The Position Of *Qiyâs* (Analogy) In The Sharia Economic Law And Its Application In The Contemporary Business Transactions

Panji Adam Agus Putra
panjiadam@unisba.ac.id

Faculty of Sharia, Universitas Islam Bandung, Indonesia

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Abstract

The agreed sources of law in Islamic law are the Holy Koran and the Sunnah. However, in the literature on ushul fiqh, Islamic jurists have different opinions regarding the position of analogy (qiyâs) as a source and legal proposition that functions as a method of finding law in Islam. Then there are differences of opinion regarding the use of analogy in the context of sharia economic law. This research focuses on the position of analogy (qiysâs) as a method of discovering sharia economic law and its application in the contemporary transactions. This study uses a qualitative method with a normative juridical approach. This research includes the type of literature study research. The results of the study show that analogy (qiyâs) can be used as a method of legal discovery, especially in sharia economic law and its application in contemporary transactions including qiyâs of IMFZ contracts to bai' al-salam contracts; (2) qiyâs sale and lease back transactions to bai' al-istighlâl; (3) qiyâs wakâlah bi al-ujrah contract to ijârah contract; (4) qiyâs Wada'i al-Mashrafiyyah to qardh contracts; and (5) qiyâs deposits to mudhârib-yudhârib.

I. Introduction

The ushul fiqh experts have agreed that the Holy Koran and hadith occupy the position as the primary source of law so that both of them become the basis for law enforcement.(Akhmad Husaini, 2022) However, the Holy Koran and hadith as sources of Islamic law are still global and general in nature, thus requiring further interpretation to detail the legal arguments of both, so that the law can be explored especially in terms of responding to contemporary issues.(Arifana Nur Kholiq, 2014)

Ijtihad has a fairly central position in the discipline of ushul fiqh which focuses on the methodology of extracting and applying Islamic law. One of the methodological instruments within the scope of the discussion of ijtihad is the analogy or popular method with the term of *qiyâs*. The law discovery method based on *qiyâs* in the study of ushul fiqh science is a theory that is quite productive to be used by ushul experts.(Ali Muhtarom, 2015)
In simple terms, *qiyâs* is equating a law that does not have a text (*nash*) with a law that does have a text (*nash*) because of the similarity of *'illat* law (ratio legis). In another sense, *qiyâs* is the result of thinking in *"deductive analogy"*.(Bay, 2012)

The *qiyâs* method is popularly used as a law discovery method in the Shafi'i school of thought. In the Shafi'i school of thought, this *qiyâs* hierarchy occupies the fourth position after the Holy Koran, sunnah and ijmak (consensus). Even Imam Shafi'i as the pioneer of this school of thought stated that ijtihad is *qiyâs*.(Ahmad Masyhadi, 2020)

Legal issues in Islam are not only related to the discussion of (formal) worship or commonly referred to as *mahdhah* worship, but also related to muamalah matters or referred to as sharia economic law. Thus, the rules in Islam are comprehensive and universal covering various aspects of life both at the level of worship rituals and social interactions.(Hidayatullah, 2020)

This *qiyâs* method is used by the *jumhur* of ushul fiqh scholars in making discoveries and determining laws (*istinbâth*) in the development of Islamic legal thought in order to respond to and solve the current legal events.(Maimun, 2022) Thus, Islamic law is more flexible and in accordance with the demands of the times.
According to the scholars, the study in discussing the realm of worship is *tauqifi*, meaning that worship is static/rigid until there is an injunction. In contrast to studies in muamalah which are elastic and dynamic so that the opportunities and potentials of ijtihad are wide open. Related to the contemporary issues in the field of muamalah transactions, it is very possible for the presence of the role of *qiyâs* in the method of discovery and determination of law. Therefore, this paper aims to determine the position of *qiyâs* in the sharia economic law (*muamalah mâliyyah*) and its application in the contemporary transactions.

2. Research Method

The approach used in this study is a normative juridical approach. The normative

juridical approach is carried out through a philosophical, systematic and critical analysis approach. Because this research is based on a normative juridical approach, the technical data collection in this research is through literature study, namely examining and reviewing primary and secondary legal materials. The primary sources in this study are ushul fikh books, especially those related to the discussion of analogy or *qiyâs* issues. The secondary sources in this study are literature that has relevance to the research focus. This research is descriptive research because this research was conducted to find as accurate and complete data as possible about the characteristics of a situation or phenomena that can help strengthen old theories related to legal discovery through analogies to build new theories and their applications in the field of sharia economic law.

