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Jl. Pendidikan No. 35 Tlp. (0370) 621298-625337-634490 Fax. (0370) 6253
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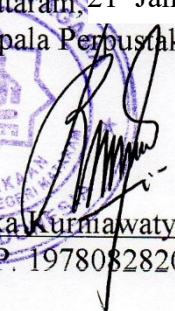
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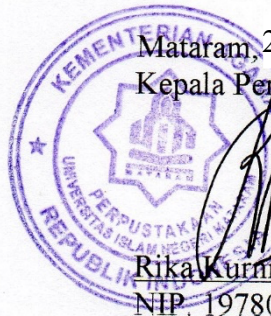
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NIP. 197808282006042001



REDESIGNING SHARIA BANK FINANCING

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REDESIGNING SHARIA BANK FINANCING CONTRACTS POLICY BASED ON THE PRINCIPLE OF INTENTION IN THE STUDY OF ISLAMIC ECONOMIC JURISPRUDENCE (MUAMALAH JURISPRUDENCE)

¹Abdulahanaa, ²Arifin Sahaka, ³Ani Heryani, ⁴Maskawati, ⁵Deasy Mauliana

^{1,2}Department of Ekonomi Syariah, Institut Agama Islam Negeri Bone

³Departm²⁵t of Ilmu Administrasi, STIA YPPT Tasikmalaya

⁴Department of Hukum Tata Negara, Institut Agama Islam Negeri Bone

⁵Department of Administrasi Pembangunan Negara, Politeknik STIA LAN Makassar

Corresponding author: Email: abdulahanaa@gmail.com

Abstract

Designs of sharia contracts entered into by Islamic banks remain a subject matter of debate among economists. Many studies examining this subject matter have been conducted, but instead of aimed at finding a solution, they strengthen the dichotomy between the two conflicting mainstreams. Thus, this study discusses this crucial subject matter to show a solution from the muamalah jurisprudential approach. The data and literatures used in this study found that, so far, the contract designs applied by Islamic banks are formal Islamization of conventional contracts and tend to ignore the normative substances of sharia economy. This is actually due to the fact that inductive-pragmatic reasoning has been more widely used in Islamic economic studies, making the Islamic identity of the Islamic contracts entered into by Islamic bank ambiguous. The solution found in this study is that deductive-normative reasoning needs to be used by Islamic Financial Institutions (LKS) in entering in contracts because this method provides more guarantees to accommodate the substances of Islamic economy and is able to produce pure contract designs without imitating conventional economy, making the basic characters of Islamic economy is clearer and more convincing.

Keywords

Principle of Intention, Financing Contract, Islamic Bank, Muamalah Jurisprudential.

Introduction

Conventional economy has serious and fundamental weaknesses, making any reform and correction to it difficult. Its failures in the real world became clear to everyone following the global financial crisis. The root of the problem is the theory of human behavior which is represented by "homo economicus", failing to provide an opportunity for the inclusion of religious (Islamic) norms in the arrangement of financing contract in financial institutions (Rucykyj, 2011; Zaman, 2019). Any effort to improve the economy must consider that the Islamic economists underline the importance of the Qur'an and the Sunnah as the main sources of positive and normative knowledge (Imamuddin, 2016; Mukhtar et al., 2018; Volker Nienhaus, 2020) which recommends attention to elements of intention and economic behaviors.

The formal and substantial elements in each transaction (contract) must be in line with each other. One important part of the substantial elements of contracts is the intention of the actors. Jurists of the Islamic law (shariah) require that every transaction planning and execution shall be based on good faith so that all forms of fraud, deception, and misappropriation can be prevented (Nurfaizal, 2013; Supriyadi, 2014). In case of difference between the intention and what is formally done, the contract design shall be a means of hilah. For example, the design of Ijarah Muntahiya bi Tamlik (IMBT) contract ignores the principle of intention of the customers to own a house but they are given standard lease transactions. In this case the contract substance is not fulfilled because what the customers should have is a sale and purchase agreement. According to Abdullah Saeed, what Islamic banks, including those existing in Indonesia, has widely studied and practiced today is Islamization of the formalities of the contract in use. For example, a murabahah contract appearing to be a sale and purchase contract has been in practice a type of financing based on a predetermined profit which is not much different from fixed interest-based financing (Musaroh et al., 2020; Prabowo, 2009).

