

TABARRU CONTRACTS IN THE FORM OF SELF GUARANTEE AND PROVIDING SOMETHING

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Abstract

This study is to discuss the tabarru contract in the form of guaranteeing oneself (Kafalah and Wakalah) and giving something (Grants, Gifts, Waqf, Zakat, Infaq, Alms), where basically the tabarru contract is giving something (giving something) or lending something. (lending something) adak tabarru the purpose is to help each other. When the tabarru contract has been agreed, it cannot be converted into a tijarah contract whose purpose is to gain profit, except by agreement between the two parties to the contract. However, it is different from the tijarah contract that has been agreed upon, this contract may be changed into a tabarru contract if the party whose rights are retained gives up their rights, thereby canceling the obligations that have not carried out their obligations. The function of this tabarru contract, apart from the orientation of this contract, is to seek the afterlife, not for commercial purposes. However, in its development, this contract is often related to commercial transaction activities, because this tabarru' contract can function as an intermediary that bridges and facilitates the tijarah contract

Keywords: Tabarru Contract, Guarantee Yourself, Give Something

A. INTRODUCTION

In muamalah, there are ordinances for living together in community life. The word aqad comes from Arabic which means bond or obligation, usually also interpreted as contact or agreement (Zakariyah, 1994, p. 679). The point is to enter into a bond for approval. When two groups enter into an agreement / contract, namely the bond of giving and receiving together at one time. The obligations arising from the contract are called uqud. Basically the tabarru contract is giving or lending something (Karim, 2007, p. 68). The purpose of the tabarru contract is to help each other (Yunus, 1990, p. 60).

When the tabarru contract has been agreed, it cannot be converted into a tijarah contract whose purpose is to gain profit, except by agreement between the two parties to the contract. However, it is different from the tijarah contract that has been agreed upon, this contract may be changed into a tabarru contract if the party whose rights are retained gives up their rights, thereby canceling the obligations that have not carried out their obligations. As for the function of this tabarru contract, apart from the orientation of this contract, it is aimed at seeking profit in the afterlife, not for commercial purposes. However, in its development, this contract is often related to commercial transaction activities, because

this tabarru' contract can function as an intermediary that bridges and facilitates the tijarah contract (Zuhdi, 2017, pp. 78–115).

The tabarru contract that will be discussed is about guaranteeing oneself in the form of kafalah and wakalah and the tabarru contract giving something, namely the contract of grants, gifts, waqf, zakat, infaq, alms. In all these contracts, the first party gives something to someone else. If the use is for public and religious purposes, the contract is called waqf. While alms, grants, and gifts, are giving something voluntarily to others.

Theoretical Framework

Tabarru contract about guaranteeing oneself (kafalah and wakalah) in the view of the priest of the school of thought

1. Kafalah

a. Definition

Linguistically, according to Hanafi scholars and Hanabilah scholars adh-Dhammu (combining) (Sabiq, 1983, p. 283). In the book of scholars Syafi'iyah al-Iltizam (require or oblige on oneself something that is not actually obligatory on him) (Az-Zuhaili, 2011, p. 35). Kafalah can also mean as a guarantee (dhaman) (Al-Ghomrowi, t.th, p. 239). In terms, it also means the combination of one's dependents to another regarding mutually demanding rights (Al-Kounsy, t.th, p. 223).

According to Hanafiyyah scholars: combining one dhimmah (dependant) with another dhimmah in billing or another prosecution absolutely. According to Malikiyah scholars, kafalah is a person who has the right to work on his own burdens and burdens that are put together, both bearing the same (same) work or different jobs (Suhendi, 2002, p. 197). According to the Hambali scholars, kafalah is the iltizam of something that is obligatory on others and the immutability of the object that is charged or the iltizam of the person who has the right to present two assets (the owner) to the person who has the right (Rohmaniyah, 2019, p. 132).

According to the Syafi'iyah scholars, kafalah is a contract that stipulates iltizam that remains on another dependent (burden) or presents substances that are charged or presents the body by the person who has the right to present it (Al-Jaziri, 1990, p. 221). According to the author, Kafalah is to combine dependents with other people's dependents in terms of billing something.

b. The form of the kafalah and the views of the Imam Madhab

In the guarantee (kafalah) the benefit side in it occupies the hajiyyat position. Hajiyyat is everything that society and humans need to avoid hassles (masyaqqah) and eliminate pettiness (Djazuli, 2003, p. 251) (difficulty leads to ease) (As-Syafi'i, 2007, p. 111). When there is a guarantee between a third party against a second party (which is guaranteed) it creates benefits for the second party which has been guaranteed by the third party when a default occurs. This benefit aims to make human life (the second party) happy in the world and in the hereafter by taking what is useful and rejecting what is bad (Hakim, 2011, p. 143).