3. Results and Discussion

The Position of *Qiyâs* as a Method of Discovering Sharia Economic Law

Etymologically, the word *qiyâs* has the meaning of *al-taqdîr* and *al-taswiyah* (guessing and equating).[1] The etymological definition of *qiyâs* which is closer to the definition of *qiyâs* in terms is to equate the branch to the principal (*taswiyah al-far' ila al-ashl*).[2]

While the terminological definition of *qiyâs* as presented by al-Baidhawi is as follows:

إثبات مثل حكم معلوم ف معلوم آخر لاشتراكهما ف علة الحكم عند المثبت

"*Applying legal equivalents to cases whose law is explained in the texts (nash), to cases where the law is not explained, because according to the view of a mujtahid, there is an illat (ratio legis) legal equation*".[3]

In applying the concept of *qiyâs* required devices that must be fulfilled. Without these elements, the *qiyâs* methodology cannot work in establishing law. Therefore, before ijtihad in legal *istinbâth*, the pillars of qiyâs must first be found. There are 4 (four) pillars or elements of *qiyâs*, namely: (1) principal/origin; (2) branches; (3) original/principal law, and (4) *'illat*. The brief description of the four pillars/elements in *qiyâs* is as follows:[4]

1) *Ashl* (principal/origin), namely something that is legalized in the text (*nash*) which is a measure or place of likening or *qiyâs*. In terms of the science of ushul fiqh, it is called *ashl* or *maqîs 'alaih* or *musyabbah bih.*
2) *Furu'* (branch) is something that is not legalized in a similar or *qiyâs* legal text (*nash*). In terms of the science of ushul fiqh it is called *al-far'u* or *al-maqîs* or *al-musyabbah.*
3) *Ashl* law, namely *syara'* law which is texted (*nash*) on the principal which will then become law for the branch.
4) *'illat*, namely the cause that connects the main with its branches or a trait that is in *ashl* and the trait that is sought in *furu'.*

The discussion regarding of the position of *qiyâs* as a legal argument in Islamic economic activities, there are at least 2 views of scholars regarding this matter, the first group states that *qiyâs* is a legal argument in Islamic economic activities. This first group states that the jurists have agreed that *qiyâs* is one of the main points or bases for establishing law in the field of sharia economics. The view of this first group generates to the attitude and shared by the majority of scholars that *qiyâs* is a legal proposition and therefore becomes *hujjah syar'iyyah* (the basis of argumentation in establishing law).

[1] (Mahmasahshani, 1961)165.
[2] (Muhammad Taqi al-Hakim, 1963)304.
[3] Ibn Yahya Al-Subki, *Al-Ibhâj Fî Syarh Al-Minhâj* (Beirût: Dâr al-Kutub al-'Ilmiyyah, 1995).3
[4] (Mufid, 2016)63.

The legal basis that is used as a guideline by this first view is the Holy Koran sura al-Nisa (4): 59 and the hadith narrated by Abu Dawud regarding ijtihad carried out by Mu'adz Ibn Jabal's companion. On the basis of this hadith, according to the majority of scholars, the Prophet Muhammad has shown how to find out and establish laws, one of which is in the field of sharia economic law which includes ijtihad with *ra'yu* if it is not found in the *Nash* (The Holy Koran and hadith). While *qiyâs* is part of ijtihad with *ra'yu*. Therefore, the determination of sharia economic law is carried out using the *qiyâs* method.

The next argument put forward by the first group is based on the practice of companions. The companions have agreed to use *qiyâs* as the basis for determining the law. The election of Abu Bakr as the Caliph (leader) was based on *qiyâs* which was based on the consideration that Abu Bakr was always the imam in prayer when the Prophet was not around.

The last argument put forward by this first group is that the texts (*nash*) of the Holy Koran and hadith are limited. Meanwhile, contemporary issues in the field of sharia economic law, such as contemporary transactions, will continue to emerge from time to time. To be able to answer these contemporary issues in the field of sharia economic law, there is no other way except by examining the *'illat* laws that exist in the texts (*nash*) and it is on the basis of 'illat that the law is applied to these new issues. With limited *Nash*, while new issues especially those related to contemporary transactions, continue to emerge, ijtihad using *qiyâs* is a must.

Based on the four basic arguments above, the scholars among the majority of scholars stated that *qiyâs* is the proposition in establishing *syara'* law, especially in the field of sharia economic law, because it has the power of proof (*hujjah*) in establishing syara' law.

The second group is a group that rejects the existence of *qiyâs* as a proposition and *hujjah of sharia'* (the basis for establishing law). This group consists of al-Nazm and his followers from among the Mu'tazilah, Dawud Zahiri, Ibn Hazm and some of the Shiites.[5] bn Hazm, one of the figures from the Zhahiriyyah school of thought stated that refusing to argue with *ra'yu* and only argue with the Holy Koran and sunnah by paying attention to the outward meaning (zahir) only. According to him, because *qiyâs* is a part of *ra'yu*, this cannot be accepted as a hujjah and proposition in determining the law.[6]

There are several arguments presented by this second group in terms of rejecting *qiyâs* as a legal proposition. There are at least 3 (three) arguments, *first*, based on Q.S al-Baqarah: 29 and Q.S al-Maidah: 3. According to this second group, these two verses show that Islam is perfect and does not need *qiyâs* because the texts (*nash*) come to explain everything clearly, whether related to matters that are obligatory, unlawful, makruh, sunnah or permissible. *Second*, the basis for determining the law based on *qiyâs*

[5] (Abd al-Wahab Khalaf, 1972)29-30.
[6] (Abu Zahrah, 1954)383.

is *zhanni* in determining the law's 'illat. Therefore, *qiyâs* cannot bring it to the level of belief; and *third*, the final argument for this group is holding on to companions like Abu Bakr and Ibn Mas'ud who denied *qiyâs* and warned them to be careful with *ra'yu* (logic).