Rahmanti added that the atmosphere of this kind of sharia has been increasingly popular among Indonesian people, but the essence of sharia has not been integrated in sufficient sharia contracts (Rahmanti, 2019). The demands for the company's growth targets which are quite high can potentially distort the sharia value in products and their operations. It is actually triggered by limited human resources who have sufficient mastery of religious knowledge (Islamic economy, jurisprudence, and hadith) (Ali, 2010; Suryani et al., 2020). In terms of banking, this issue is crucial because, so far, it is suspected that Islamic banks are still following conventional banks in terms of both products and human resources or their banking operations (Iswanaji, 2018; Kinyanjui, 2013; Salman & Nawaz, 2018). Arief Budiono emphasized that the non-sharia of Islamic banks is precisely at its basic level, namely the incompatibility between banking operations and the fatwa of the National Sharia Council (DSN). The director of the Directorate of Islamic banking, Mulya E. Siregar, has finally admitted the incompatibility of Islamic Financial Institutions (LKS) including Islamic, stating that the Islamic banking has not completely applied the sharia system. According to Mulya, no Islamic Bank has truly applied Sharia principles. IDB has not even applied the sharia principles in full (Budiono, 2017).

So far, researches on Islamic banking have focused more on the issue of Islamization of formalities of conventional contracts. Many studies and researches have been conducted to ensure the correctness of the contract system currently implemented in Islamic banks. However, it is less realized that what has been discussed actually still revolves around the aspects of the formality of procedures and mechanisms, instead of the substance of sharia economy the foundations of which have been provided by previous scholars in muamalah jurisprudence. The Sharia banking products (contract) still have a number of weaknesses and limitations (Azadinamin, 2012; Baidhowi, 2018). According to M. Hafiz, for the benefit of banking product innovation, Islamic banks have basically conducted a series of innovative efforts, one of which is "engineering" on contracts in muamalah Jurisprudence by "adapting" it to the public needs for banking services (M. Hafidz MS., 2015). Engineering often occurs to prioritize the fulfillment of formality aspects by referring to the construction of

conventional contracts while the substantive aspects are neglected. Therefore, according to Arief Budiono, the paradigm that must be applied in the development of products of Islamic financial institution must be different from those applied in conventional banks or conventional financial institutions, which apply types of transaction in the form of interest-based loans. In Islamic financial institutions, products must be developed according to different characters and characteristics of Islamic products in line with the intentions of the parties (Budiono, 2017). Meanwhile, studies on the importance of the intention aspect in Islamic banking contracts have not received proper attention.

According to Jamal Abdul Aziz, the current studies pay more attention to the Islamization of contracts. However, in practice, those studies are likely to become rigid formalism and seem less able to promote their Islamic missions (substance) (Aziz, 2004). When discussing the substance of sharia economy, the main elements that cannot be ignored for being the basis of other substantial elements is the issue of intention in transactions. Meanwhile, studies that pay attention to the principle of intention are very limited, though, in fact, in the muamalat jurisprudential approaches, the principle of intention determines the essence of contracts. According to Ibn Qayim, intention has become the basis for evaluating muamalah activities and transactions in terms of halal and haram, legal and illegal, and obedience and disobedience (al-Jauziy, 2001, pp. 95–96). To assess the validity of a contract, the element of intention is one of the main elements (pillars) that must be paid attention to the clarity of the two parties entering into the transaction. Yusuf Qardhawi stated that it has become a principle in muamalah that transactions must be based on good faith and honesty (Qardhawi, 2001, p. 194). One of the definitions of good faith and honesty herein is that the transactors have no intention to speculate or to manipulate to avoid formally what Allah prohibits. The neglect of the principle of intention in contracts used in Sharia Banks has resulted in unclear differences between contracts entered by Sharia Banks and those of Conventional Banks, and in the occurrence of hilah (formality tactics) in making contract designs.

The purposes of this research is to show the importance of prioritizing the substance aspects of the sharia economy in making the contract design used in Islamic banks in order to produce a contract design construction that is purely sharia and clearly different from those used in conventional banks, not just a formalistic justification. Therefore, this study carefully examined three aspects as follows:

- (1) the importance of the principle of intention as the basis for determining the contract design entered into by Islamic banks;
- (2) the consequences of neglecting the principle of intention in contract designs, and;
- (3) muamalah Jurisprudential approaches as a solution for financing agreement entered into by Islamic banks.