To be more concise in the discussion, the caravan can be divided into:

- 1) Kafalah / provide guarantees for al-'ain (goods) / property (Az-Zuhaili, 2011, pp. 51–52)

That is an obligation that must be fulfilled by a dhamin or kafil with payment (fulfillment) in the form of property.

- a) Kafalah bi dayn, namely the obligation to pay debts that are the burden of others. In the case of debt, the following conditions are required.

- (1) The value of the goods should be fixed at the time of the guarantee transaction, such as qiradh debt, wages and dowries, as someone said: "sell the object to A and I am obliged to guarantee the payment at that price, then the selling price of the object is clear, this is required according to the Shafi'i school. Meanwhile, Abu Hanifah, Malik and Abu Yusuf argue that it is permissible to guarantee something whose value has not been determined.

- (2) Let the guaranteed goods be known. According to the Shafi'i and Ibn Hazm schools, it is illegitimate to guarantee something that is not known, because the act is included in gharar (fraud), while Abu Hanifa, Malik and Ahmad argue that a person may guarantee something that is not known.

- b) Kafalah with material or by handing over, namely the obligation to hand over certain objects that are in the hands of others, such as returning the goods that are in demand and handing over the goods sold to the buyer. crazy. However, if it is not in the form of a guarantee then the caravan is void.

- c) Kafalah with disgrace, meaning that the goods found are in the form of the seller's property and are in danger (defective), because of too long a time or because of other things. So he (carrier of goods) as a guarantee for the right to buy to the seller as if it is proven that the goods being sold belong to someone else or the goods are pawned goods (Suhendi, 2002, p. 194)

Regarding property dependents, the fuqaha have argued that if the insured person dies or travels, the insurer must compensate for the loss. Then they disagreed if the guarantor and the person being borne were both in the same place and both rich.

Imam Malik said in one opinion that the creditor should not take the guarantor if the person being borne is still there. He also has other opinions as stated by the majority of scholars.

- 2) Kafalah / provide guarantees for the soul (guarantee to present or surrender the person who bears the rights to the owner of the rights) (Az-Zuhaili, 2011, p. 52)

Jumhur fuqaha, including the four schools of thought, allow kafalah bi nafs (guaranteeing to present and hand over the party who bears the right to the party who has the right) if indeed the emergence of the right is motivated by property problems.

As for the words of Imam Shafi'i kafalah to the soul or body is that if it is required to surrender something that is guaranteed (in this case is the party who bears the right) at a certain time, then the kafil party must bring it in and hand it over if at the specified time he is demanded to give it up, as a form of fulfilling what is indeed his obligation based on the commitment he has given, just like a debt that is due for payment. If the kafil submits something that is guaranteed, then he is already from the burden of his responsibilities and obligations. But if he doesn't give it up, then the judge detains him and locks him up, because he can't fulfill the rights he should have fulfilled (Az-Zuhaili, 2011, pp. 53–54)

2. Wakalah

a. Definition

In language wakalah is protecting, surrendering. (Yarmunida, 2014) This understanding provides an understanding that wakalah action means the act of protecting or the act of surrendering something. In terminology, according to Syafi'iyah, wakalah is the transfer of authority to something that can be done alone and can be delegated to others, to be carried out by the representative as long as the original authority owner is still alive.

In terms of the definition of wakalah according to Syafi'iyah, it provides an understanding that there is an act of a person who has the authority to hand over a job to another person so that the other person does the job in accordance with the will of the person who represents it as long as the person who represents it is still alive.

Wakalah according to Imam Hanafi is a person occupying another person in tasarruf (management). Wakalah in the view of Imam Maliki is a person who replaces (occupies) another place in terms of (obligations) he is managing in that position. Meanwhile, in Imam Hambali's view, wakalah is a request in exchange for someone who allows a balanced tasarruf on the other party, in which there is a substitution of Allah's rights and human rights (Al-Jaziri, 1990, p. 143).