According to the author's view, the first opinion is a relevant opinion and a superior opinion. This is based on consideration of legal arguments as stated by the first group and at the level of implementation, *qiyâs* is needed so much in contemporary transaction issues. Thus, *qiyâs* has a position as a legal proposition in the determination of law in the field of sharia economic law.

The Application of Qiyâs in The Contemporary Business Transactions

Qiyâs IMFZ to Bai' al-Salam

One of the contemporary contracts introduced by the scholars as contracts in contemporary financial transactions is *ijrârah maushûfah fî al-dzimmah*. The *ijrârah maushûfah fî al-dzimmah* (IMFZ) contract is also known as the *ijârah forward* or *forward lease* or *salam fî al-manâfi'* (*salam* for the benefit). In the sale and purchase of *salam* contract, there is *bai' al-'ain* (sale and purchase of objects), while in the *ijrârah maushûfah fî al-dzimmah* (IMFZ) contract, there is *bai' al-manfa'ah* (sale and purchase of benefits). The price is paid in advance, while the benefits of the goods are *forward*. As is the case in buying and selling *salam*, the price (money) is paid in advance, while the benefits of the goods are deferred and become the debt (*dzimmah*) of the seller.[7]

According to Ahmad Muhamad Mahmud Nashir, the *ijârah maushûfah fî al-dzimmah* contract is defined as follows:

بيع المنافع مستقبلة بثمن حال

"Buy and sell future benefits at a price that comes first" [8].

Ahmad Muhammad Mahmud Nashar, in his book *Fiqh al-Ijrârah maushûfah fî al-Dzimmah* explains the *iktilâf* (differences of opinion) among fiqh scholars regarding the legal status of the *ijrârah maushûfah fî al-dzimmah* contract. The description is as follows:

اختلف الفقهاء ف مشروعية الإجارة الموصوفة ف الذمة فذهب الحنفية إلى منع إجارة منافع الأعيان الموصوفة ف الذمة، واشرطوا أن تكون العن المؤجرة معينة. وذهب جمهور الفقهاء من المالكية والشافعية والحنابلة إلى جواز إجارة العن الموصوفة ف الذمة وعدوها من باب السلم ف المنافع. لذلك فمشروعية الإجارة الموصوفة ف الذمة مستمدة من مشروعية عقد الإجارة وعقد السلم.

"Fikh experts are of the opinion regarding the legal status of the *ijrârah maushûfah fî al-dzimmah* contract; *first*, the Hanafiyah scholars are of the opinion that the *ijrârah* contract for goods which are included in *maushûf fî al-dzimmah* (which are classified as dependents) is a prohibited contract. Hanafiyah scholars argue that rented goods must be tangible at the time the contract is made. *Second*, the majority/jumhur of

[7] (Adam, 2021)170.
[8] (Ahmad Muhammad Mahmud Nashir, 2015)19.

scholars from the Malikiyah, Syafi'iyah and Hanabilah circles are of the opinion that it is permissible to enter into an ijârah contract on goods that are *maushûf fî al-dzimmah* (which are classified as dependents) because the majority view that it is the same as a *salam* contract in terms of benefits" [9].

Based on the information provided by Ahmad Muhammad Mahmud Nashar above, the opinion of the majority of scholars regarding the permissibility of the *ijrârah maushûfah fî al-dzimmah* contract is based on analogy (*qiyas*), namely analogizing the IMFZ contract to the *bai' al-salam* contract. The IMFZ contract is analogous to the *bai' al-salam* contract. When viewed from the pillars of *qiyas*, then (1) the *ashl* is the *bai' al-salam* contract; (2) the *furu'* is the *ijrârah maushûfah fî al-dzimmah* (IMFZ) contract; the *ashl* law is permissible; and (4) the *illat* includes *bai' maushuf fî al-dzimmah*, namely buying and selling which is characterized by responsibility. Because an *ijârah* contract is the same as a sale-purchase contract, the difference is that the object in the sale-purchase contract is *'ain* (object) and benefits while in the *ijârah* contract the object is benefits. Either the benefits of an item or service.

With regard to the permissibility of the *bai' al-salam* contract, this is based on information in the Holy Koran, the hadith of the Prophet SAW, and ijmaid

Regarding the above verse as a legal or juridical basis for buying and selling salam, Ibn 'Abbas said::

عن ابن عباس، قال: أشهد أن السلف المضمون إلى أجل مسمى أن الله أحله وأذن فيه

"I testify that the salaf (salam) is part of the debt with a time that is permissible and lawful by Allah".[10]

The argumentation side of verse 282 of surah al-Baqarah shows that it is permissible for debt transactions and salam buying and selling agreements to be part of a debt transaction. Al-Qurthubi explains in his interpretation as follows:

وحقِيقةُ الدَّين عِبارةٌ عنْ كلِّ١ مُعاملةٍ كانَ أحدُ العِوضيْنِ فِيها نَ.قْدًا والحُرُ فِي ال ذِمَّةِ نَسِيئةً، فإنَّ العَيْ عِنْدَ العَرَبِ ماكانَ حاض

رًا، والدَّينُ ماكانَ غائِبًا

"The nature of debts is an expression of every muamalah which states there are two i'wadh (compensation), that one is done in cash and the other is in the responsibility. According to the Arabs, 'ain (object) is if it is tangible and dain (debt) if it is not"[11]

The provisions regarding the permissibility of buying and selling *salam* in the hadith of the Prophet SAW based on the history of Ibn 'Abbas are as follows:

عنْ ابنِ عبَّاسٍ رَضِيَ اللَّهُ عنْ.هُما قالَ

لَمَّا النَّبِيُّ صلَّى اللَّهُ عَلَيْهِ وسلَّم المَدِينةَ وهُم يُسْلِفُونَ بِالتَّمْرِ السَّنَ.تَيْنِ والثَّلاث فَ.قالَ مَنْ أَسْلَفَ فِي شَيْءٍ فَفِيكَيْلٍ مَعْلُومٍ

[9] (Ahmad Muhammad Mahmud Nashar, 2009)7.
[10] (Katsir, 2003)412.
[11] (Syam al-Din al-Qurthubi, 1964)337.

ووزْنٍ معلومٍ إلى أجلٍ معلومٍ (رواه البخارى)

from Ibn 'Abbas radliallahu 'anhuma said: When the Prophet sallallaahu 'alaihi wasallam arrived in Medina, they (residents of Medina) practiced buying and selling fruits with the salaf system, namely paying in advance and receiving the goods after a period of two or three years later, then He said: "Whoever practices the salaf in buying and selling fruits should do it with a known measure and a known scale, and until a known time" (Al-Bukhari, 2008)(H.R Bukhari).

As for the basis of the ijmaid of the Ulama on the permissibility of buying and selling *salam* contracts, it can be seen as said by Ibn Mundzir as follows:

وأما الاجماع فقال ابن المنذر: أجمعكل من نحفظ عنه من أهل العلم على أن السلم جائز

"Ulama have agreed that the contract of buying and selling salam is permissible" [12]

Thus, it can be concluded that the permissibility of the ijrârah maushûfah fî al-dzimmah (IMFZ) contract is based on the analogy (qiyas) to the bai' al-salam contract. The National Sharia Board-Indonesian Council of Ulama (DSN) has issued a fatwa related to the *al-ijrârah maushûfah fî al-dzimmah* contract, namely the DSN-MUI Fatwa NO: 1Ol/DSN-MUIIX/2016 concerning the *al-Ijarah al-Maushuah Fi al -Dzimmah* contract.

In the general provisions of the fatwa it is explained that: (1) what is meant by ijarah is a contract of transfer of usufructuary rights (benefits) of goods and/or services within a certain time with payment of rent (ujrah); (2) The *Al-Ijarah al-Maushufah fi al-Dzimmah* contract is a leasing contract for the benefit of an item (*benefit of 'ain*) and/or service (*'amal*) which at the time of the contract only states its characteristics and specifications (quantity and quality)

In the legal provisions of the fatwa it is explained that: (1) the *al-Ijarah al-Maushufah fi al-Dzimmah* contract may be made by following the provisions in this fatwa; and (2) the *al-Ijarah al-Maushufah fi al-Dzimmah* contract applies effectively and creates legal consequences, both in the form of specific legal consequences (the purpose of the contract) and general legal consequences, namely the emergence of rights and obligations, since the contract was executed

Qiyâs Sale and Lease Back transaction to *Bai al-Istighlâl*

The concept of *sale and lease back* (*al-bai' ma'a al-isti'jâr*) is a term used in business law. *Sale and Lease Back* is a type of financing in which goods actually come from the *lessee*, then purchased by the *lessor*. Then, the goods that are already in the hands of the *lessor* are leased back to the *lessee* based on a certain agreed period of time.

The discussion regarding the concept of *Sale and Lease Back* is indirectly related to the concept of buying and selling wafa (*bai' al-wafâ*). As for the definition of *bai' al-wafa* in terminology as stated in the book *Majallat al-Ahkâm al-'Adliyyah* Article

[12] (Abu Malik Kamal Ibn al-Sayyid Salim, 2003)303.

118, namely:

(المادة 118) بَيْعُ الوفاءِ هو البَيْعُ بِشَرْطِ أَنَّ البائِعَ مَتَى رَدَّ الثَّمَنَ يَرُدُّ المُشْتَرِي إِلَيْهِ المَبِيعَ

"Buying and selling on condition that the seller can buy back the goods he has sold to the buyer at a mutually agreed time". [13]

The concept of *sale and lease back* is one of variant of the *leasing* concepts. In muamalah fiqh studies, the concept of *leasing* is usually closely related to the concept of *Ijârah Muntakiyyah bi al-Tamlîk* (IMBT). Meanwhile, the concept of *sale and lease of back* in contemporary muamalah fiqh studies is commonly referred to as *al-bai' wa al-isti'jâr*.

