are justified by Islamic law.

The concern, with regard to transactional activity in Islamic financial institutions in Indonesia, is the contract between parties. The contract, which will be the legal basis of relations in the transaction between the parties, must not violate Islamic principles such as allowing usury to happen. What needs to be examined is the content of the contract forms which occur in several Islamic financial institutions in Indonesia. The scrutiny is needed in order to create a contract that is based on Islamic principles so as to realize the nomenclature of contracts that meet the characteristics of *maqâshid al-syarî'ah*.

Referring to the explanation above, the concept of *maqâshid al-syarî'ah* according to Islamic economic law introduced by us in this article, is related to the ways of managing property or ownership rights transfer which is not done illegitimately, for example in the contracts found in several Islamic financial institutions in Indonesia, which once again should not allow chances to trap the parties into usury. From the viewpoint of *maqâshid al-syarî'ah*, acquiring wealth involving usury is illegitimate practice, whose impact lead to injustice in society and economic injustice.

Critical Study of the Practice of Contract in Indonesia Islamic Financial Institutions

Before explaining the importance of contract reconstruction of several Islamic financial institutions in Indonesia, we would describes some facts of contracts found in some Islamic financial institutions, then do a critical study on some

clauses of the contract contained therein, which seems to deviate from the principles of sharia so that it is possible to trap the parties in the contract into transactions contain elements of usury.

Some facts of contract to be observed are those that are usually found in the institution of Islamic banking, Islamic insurance institution, and the institution of sharia pawnshops. These three Islamic financial institutions are what are mostly found in the Islamic financial transaction activities in Indonesia.

The first is the contract of *mudlârabah* in Islamic banking institutions. This form of contract is often found in Islamic banks. *Mudlârabah* is a form of contract recognized in Islamic business transactions using a partnership scheme between the parties to run certain business with the concept of profit sharing (ratio).¹⁵ The partnership scheme described in Islamic banking, uses the following forms: The sharia bank serves as the capital owner (*shâhib al-mâl*), while the customer serves as a manager of the capital (*mudlârib*). Contract agreements between the bank (*shâhib al-mâl*) and the customer (*mudlârib*) using *mudlârabah* scheme are the Islamic banks would give their capital to the customer to be used for running certain business activities for specific period of time. Based on the agreement, at a specified time, it is then determined the profit sharing (ratio) of business run by the customer (*mudlârib*), usually the bank, as the *shâhib al-mâl*, would get about 60% of

¹⁵ Sita Ita Rosita, "Studi Pembiayaan Mudharabah dan Laba Perusahaan Pada PT. Bank Muamalat Indonesia Tbk. Cabang Bogor (Study of Mudharabah and Profit in Bank Muamalat)", *Jurnal Ilmiah Kesatuan* 14, no. 1 (2014): 104-105.

profit while the customer as the *mudlârib* only gets 40% of the profits.

In *mu'âmalah* jurisprudence which discusses specifically the *mudlârabah* contract, it is formulated that the *mudlârabah* contract is a partnership formed by the funder (*shâhib al-mâl*) and the customer (*mudlârib*). In other words, the *mudlârabah* partnership is formed by mixing properties and bodies. The profit of a *mudlârabah* company is divided according to agreement while the loss (liabilities) is borne by the *shâhib al-mâl*. The *mudlârabah* company is considered legitimate or is formed after the *shâhib al-mâl* has deposited capital to *mudlârib*. The *shâhib al-mâl* are not allowed to work together with the *mudlârib*. Similarly, the *mudlârib* is not allowed to run a specific business activity or transaction without the permission of the *shâhib al-mâl*.¹⁶