Wakalah can also be interpreted as someone who surrenders his affairs to others in which there is a replacement (Al-Bakri, t.th, p. 145) or as a contract of transfer of power, in that contract someone appoints another person instead of worshipping (Ash-Shiddieqy, 1985, p. 91). when someone authorizes another person to replace him in obtaining civil rights (Doi, 2002, p. 467).

An easier understanding according to the author is the granting of power to another person for an action against property or a job that should be done himself, but for one reason or another, transfers his authority to another person to be carried out on behalf of the giver of the power of attorney.

b. The form of wakalah and the views of the Imams of the madhhab

Al-Wakalah is an invalid contract without consent, although it is not required to have certain words, but it can be in any form that shows the intent of the contract, both in words and deeds. With regard to this wakalah contract, the scholars have agreed on the permissibility of the wakalah contract because in practice in Islamic banking this contract is used for mutual assistance activities (Nuhyatia, 2013, p. 96)

The scholars of madzhab agree that representation in contracts (contracts, agreements and transactions) that can be replaced by others to do so is permissible as long as the pillars are fulfilled. Wakalah is declared valid if it does things that can be replaced and can be done by other people, such as buying and selling, leasing, paying debts, ordering rights and getting married (Ad-Dimasyqi, 2014, p. 253).

There are several pillars that must be fulfilled in wakalah: (Afandi, 2009, p. 204)

- 1) Al-muwakkil (people who represent/delegate power)
- 2) Al-vice (person who receives representation)
- 3) Al-muwakkah fih (something that is represented)
- 4) Sighat ijab-qabul (handover)

There are three forms of wakalah, namely:

- 1) Al-wakalah al-Mutlaqah, that is to represent absolutely, without time limit and for all matters. In positive law, it is often known as broad power of attorney, which is usually used to represent all the needs of the power giver and usually only for administrative actions.
- 2) Al-Wakalah al-Muqayyadah, namely the appointment of representatives to act on behalf of certain affairs (Waluyo, 2014, p. 115). In positive law, this is known as a special power of attorney and is usually only for one legal action. This special power is usually intended for certain legal actions related to ownership of an item, making peace, or other actions that can only be carried out by the owner of the item.
- 3) Al-Wakalah al-Amamah, that is, a representation that is wider than almuqayyadah but simpler than al-mutlaqah. Usually this power is for the day-to-day actions of the administrator. In the practice of Islamic banking, wakalah is often used as a complement to the transaction of a contract or as a bridge over the limitations or obstacles of the implementation of a contract (Purnamasari & Suswinarno, 2011, p. 146)

Based on the types of wakalah, it will be implemented in existing contracts in the community. This wakalah contract has become an important part of transactions, both in profit-oriented and non-profit-oriented activities. Therefore, in its implementation, the rules must be strictly observed according to the Shari'a. Each wakalah activity in its implementation takes different forms in its activities. Therefore, it must be properly understood and identified each of the types of wakalah contracts. (Nuhyatia, 2013, p. 98).

Tabarru contract about giving something (Grants, Gifts, Waqf, Zakat, Infaq, Alms) in the view of the Imam of the school of thought

1. Grant

The grant comes from the word *wahaba-yahabu-hibatan*, which means to give or give, and is a management contract for the provision of grants to their assets without replacement. Voluntary without compensation from one person to another while still alive to be owned (Sholihin, 2011, p. 314) there is no exchange and no reason, it can also be a gift with the aim of virtue in association without expecting anything from anyone (Syarifudin, 2010, p. 230).

The definition of a grant according to the term, the Maliki school provides a definition of a grant is to give material rights without expecting anything in return or compensation. Giving is only intended for the person to whom it is given, without expecting anything in return. According to the Shafi'i madhhab, grants are only sunnah in nature which are carried out with consent and qabul when the giver is still alive, giving is intended to honor or glorify someone and get the pleasure of Allah SWT (Ramulyo, 1994, p. 145).

According to the Hanafi school of thought, grants are included in giving ownership of an object without any condition that they must receive compensation. Meanwhile, according to the Hambali school of thought, it is a gift of property made by a smart adult to a number of assets that are known or unknown but are difficult to find out, the property does exist, can be handed over with obligations without compensation (Al-Jaziri, t.th, p. 425)

According to the authors, grants are free gifts to others without expecting anything in return.