The substance *of bai' wa al-istighlâr* is similar to *bai' al-istighlâl* which is contained in the book *Majallah al-Ahkâm al-'Adliyyah* (Islamic Civil Law) Article 119 of the Turkish Qanun 1876 H. In Article 119, *bai al-istighlâl* is defined as following:

(المادة 119) (بَيْعُ الاِسْتِغْلالِ هو بَيْعُ وفاءٍ على أَنْ يَسْتَأْجِرَهُ البائِعُ)

"Bai' al-istighlâl is buying and selling wafâ in which the buyer leases back the goods he bought to the seller". [14]

The buying and selling of *istighâl* in principle is the relationship between the concept of buying and selling *wafâ* and the concept of *ijârah* (leasing), namely the use of objects for buying and selling by way of renting or leasing. In other words, the goods that have been sold to the buyer are leased back by the buyer to the seller.

In the perspective of the Hanafi school of thought, the *bai' al-istighlâl* contract is a valid and permissible contract.[15] Meanwhile, according to Rafiq Yunus al-Mishri, the *bai' al-istighlâl* contract is a forbidden contract. Rafiq Yunus al-Mishri stated that:

بَيْعُ الاِسْتِغْلالِ: مِثْلُ بَيْعِ الْوَفَاءِ, وَلَكِنَّ الْمُقْتَرِضَ يَسْتَأْجِرُ الْمَبِيعَ مِنَ الْمُقْرِضِ , فَهُوَ بَيْعٌ صُورِيٌّ الْغَايَةُ مِنْهُ أَكْلُ الرِّبَا مِنْ طَرِيقِ الْإِجَارَةِ.

"Buying and selling *istighlâl* is similar to *bai' al-wafâ*, but (the difference) is that the muqtaridh (debtor in a qardh/debt contract (the seller in the first buying and selling contract) rents the goods he sells from the muqridh (creditor in the qardh contract) the buyer in the first buying and selling contract); then the buying and selling of *istighlâl* includes a *shûry* (artificial) buying and selling contract because the purpose of the buyer (in the first buying and selling contract) is to seek profit (usury transaction) by way of leasing"[16]

Sale and lease back transactions are allowed because they are analogous to *bai'*

[13] (Anonimous, n.d.)30.
[14] (Anonimous, n.d.)30.
[15] (Muhammad Taqi 'Utsmani, 2005)523.
[16] (Rafiq Yunus al-Mishri, 2009)112.

al-istighlâl. Thus, when viewed from the pillars of *qiyas*, then (1) the *ashl* is *bai' al-istighlâl*; (2) the *furu'* is a *sale and lease back* transaction; (3) the *ashl* law is permissible, based on the views of the Hanafiyah and Syafi'iyah scholars; and (4) the *illlat* is an asset *bai'* (buying and selling) contract in which the buyer then leases back the assets he has purchased to the seller.

The National Sharia Board-Indonesian Council of Ulama (DSN-MUI) has issued a fatwa regarding *Sale and Lease Back*, namely Fatwa No. 71/DSN-MUI/VI/2008 concerning *Sale and Lease Back*. Fatwa NO: 71/DSN-MUI/VI/2008 concerning *Sale and Lease Back* (*al-Bai ma'a al-Istijar*). In general provisions it is explained that *Sale and Lease Back* is the buying and selling of an asset in which the buyer then leases the asset to the seller; and *Sale and Lease Back* is legally permissible.

The specific provisions explain the following: (1) The contracts used are *Bai'* and *Ijarah* which are carried out separately. (2) In the *Bai'* contract, the buyer may promise to the seller to resell the assets he bought in accordance agreement; (3) An Ijarah contract can only be made after a buying and selling of assets that will be used as an Ijarah object; (4) Ijarah objects are goods that have benefits and economic value; (5) The pillars and terms of Ijarah in this *Sale and Lease Back* fatwa must take into account the substance of the related provisions in the DSN-MUI fatwa Number: 09/DSN-MUI/IV/2000 concerning Ijarah Financing; (6) The rights and obligations of each party must be explained in the contract; (7) The costs incurred in maintaining the *Sale and Lease Back* Objects are regulated in the contract.

Qiyâs Wakalah bi al-Ujrah contract to Ijârah contract

Basically, the *wakâlah* contract is the domain of *tabarru'* contracts. It means that in principle this contract is formed not to seek profit. This is the opinion of the majority of fiqh scholars as informed by Thalal Sulaiman Ibrahim al-Dausui as follows:

الاصل ف الوكالة من حيث الجملة انها تبرع بدون اجر وهذا ظاهر ف كلم الفقهاء

"Basically the wakâlah contract in general is the domain of the tabarru contract, so there is no ujrah (wages/fees) and this is the opinion of the fiqh experts"[17]

However, in contemporary transaction practices, *wakâlah* contracts are introduced and applied which are accompanied by a *fee* or *ujrah* (*wakâlah bi al-ujrah*). Scholars who allow *ujrah* in *wakâlah* contracts include Ibn Juzai, a scholar from the Malikiyyah school of thought in the book Qawanin al-Fiqhiyyah, argues as follows:

تجوز الوكاة بجرة وبغير أج رة فإن كانت بج رة فحكمها حكم الإجارات

"A wakâlah contract is permitted to be accompanied by ujrah (wages/fees) or without ujrah. If the wakâlah contract is accompanied by ujrah, then the law of it follows the law of ijârah contract".[18]

Apart from Ibn Juzai, among the Shafi'iyah scholars, namely al-Raf'i allowed the

[17] (Thalal Sulaiman Ibrahim al-Dausui, 2017)118.
[18] (Al-Gharnati, n.d.)216.

wakâlah bi al-ujrah contract, as his statement is as follows:

ان الجواز من أحكام الوكالة يرير به الوكالة الخالية عن الجعل فأما إذا شرط فيها جعلَ معلوما واجمتع شرائط

الاجارة وعقد العقد بصيغة الاجارة فهو لازم وان عقد بصيغة الوكالة فيمكن تخريجه على أن الاعتبار بصيغ العقود أو بمعانيها

"In fact, the permissibility of the wakalah contract law is that basically the wakalah contract does not have wages. If there is a requirement for wages that are known (specifications) and the conditions for an ijârah contract are gathered, then the contract uses the provition (shîghat) of the ijârah contract, then the wakâh contract is conventional in nature (binding/cannot be canceled unilaterally), if using the provision wakâlah contract, then what is used as a guidance is the provision contract or the substance of the contract."[19]

Apart from the Maliki and Shafi'i schools of thought, in the Hanbali school of thought it is permissible to practice a *wakâlah* contract accompanied by a *fee*. This is the statement of Ibn Qudamah as follows:

ويُجوزُ التَّوكِيلُ بِعِوَلٍ وغيرِ جعلٍ... وكانَ يَ.بْ.عثُ عمّالَهُ لِقبضِ الصَّدقاتِ، ويُجعلُ لهُمْ عِمالةٌ.

"It is permissible for a wakâlah contract with a fee or without a fee... this is based on (the description of the hadith) that the Prophet sent a zakat officer and gave him a wage for the zakat official" [20]

The permissibility of a *wakâlah bi al-ujrah* contract is an analogy (*qiyas*) to *ijârah* so that the legal consequences follow the *ijârah* contract. This is as stated in the *Ma'ayir Syar'iyyah* as follows:

اذا كانت الوكالة باجرة تطبق عليها احكام الاجارة

"If the wakâlah contract is accompanied by ujrah (wages/fees) then the law is to comply with the ijârah contract (services)"

When viewed based on the pillars of *qiyas*, then (1) the *ashl* is an *ijârah* contract; (2) the *furu'* is the *wakâlah bi al-ujrah* contract; (3) the *ashl* law is permissible as stated by the scholars above; and (4) the *illat* are both renting out services accompanied by *ujrah*.

The law regarding the permissibility of the *wakâlah bi al-ujrah* contract is the ijmak (consensus) of the scholars including *madzâhib al-arba'ah* (the four schools of fiqh, namely Hanafiyyah, Malikiyyah, Syafi'iyyah and Hanabilah) [21]

The National Sharia Board-Indonesian Council of Ulama (DSN-MUI) has issued a special fatwa relating to the *wakâlah bi al-ujrah* contract, namely Fatwa Number 113/DSN-MUI/IX/2017 concerning the Wakalah bi al-Ujrah contract. The legal provisions in the fatwa stated that the *wakalah bi al-ujrah* contract may be carried out subject to and complying with the provisions and limitations contained in the fatwa.

[19] (Abd al-Karim Ibn Muhammad al-Rafi'i, n.d.)70.
[20] (Ibn Qudamah al-Maqdisi, 1968)68.
[21] (Abd al-Qadir Muhammad al-Jibrati, 2018)73.

Qiyâs Wa'dâ'i al-Mashrafiyyah to the Qardh Contract

One of the products of Islamic banking is a fundraising product which in contemporary fiqh literature is called *wadâ'i mashrafiyyah* or *hisâb al-jârî*. that conventional banking products, especially fundraising products, are only based on the interest system as a form of achievement and counter-achievement for the use of funds, whereas sharia banking is based on traditional Islamic contracts whose existence is highly dependent on the real needs of customers. (Rozali, 2020).