In *mudlârabah* contract found in some Islamic banking institutions in Indonesia, apparently *shâhib al-mâl* or the owners of capital, in this case the Islamic banks itself, still place collateral as mandatory requirements that must be met by the *mudlârib*. According to the author, in a *mudlârabah* contract, a collateral used as an essential requirement is not a problem when it is seen as a strategy to ensure that the *mudlârib* remains cautious in the use of capital provided by *shâhib al-mâl* (Islamic bank). However, in the perspective of Islamic jurisprudence, it is considered as having legal flaws which could undermine the nomenclature of the *mudlârabah* contract. It is because in a *mudlârabah* contract, what is emphasized is legal relationship which is a partnership or joint ventu-

re cooperation. The characteristics of partnership in a *mudlârabah* contract, require the two parties, namely *shâhib al-mâl* and *mudlârib* not to be bound by an additional agreement as a requirement in the *mudlârabah* contract, as seen in the the contract of *mudlârabah* practiced in some islamic banks in Indonesia, in which they have put the requirement of guarantees to be met by *mudlârib*. These guarantees can be used as a replacement of the capital value that has been used by *mudlârib*, if later the *mudlârib* is not be able to repay the capital on the grounds that he has been negligent or breach of contract.

Essentially, the requirement of collateral that must be met by *mudlârib* has legal defects, which proportionality damages the nomenclature or the characteristics of *mudlârabah* contracts. This is because it may have effects of changing the characteristics of the agreement into an agreement of debts. The reason is that the essence of a guarantee is a form of coercion to *mudlârib* to better use the capital of *shâhib al-mâl*. It means that the contract increasingly traps both parties to make the capital as the object of the agreement. When capital is used as the main object of the agreement, it has philosophically made the agreement as an agreement of debts. In fact, in *mudlârabah* contract, it is not the capital which is the object of the agreement, but the division of the profit (*nisbah*) which is obtained by the *shâhib al-mâl* and *mudlârib*.

The second is the fact of contracts in sharia pawnshops. The basic principle of the contract which takes place in sharia pawnshop in Indonesia, is the contract of debts (*qardl*) by attaching a secured loan contract for the repayment of debt owed by the parties. The lien contract attached

¹⁶ al-Nabhânî, *al-Syakshîyah al-Islâmîyah*, Juz III (*Ushûl al-Fiqh*), 160-61.

to these receivables debt agreement, in the perspective of Islamic jurisprudence is called *rahn* contract. Because the basic principle of the contract in the sharia pawnshops is the contract of debt, the underlying principle should be the principle of mutual help, or the principle of *ta'âwun*. Thus, any charges imposed by the sharia pawnshop to customers are not justified, it can give a chance for the sharia pawnshops take profits or benefits from the customers (*râhin*).

Observing practices in the contract of debt in the sharia pawnshops, it appears that there are still some aspects to be criticized if it is linked to the enforcement of the principles of *ta'âwun* underlying the sharia-based debt contracts. It is specified in the clause that the client (*râhin*) has certain obligations to be itemized by the sharia pawnshop (*murtahin*). One of the obligations as seen in its practice is the obligation to bear the cost of maintenance. In the context of debt agreements in sharia pawnshop, such obligation can lead to problems when viewing from the viewpoint of upholding the principle of *ta'âwun* itself. It is because the maintenance cost should not be there or in other words, to be borne by the customer (*râhin*).

Indeed, the maintenance done by *marhûn* is the responsibility of *râhin* as the owner of the goods pawned (*marhûn*). However, if the *marhûn* under the authority of the pawn recipient (*murtahin*), it is the *marhûn* who should pay the maintenance costs, but it does not apply to all types of property. It applies only to the property need to take care of to avoid being damaged or destroyed such as animals, because they will certainly die if not fed. They can also shrink or get sick if not

treated properly. However, if the goods belong to the *râhin* as found in the contract of sharia pawnshops, are like gold, fabrics, electronic devices, cars, motor-cycles, and so on, they do not need a special care, let alone a period of debt which is relatively short, for example four months. If the asset does not need to be cared of, it does not need maintenance costs.