The Imams of the schools agree that grants are permissible, among the forms of grants are:

- 1) Conditional grants are grants that are carried out by being associated with a condition, such as restrictions on the use of goods by the recipient of the grant to the recipient of the grant.
- 2) Ruqba grant, granting with mastery requirements if someone gives something to someone else (Al-Jazairi, 2016, p. 800)
- 3) Al-umra grant, is a grant for a period of time
- 4) Al-musya grant, a grant that occurs if a person owns a portion of an uncertain property (its size or amount), then gives it to another person or the person owns something, then grants it to two or more people.
- 5) Benefit Grant, the grantor may use the object that is donated as long as the grantee is still alive. If the recipient of the grant dies, the object that is donated must be returned to the person who gave the grant (Rozalinda, 2016, p. 307)
- 6) Goods Grant, giving property or goods to other parties including all materials and the value of their benefits and not expecting a reward for the giver to the grantee.
- 7) Debt Grants, are grants made by someone for their rights in the form of a debt to another person who does not have debt or is called a third party.

2. Gift

Gift is the surrender of property rights without compensation which is generally sent to the recipient to honor it (Asy-Syafi'i, t.th, p. 566). Sayyid Sabiq gives the definition of a gift the same as a gift in terms of law and its meaning (Sabiq, 1983, p. 315). A more complete understanding of gifts is the giving of something without reward to connect the ties of friendship, close relationships, and glorify.

3. Waqf

Jumhur Ulama, including the Shafi'i Madzhab, defines waqf as holding assets that can be used, while the goods are still intact, by completely ceasing the control over the goods from the person who gives waqf and others, for the management of what is allowed, or the management of the proceeds for the purpose of virtue is to draw closer to Allah. on this basis, the property is released from the ownership of the person who is waqf, and becomes under the ownership of Allah.

Asy-Syarbini, from the scholars of the Shafi'i school, defines waqf by holding assets that can provide benefits and enduring the waqf object (al-'ain) by deciding the management rights owned by the wakif to be handed over to nazhir which is permitted by sharia (Asy-Syarbini, 1994, p. 522)

The Maliki scholars argue that waqf is the owner of the property making the proceeds from the property he has even though by renting - or making the results from the management of the property, and giving the proceeds to those who are entitled to a certain contract for a time which is considered by the person who is waqf. This means that the owner of the property withholds his property from all forms of ownership management, giving the proceeds to charity, while the property is still intact and belongs to the person who is waqf, for a certain period of time. According to this school, waqf does not release the property that is waqf from the ownership of the wakif (Al-Magribi, 1995, p. 626).

Hanabilah scholars define waqf as holding back the principal and channeling the results to virtue. This definition is taken from the hadith of the Prophet which was conveyed to Umar ibn al-Khaththab when he asked about the best deeds to take advantage of the fertile plantations in Khaibar (Prajā, t.th, p. 28).

4. Zakat

According to Shaykh Utsaimin, zakat according to language means to increase and develop. Anything that increases in number or increases in size is called zakat. As for according to syara', namely worshipping Allah by issuing an obligatory share according to syara' from certain assets and given to certain groups or institutions (zakat) (Ustaimin, 2010, p. 45).

M. Nur Ariyanto explained that the meaning of blessing contained in zakat means that by paying zakat, zakat will give blessings to the assets we have and lighten our burden in the hereafter. Zakat means growth because by giving rights to the poor and others, there will be a healthy circulation of money in society and encourage the development of the function of money in the economy (Al-Arif, 2011, p. 249).

Zakat is a certain amount of property that must be issued by people who are Muslim and given to groups who are entitled to receive it (the poor and so on) according to the provisions set by Syarak.

- 1) Zakat is part of property with certain conditions, which Allah SWT requires the owner (muzakki), to be handed over to those who are entitled to receive it (mustahik) with certain conditions.
- 2) Zakat is al-māliyah al-ijtimā'iyah, meaning worship in the field of property which has a very important position in building society. Therefore, in the Qur'an and hadith there are many commands to pay tithe, as well as praise for those who do it (Qardhawi, 1996, p. 87).

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5. Infaq

The word infaq according to the language comes from the word anfaqa which means to spend, to spend, to give or to spend wealth. According to the term fiqh, the word infaq has the meaning of giving part of the property owned to people who have been prescribed by religion to give it, such as the poor, the poor, orphans, relatives and others. The terms used in the Qur'an regarding infaq include the words: zakat, sadaqah, hadyu, jizyah, grants and waqf (Mardani, 2012, p. 17).