This paper is based on an argument that contract designs entered into by Islamic banks has only paid attention to the fulfillment of formality elements and tend to ignore the element of substance, particularly the aspect of intention. This fact leads contract designers and sharia business actors to commit hilah (engineering) to legalize something that is substantively prohibited (in essence). In this case, there was an error in the flow of thought and method in formulating contract designs. What should be done is that the substance of a contract is used as the basis for formulating the elements of formality so that it can give birth to original contract design constructions which are different from those of conventional contracts.

LITERATURE REVIEW: SHARIA BANKING

Concepts of Islamic Banking

There are principal differences between the concept of Islamic banking concept and that of conventional banking which includes differences in religious principles that are involved in the regulations (Kapur, 2020; Satibi et al., 2018). The rules in the Islamic banking concept are based on the verses of Al-Quran and Traditions (sunnah). Most authors and researchers emphasize the fundamental differences on the issue of interest (in the concepts of conventional banking), which is called usury in Islamic banking. In Research (Muhammad Arsalan Khan, Dodik Siswanto, 2020) other differences which are also often discussed are the Islamic financial system that sees investors as a partner based on equity, whereas the conventional banking system sees investors based on loans. Profits earned from equity are earnings that can be received in Islamic banking, while income earned through interest (usury) is unacceptable (Belwal & Al Maqbali, 2019). Based on sharia law, Islamic banks are required to operate within the central parameters of Islam: halal and haram (Mukhtar et al., 2018; Qasaymeh, 2011).

In Islamic banking, according to (Hussain et al., 2015), there are two instruments, namely loans and financing modes, which consist of three categories: profit-and-loss sharing, non-PLS contracts, and fee-based products. The first category - commonly abbreviated as PLS, according to Hussain, is the closest to the spirit of Islamic finance (Hussain et al., 2015). There are two types of financing in the PLS, which musyarakah and mudarabah. The second category, namely non-PLS contracts, is the most common type in practice. It is usually used to finance consumer and company credit as well as asset leasing and manufacturing (Hussain et al., 2015). The financing instruments that fall into this category are murabahah, ijarah, salam and istisna. The last category offers a broad spectrum of fee-based services using three types of contracts: wakalah, kafalah or ju'ala. Islamic normative rules relating to financial instruments are based on muamalah Jurisprudence (Islamic rules regarding transactions) (Hutomo Mukti, 2020; Qasaymeh, 2011). Among the Islamic concepts commonly used in Islamic banking are profit sharing (mudaraba), deposits (wadi'ah), joint ventures (musyarakah), additional costs (murabahah), and leasing (ijarah). Sharia banking and Islamic finance approaches have been more widely adopted and practiced in Malaysia than in any other Islamic country in the world. Therefore, many sharia banking studies such as those conducted by (Hoque et al., 2019; Schottmann, 2014; Sobol, 2015) researching the implementation of sharia banks with rules based on Islamic sharia.

Sharia Principles in Banking

Studies on Islamic banking have been carried out by scholars from various parts of the world. However, sharia principles in banking have never been discussed specifically. Most of the writings only reveal that the principles of Islamic banking are based sharia rule. There is no definite definition of the principle. According to (Roy, 1991), Islamic banking means following the principles of sharia in transactions, but its definition is difficult due to the many ways of how the law is interpreted and applied. According to (Qadri, 2008), the basic principles of Islamic banks are the sharing of profits and losses and prohibition of usury (interest). According to the Qur'an, usury is immoral because it breaks the natural bonds between humans, causes mistakes between borrowers and lenders, allows the rich to continue to dominate the poor and, inevitably, causes social unrest (Roy, 1991).

(Hendriarto, 2021; Hussain et al., 2015) also gave a different statement regarding the principles in Islamic banking. According to him, three principles shall be obeyed: first, the principle of equity, which prohibits usury and gharar. The command to give alms comes from this first principle. The second principle is the principle of participation. According to (Hendriarto, 2021), this principle lies at the heart of Islamic finance, whose function is to ensure that increased wealth accrues from productive activities. The last principle is the principle of ownership. The decision "not to sell what you don't have" (e.g., short sale) requires ownership of the asset prior to the transaction (Hussain et al., 2015). Therefore, Islamic finance is known as asset-based financing, forging a strong link between finance and

the real economy. It also requires respect for property rights and obedience to contractual obligations by respecting the sanctity of contracts.