Sharia principles in the fundraising product in the form of savings at Islamic banks are in accordance with the fatwa of The National Sharia Board-Indonesian Council of Ulama (DSN-MUI) Number 2 of 2000 concerning *Wadî'ah* contract savings. (Reza Henning Wijaya, 2021)

The context of the *wadî'ah* contract in the provisions of the fatwa of The National Sharia Board-Indonesian Council of Ulama (DSN-MUI) is different from the *wadî'ah* contract in Islamic fiqh literature. In Islamic jurisprudence, the *wadî'ah* contract is a trustworthy contract, this is different from the provisions of the fatwa and the implementation of the *wadî'ah* contract in sharia bank savings products that are *dhamânah* (Hamid, 2019). As a legal consequence of using *dhamâmah* in a *wadî'ah* contract, apart from the bank being able to use these funds, the bank guarantees all of the funds so that the customer can take any risk at any time. (Meskahat Mahbub dan Anisul Mannan Shammo, 2016)

The *wadî'ah* contract which was originally trustful in nature and included in the domain of the *tabarru'* contract in Islamic banking practices as well as the DSN-MUI fatwa provisions related to the Savings fatwa changed to *dhamânah* which has the connotation of *profit* resulting in a shift between *wadî'ah* contract provisions in Islamic fiqh and *wadî'ah* as a sharia banking product, especially savings deposit products.(Huda, 2015)

In the *mu'âmalah mâliiyah* fiqh study, the discussion related to the use of goods deposited by the recipient of the deposit in a *wadî'ah* contract and the existence of guarantees for risks for the recipient of the guarantee, causing the contract to be damaged/canceled according to the views of Syafi'iyyah scholars.(Afif, 2014)

The author views that the substance of the *wadî'ah* contract in the savings deposit product (*wadâ'i al-mashrafiyah*) is a *qardh* contract. If we look at the definition of a *qardh* contract as conveyed by Wahbah al-Zuhaili, it is as follows:

تمليك شيء للغير على ان يرد بدله من غير زيادة

"The contract which results in the transfer of ownership of goods to another party which must be returned (by the borrower) without any additions" [22]

Based on the definition of a *qardh* contract as conveyed by Wahbah Zuhaili above, the author views that the substance of the contract contained in the savings deposit product in an Islamic financial institution product is a *qardh* contract. Wahbah Zuhaili further said that:

[22] (Wahbah al-Zuhaili, 2002)79.

تحول الوديعة الى قرض: اذا كانت الوديعة مبلغا من النقود او شيا يهلك بالاستعمال كالحبوب, واذن المودع للوديع ف استعماله, اعتبر العقد قرضا.

"Changes from a wadî'ah contract to a qardh contract: If the object of the wadî'ah contract is money or objects that are consumed by way of consumption, such as seeds, if the depositor gives permission to the person entrusted with the object of the deposit (money) then the contract is a contract qardh"[23]

The above opinion is at least based on 2 (two) considerations: *first*, the intention of the Islamic financial institution to collect funds from customers in the form of savings is to carry out *tasharruf* (fund management) belonging to customers; while the customer intends to deposit the funds with the Islamic financial institution and collect them if needed; *secondly*, basically there is no *dhamân* (guarantee/responsibility) for a *wadî'ah* contract, unless the entrusted party does *ta'adî* (does an act that is beyond their authority) because the *wadî'ah* contract is a trust contract. Therefore, the existence of guarantees related to *wadî'ah* contracts contradicts the substance of the contract.[24]

Therefore, the permissibility of *wadâ'i mashrafiyyah* (savings) product transactions is based on analogy (*qiyas*), that is, analogizing it to a *qardh* contract. When viewed from the pillars of *qiyas*, (1) the *ashl* is a *qardh* contract; (2) the *furu'* is *wadâ'i mashrafiyyah*; (3) the *ashl* law is permissible; and (4) the *illat* is permissibility regarding the use of goods accompanied by a guarantee to be returned.

Because in substance the contract in the DSN-MUI fatwa No. 2 of 2000 is a *qardh* contract, so the provisions and laws related to *qardh* contracts apply. The position of the customer in this case is the *muqrdih* (lender) while the Islamic bank is the *muqtaridh* (the party receiving the loan). The legal implications of the DSN-MUI fatwa regarding savings must follow the *dhawâbith* (parameters) in the *qardh* contract, one of which is that the *muqridh* may not take advantage of the *al-qardh* contract that he does, whether the benefits are agreed upon in the contract or have become a habit that is considered as good. Among the benefits of *qradh* are *iwadh* (rewards/compensation), both in the form of goods and services.

Qiyâs Deposits to *Mudharib-Yudharib*

In simple terms, deposits can be interpreted as time deposits whose withdrawals can only be made at a certain time based on the depositor's agreement with the bank. In fundraising activities at Islamic financial institutions, the contract for deposit products is a *mudharabah* contract. This is as stipulated in the fatwa of the National Syari'ah Council No: 03/DSN-MUI/IV/2000 Concerning Deposits.

In the general provisions of the fatwa it is explained that in this transaction the customer acts as shahibul maal or owner of funds, and the bank acts as *mudhârib* or fund manager. Furthermore, in the next point, there is information that in its capacity as a *mudhârib*, a bank can carry out various types of business that do not conflict with

[23] (Al-Zuhaili, 2014)317.
[24] (Al-'Ayadi, 2012)193.

shari'ah principles and develop them, including *mudharabah* with other parties.