So all forms of spending or giving assets to things that are prescribed by religion can be said to be infaq, whether it is in the form of obligations such as zakat or in the form of sunnah recommendations such as waqf or Alms.

6. Alms

Alms is the giving of an object by someone to another because he hopes for the pleasure and reward of Allah SWT. and does not expect a service fee or reimbursement (Mardani, 2012, p. 344). Or it can also be interpreted to give something with the intention of getting a reward (Zuhdi, 2017, p. 82)

Meanwhile, according to Sayyid Sabiq, basically every virtue is charity. Judging from this understanding, alms has a broad understanding, concerning things that are material or non-material. In everyday life, alms are often equated with infaq. However, considering the above understanding, it can be distinguished that alms are more general than infaq, if infaq is related to material, while alms are material and non-material. Examples of charity in the form of material such as giving money to orphans every tenth day of the month of Muharram, while those in the form of non-material such as smiling at others (Uyun, 2015, pp. 218–234).

B. METHOD

This research is a qualitative research in accordance with the object of this scientific study. The approach is done by analyzing and interpreting things that are theoretical in nature related to research. The data used are primary data obtained from the results of library research by adopting the opinions of experts and practitioners, who have an understanding of the problems discussed. Followed by a literature review in accordance with the research theme.

C. RESULT AND DISCUSSION

Every contract that is implemented in a contract that occurs in the corridor of Islamic/sharia economics, of course, has a basic foundation in the form of verses and hadiths and has been determined by the scholars through their fatwas. As long as it is good, it is permissible for a person to make himself a guarantor for the needs or interests of his fellow believers. This practice is clear from the point of view of maqashid Sharia contains benefits in the aspect of human relations (Rakhmadi, 2019).

First, the kafalah contract. The application of kafalah contracts in L/C schemes, Bank Guarantees and Sharia Credit Cards is basically the same, banks both function as guarantors, and that also applies to non-bank financial institutions such as sharia insurance, where the insurer is the guarantor for customers who has paid a premium, for anything insured by the customer.

Second, wakalah contract. Sharia Bank service products in which transactions use Wakalah contracts are services such as transfers, clearing, collections, letters of credit (L/C) which are included in the wakalah bil ujah contract where in the implementation of this contract there is a fee (fee) must be paid as a token of remuneration. Wakalah is used when the Islamic finance company is located as an authorizing agent who asks the customer to represent something and is usually used as a complementary contract to the

murabahah financing contract, while the fatwa wakalah bil ujah is used when the sharia finance company is the recipient of the power of attorney and can be applied as the main contract that used in service financing activities.

Third, grant and gift contracts are usually distributed by Islamic banking in Indonesia to lucky customers or receive rewards taken from bank profit funds. As stated in the DSN Fatwa number 86/DSN-MUI/XII/2012 regarding the prize, the source of funds must be from LKS or a third party (sponsor) must be regulated internally.

Fourth, the Indonesian Waqf Board (BWI) positions Islamic banks as cashiers and BWI partners in management. In this position, Islamic Banks only administer cash waqf certificates issued by BWI. So, the BWI account will be maintained by a Sharia Bank like other accounts that will receive profit sharing according to the type and sharia principles used (giro, wadiah, wadiah savings, or mudharabah savings).

Fifth, zakat, infaq, and alms contracts received by Islamic banking in Indonesia are usually channeled through qardh al-hasan.

D. CONCLUSIONS

Tabarru contracts in terms of guaranteeing themselves in the practice of kafalah and wakalah have grown in Indonesia, it is necessary to be careful in conducting kafalah contracts regarding the pillars and conditions, because contemporary kafalah practices have developed rapidly with various forms and types. Scholars of the schools agree on the permissibility of kafalah and wakalah contracts, only differing in their technical views.

Regarding the tabarru contract in terms of giving something in the practice of grants, gifts, waqf, zakat, infaq and alms, there is no debate among mazhab scholars about its impropriety, what is needed in Indonesia is public awareness to do so.

The contract that is implemented in a contract that occurs in the corridor of Islamic/sharia economics, of course has a basic foundation in the form of verses and hadiths and has been determined by the scholars through their fatwas. Regarding the abuse or misuse that occurs in the field, it is related to human error or errors in its implementation.

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