Referring to the opinion of Islamic jurists,¹⁷ in principle maintenance costs can be needed if the *marhûn* is in the form of a property that does need to be cared of, such as an animal or a tree, then the

¹⁷ Based on the investigation of the author, it is found that Islamic jurists agree that basic necessities or fees needed by *marhûn* are the responsibility of *râhin*, or in other words, it is the *râhin* who has the obligation to pay expenses needed to take care of the *marhûn*, because sharia has decided that benefits and advantage gained from *marhûn* is for *râhin*, as sharia also has stipulated that the cost of taking care or maintaining the *marhûn* has been the responsibility of *râhin*. The hadits of the Prophet saying, "The ownership of collaterals is not separated from the owners who have pawned them, the advantages the collaterals are for those who have pawned them, the expenses of (maintaining) the collaterals become their responsibility." However, the Islamic jurists have different opinions about the form of the fees of *marhûn* which become the responsibility of *râhin*. In this case, there are two opinions: a. Ulama of Hanafiyyah said that the costs needed by *marhûn* are share by the *râhin* because he is the owner of *marhûn*, and *murtahin* because he is the one who is responsible of keeping the *marhûn*; b. A vast number of other scholars (Ulama of Mâlikîyah, Syâfi'iyah, and Hanâbilah) believes that all expenses both to take care of and to maintain the *marhûn* are the responsibility *râhin*. Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu (Jaminan (Al-Kafaalah), Pengalihan Utang (Al-Hawaalah), Gadai (Ar-Rahn), Paksaan (Al-Ikraah), Kepemilikan (Al-Milkiyyah))*, Jilid 6, trans. Abdul Hayyie al-Kattani (Jakarta: Gema Insani, 2011), 185-88.

treatment becomes the responsibility of the *râhin* as the owner.¹⁸ The maintenance could be done by the owner himself and so it does not need maintenance costs. He may also hire someone else, who can be the *murtahin* or others to take care of it. If it is not the *murtahin* but some one else who is employed to take care of it, then the *murtahin* will not be able to get the maintenance cost.

This is where the crucial point is, because the motivation the *rahn* contract in the practice of sharia pawnshops today is a business or seeking investment gains, it gives the impression that the practice in sharia pawnshop aims at how to generate profits by giving the responsibility of maintenance costs to *râhin*. Meanwhile, in the context of maintenance, Islamic jurists generally agree that the maintenance should be done by the *râhin* himself or he employes anyone other than the *murtahin*, in the sense that when a cost is required for the maintenance, the amount spent on the maintenance is as much as the cost of the maintenance of the property.

We criticize the contract of debt transactions in sharia pawnshop institution, in which from the outset it has shown the objective of how to make the institution as a means of investment. It gives the impression that from the very beginning the spirit of the institution is how to make conventional pawnshop, which is obviously unlawful because of usury involved in it, become "Islamic" institution while providing a benefit to the recipient (pawnshop). The spirit seems to legalize the benefits gained from the practice in order to be in accordance with the sharia. For this to happen, it makes use the opinion

¹⁸ Ibid.

sating that the maintenance cost of *rahn*, which is analogous to "estimated items", which is to be borne to the customer (*râhin*) as justification for *murtahin* (sharia pawnshop institutions) to gain profits. Obviously, the costs can trap the parties in the contract of sharia pawnshop into the withdrawal of benefits which lead to usury.

The third is the contract which take place in Islamic insurance institutions, which is in practice called *takâful* institutions. The *takâful* institutions is established as a corrective action to conventional insurance agencies that are considered as having problems and viewed as practicing usury as well as some elements of gambling (*maysir*).

The term insurance according to Islam, in Arabic literature, is called *al-ta`mîn al-ta`âwuni*. Based on the term, the National Sharia Board of Indonesia Ulama Council (DSN-MUI) defines sharia insurance as an effort to protect each other and helping each other among a number of people/parties through investment in assets and or *tabarru'* which gives the return to face particular risks through a contract which is in accordance with sharia.

Based on the definition put forward by the National Sharia Board of Indonesia Ulama Council (DSN-MUI), *takâful* puts an emphasis on the principle of mutual help (*tabarru'*) of its clients when a hazard/disaster occur in the future. As for the arguments that is often used as a guideline for running the Islamic insurance activities is the hadits of the Prophet Muhammad quoted from *Asy'arîyîn* that the Prophet said, "The *Asy'arîyîn*, if they run out of supplies in a war or if the food of their families in Medina

is running short, they collect what they have in a single sheet of fabric and then they distribute it equally among them in a container, they are a part of me and I am a part of them." (Muttafaq 'Alayh).