There is a provision stating that in deposit products, banks can enter into *mudharabah* contracts with other parties. Thus there is a multilevel *mudharabah* concept. The concept of multilevel *mudharabah* in some contemporary muamalah fiqh literature, Wahbah al-Zuhaili calls a multilevel *mudharabah* scheme (where the *mudhârib* party reinvests with a *mudhârbah* contract or the like of it) with the term *al-mudhârib yudhârib*. Rafiq Yunus al-Mishri refers to it as *al-mudhârib al-wasîth*, while Jaih Mubarok and Hasanudin refer to it as a repeat *mudharabah*.(Putra, 2020)

Legally, there is an *iktilâf* (difference of opinion) among the scholars regarding the law of repeating a *mudharabah* or *mudhârib-yudhârib* contract. There are scholars who forbid and there are scholars who allow the practice of this contract. Briefly, Rafiq Yunus al-Mishri explained that the fiqh scholars agreed that the *mudhârib* party was not allowed to repeat the *mudhârabah* or hand over the funds belonging to the *shâhib al-mâl* to a third party with a *mudhârib* contract scheme, because the *shâhib al-mâl* only entrusted the funds to the *mudhârib*, not to the third parties.[25]

In contrast to the opinion of Rafiq Yunus al-Mishri above, scholars from the Hanabilah community, as informed by Ibn Qudamah, allow *mudhârib-yudhârib* contracts, if the *mudhârib* (first) party obtains the permission from the *shâhib al-mâl*. This can be seen in the statement of Ibn Qudamah as follows:

وإنْ أذِنَ ربُّ المالِ فِي دفعِ المالِ مُضارَبةً، جازَ ذلِك . نُصَّ علَيْهِ أحمدُ ولا نَعلَمُ فِيهِ خِلافًا. ويَكونُ العامِلُ الأوَّلُ وكِيلاً لِرَبِّ المالِ فِي ذلِك .

"If the owner of the capital gives permission to hand over *mudharabah* capital to the third party, then this is permissible. This was emphasized by Imam Ahmad, and we are not aware of any *khilâf* (differences of opinion) in this matter. And the position of the first *mudhârib* is only as a representative for investors in this *mudhârabah* contract."[26]

Further Ibn Qudamah al-Maqdisi:

فإذا دفَعهُ إلى آخر، ولمْ يشْرِط لِنَفْسِهِ شَيْئًا مِنَ الرِّبحِ، كانَ صحِيحا. وإنْ شرط لِنَفْسِهِ شَيْئًا مِنَ الرِّبحِ، لمْ يصِحَّ؛ لِأنَّهُ لَيس مِنْ جِهتِهِ مالٌ ولا عملٌ، والرِّبحُ إنَّما يستحقُّ بِواحِدٍ مِنْهُما.

"When the first *mudhârib* hands over the capital to the third party, and he does not require that he must receive profit sharing, then the *mudhârabah* contract is valid. However, if the first mudhârib requires you to get profit sharing, then the mudhārabah is invalid. Because he is not the owner of capital nor is he a worker. While profit can only be obtained with one of the two reasons".

In the contemporary financial practices, in the opinion of the author, the opinion that allows *mudhârib-yudhârib* contracts to be superior opinion, binding in practice is carried out by Islamic financial institutions, the role of Islamic financial institutions as *intermediary finance* functions to collect funds from the public and distribute funds to the public.

[25] (Al-Mishri, 2012)251.
[26] (Ibn Qudamah al-Maqdisi, 1968)36.

Thus, the collection products in the form of deposits made by both bank (shariah) and non-bank-shariah institutions such as sharia cooperatives, in practice allow using *mudhârib-yudhârib* contracts. Therefore, the permissibility of deposits is based on an analogy (*qiyâs*) to the *mudhârib-yudhârib* contract.

When viewed from the pillars of *qiyâs,* then (1) the *ushul* is *mudhârib-yudhârib*; (2) the *furu'* is deposits; (3) the *ashl* law is permissible as is the opinion of the Hanabilah scholars above; and (4) the *illat* is the permissible to repeat *mudhârabah*.

4. Conclusion

There are differences of opinion among scholars regarding the position of *qiyâs* as a legal proposition in the determination of law, including in the field of sharia economic law. However, according to the author's opinion, the opinion that is superior and relevant is the opinion of the majority of scholars who make *qiyâs* the basis for determining the law. The reason is the limited texts (*nash*) of the Holy Koran and hadith. Meanwhile, the contemporary issues in the field of sharia economic law, such as contemporary transactions, will continue to emerge from time to time. To be able to answer these contemporary issues in the field of sharia economic law, there is no other way except by examining the *'illat* (ratio legis) of the laws contained in the texts (*nash*) and on the basis of *'illat*, the law is applied to these new issues. With limited nash, while new issues, especially those related to the contemporary transactions, continue to emerge, ijtihad using *qiyâs* is a must. The application of the *qiyâs* method in the field of sharia economic law is applied in contemporary transaction activities, including the *qiyâs* of the IMFZ contract to the *bai' al-salam* contract; (2) *Qiyâs sale and lease back* transactions to *bai' al-istighlâl*; (3) *Qiyâs wakâlah bi al-ujrah* contract to *ijârah* contract; (4) *Qiyâs Wada'I al-Mashrafiyyah* to the *qardh* contract; and (5) *qiyâs* deposits to *mudhârib-yudhârib.*

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