It should be understood that the basic characteristic of *tâkaful* is not a motive for profit or standing on the foundation of the business. So, the establishment of the *takâful* institution (Islamic insurance), is purely for a social activity rather than for profit. However, what can be seen in the *takâful* contract is that the clients as well as insurance companies have also made the contract as a *tijârah* contract, which is a contract containing the clause of *mudlârabah* agreement or an agreement of profit sharing between insurance company and customers when the premium money is used in a certain business activity. It is the clause in the contract which destroys the basic character of Islamic insurance, which is actually has a humanitarian aim, namely mutual help for members or customers who suffer from a disaster.

Reconstruction of Contracts in *Maqâshid al-Syarî'ah*-Based Islamic Financial Institutions

As described above, some contracts in Islamic financial institutions in Indonesia need to be reconstructed, so that the form of the contract is not prone to fall into things that are not in line with sharia, or to trap the parties into illegitimate ways of earning wealth such as usurious transactions. This is the dimension of *maqâshid al-syarî'ah* that should be the basis of such contracts.

What matters more is the characteristic of the contract clauses in several Islamic financial institutions in Indonesia, which are still contaminated by the ide-

ology of capitalist economy. One of the characteristics of a capitalistic economy is to make money as a commodity, while in this concept of sharia, money should not be used as a commodity but solely as a means of exchange of goods and services. This is the philosophical value of *maqâshid al-syarî'ah* of the nomenclature of Islamic-based contract, which is for a Muslim running a business is not only to earn profit but also to business to maintain the property. It means that in the perspective of sharia, maintaining the property is to keep the sanctity of the property from sin. On this basis, the reconstruction of contract clauses in some Islamic financial institutions is a matter in hand. It is intended to keep the dimension of *maqâshid al-syarî'ah* really characterizes such contracts as well as to ensure that sharia contracts in Indonesian Islamic financial institutions are not trapped in a capitalistic model.

One of the sharia contracts which must be reconstructed is the contract of *mudlârabah* in Islamic banks. According to our observations, a *mudlârabah* contract in Islamic banks, for example, still requires a collateral in the contract, although this requirement is regarded only as a caution of the Islamic banks to keep safe their capital managed by the client (*mudlârib*). However, the existence of the guarantee shows as if the clauses are imposed or required.

The existence of the collateral as something imposed clearly traps the parties into the agreement of debts which no longer retain the characteristic of *mudlârabah* in the contract. It is obvious that the Islamic banks do keep their capital given to *mudlârib* that the Islamic banks worried about the risk of loss if the business ma-

naged by the *mudlârib* would go bankrupt in the future.

What is problematic, according to us, with regard to the contract of collateral which serves as a complementary agreement of *mudlârabah* contract, is that it seems to give a chance to the Islamic banks (*shahib al-mâl*) to force the customers to pay back the capital hiding behind the contract of *mudlârabah*. From the perspective of *maqâshid al-syarî'ah*, it is a critical point because it is possible that the parties involved could be trapped in usury. This is because it has deviated from the object of the *mudlârabah* agreement, which seems to make the capital as the object of the contract.

The dimensions of *maqâshid al-syarî'ah* in the perspective of Islamic economics, requires the capital to be managed in a way that can provide benefits for all parties involved in the contract and not even put them into harm. The clause in the *mudlârabah* contract seems to force customers (*mudlârib*) to return the capital without any considerations of the risks or things beyond the customer ability, for example taking customer properties which are used as a collateral if he is not able to pay back the capital completely. This can bring harm to the customer.

Meanwhile the nomenclature of sharia *mudlârabah* contract, the object of the agreement is the ratio (profit-sharing) between *shahib al-mâl* and the *mudlârib*. If in the future the business makes a loss then the capital loss is borne by the *shahib al-mâl* while the loss of energy, thought, and time are borne by the *mudlârib*. From the perspective of justice according to sharia, the *mudlârib* still suffers from losses, although, when the capital is calculated, it appears as though it is the ow-

ners of capital or in this case Islamic banks who lost in the *mudlârabah* contract, while the company (*mudlârib*) does not seem to lose anything because it does not have to bear capital losses.

If we take into consideration the nomenclature of the position of the parties in the *mudlârabah* agreement using the perspective of proportional principle, actually, the loss is faced not only by the capital owner but also by the business (*mudlârib*). Proportionally, the financial loss should be borne by the capital owners. However, on the other hand, businesses also suffer losses. The businesses suffer from losses in terms of energy and time they have spent. It is true that the businesses are not charged to bear the capital loss, but with the losses suffered in the implementation of the *mudlârabah* agreement, the businesses do not get anything of their works. The sufferings even more stressful when the work of the *mudlârib* is only concentrated on the *mudlârabah* agreement, certainly it will affect the psychic aspect faced with the fact that he has to meet the daily living needs, especially when the need is also related to family needs. Thus, it is disproportionate and arguably it is unwise to charge the businesses in the case of capital losses in a *mudlârabah* partnership. The business suffer double losses when they have to bear the capital losses in the implementation of the *mudlârabah* agreement.

Sharia contracts in both sharia pawnshops and Islamic insurance, are based on the principle of mutual help or *ta'âwun*. With this principle, the contracts in sharia pawnshops and Islamic insurance should be should be nonprofit oriented. Therefore, it is not justifiable if the clause in the contracts of the Islamic financial in-

stitutions necessitate transactional relationships which take benefits or profits. In the contract of sharia pawnshops, for example, it is not allowed that the sharia pawnshops as the *murtahin* makes profit from the customer by charging them with rent expenses of the collaterals. This is not allowed in the perspective of sharia because making profit through rental fee is one of the forms of transactions which contain elements of usury.

Likewise, the contract in Islamic insurance is not allowed to make profit using the mechanism of *mudlârabah*, because the essence of the sharia insurance should refer to the *fatwâ* of the National Sharia Board of Indonesia Ulama Council (DSN-MUI). Placing the clause of *tijârah* by transplanting the concept of *mudlârabah* means attaching the contract of sharia insurance as a contract whose purpose is for profit, and So, the motivation of customers to involve in the Islamic insurance may no longer for mutual help but to gain benefits.

In the perspective of *maqâshid al-syarî'ah*, some contracts in Islamic financial institutions should be reconstructed. The ultimate goal is that the property which is obtained remain in line with the sharia, it is not gained in illegitimate way. This is what distinguishes the economic principles underlying Islamic businesses and businesses that are based on capitalism. Sharia business does not consider money as a commodity but as a means of exchange for goods and services while capitalism based business considers money as a commodity.

Conclusion

The presence of Islamic financial institutions in Indonesia should be wel-

comed, and their eshtablishment should be encouraged. However, the values of sharia that are guided by the Qur'an and the traditions of the Prophet Muhammad should be maintained. According to this study, what matters is that presence of the Islamic financial institutions in Indonesia is not merely as a religious symbol, because in the practice they also accommodate a capitalistic transaction. The Islamic financial institutions must actually be present as a financial institution that represents Islamic law purely and consistently. This is why it is important to reconstruct the contracts in several Islamic financial institutions in Indonesia which seem to be problematic and contain defects when viewed from the perspective of sharia. The importance of the reconstruction of the sharia contracts is to realize a contract which truly implements the *maqâshid al-syarî'ah* in the field of sharia-based economy, namely to keep the property from being obtained illegitimately. Based on the conclusion, the author suggests that it is urgent to issue laws that regulate specific set of draft of a standard contract in several Islamic financial institutions which are purely sharia-compliant. Accordingly, it is also necessary to set up a kind of institutions of Islamic Financial Services Authority which in charge of overseeing the practices of islamic financial contracts in order to really maintain the purity of sharia to achieve a model of contract implementing the *maqâshid al-syarî'ah*. []

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