(El-Galfy & Khiyar, 2012) revealed that previous studies identified nine characteristics of Islamic banking: (1) prohibition of interest; (2) prohibition of investing in unethical matters; (3) free from al-gharar — free from excessive uncertainty; (4) free from al-darar - not harmful to any party; (5) free from impulses; (6) the relationship between money and productivity; (7) fair contract; (8) desire for profit sharing; (9) alms and al-qard al-hassan - contribute to the fulfillment of socio-economic goals and the creation of a just society. In addition to profit sharing, Islamic banking relies on fair risk sharing between providers of capital and entrepreneurs (Roy, 1991). Yet, there is still a contradiction between these principles and the reality that occurs. For example, (Kamla & Rammal, 2013) wrote that although Islamic banking proclaims an ethical and socially responsible corporation, the same thing is not seen in practice.

Contracts in Islamic Banking Literature

One of the important concepts in Islamic banking is a contract or agreement. But contracts are rarely discussed in literature. So far, the preferred studies as conducted by (Ahmad & Hassan, 2007; Alhammadi et al., 2020; Khaki & Sangmi, 2011) are related to interest (usury). It seems that interest has been a big concern because it is the core difference between Islamic banking and conventional banking. In addition, as stated by (Kazi, A. U., & Halabi, 2006): "Interest plays an important role in business, and this makes trade and commerce under Islam different from any other law." According to Belwal & Al-Maqbali, the main purpose of contracts in Islam is actually the sharing of profits and losses. Contracts as regulated by the muamalah jurisprudence regulates is closely related to faith (Qasaymeh, 2011).

Several studies on contracts in Islamic banking as conducted by (Al-Amine, 2001) concern with istisna' contracts the legality of which is not clearly defined in the Qur'an. Some Islamic banks have also not fully used istisna contracts, especially those related to the possibility of issuing contracts to raise funds or to manage liquidity. Another example of writing that raises a contract/agreement comes from (Shaharuddin, 2012). In Malaysia, controversies among scholars regarding whether or not to use the bay' al-'inah contracts have come to the fore (Abdul-Rahman et al., 2014) theoretically evaluates why PLS contracts in Islamic banking fail and their potentials for improvement in the New Institutional Economic Theory (NIE). (Suhaimi et al., 2016) has also conducted evaluative studies or tests on the use of contracts based on Islamic banking rules. They also revealed that although these concepts have been widely adopted in Islamic finance products and services, few studies have been conducted to examine their practice.

METHOD

Research process

It is a library research which applied the normative paradigm of the principles of Islamic jurisprudence (ushul fiqh) and muamalah jurisprudence. The subject matter of the the study was traced by applying normative mindset deliberately chosen, considering the raised issues related to aspects of Islamic economic law (muamalah jurisprudence).

Data Collection Procedure

Literature discussing sharia/Islamic economy, especially those related to the contracts used in Islamic banks, and theoretical and practical studies on contract/contract designs in sharia/Islamic economy were used as the primary data of this study. Data were collected from online and offline sources of previous researches, journals, and books.

Analysis

This research focuses on the existence of the substance of the sharia economy, especially the principle of intention in development of Islamic banking products/contracts based on imitation²¹ and Islamization of formalities as the object of the research. This object was chosen considering the lack of studies on the importance of maintaining the substance of the Islamic economy with muamalah jurisprudential approaches. The research was described thematically with muamalah jurisprudential interpretation approaches and a comparison of the mindsets applied in studies on Islamic economic contracts developed and entered into by Islamic financial institutions, especially in Islamic banks.

RESULTS/FINDINGS

Principle of Intention as the Foundation to Determine Contract Design

The arguments on the importance of intention in charity/work that can be referred to in the Qur'an can be found in al-Bayyinah Verse 5, "They were commanded only to serve God, making the religion His sincerely, men of pure faith, and to perform the prayer, and pay the alms - that is the religion of the True". What is meant by "making the religion His sincerely" in this verse is that the esoteric worshipping shall be reflected from the exoteric worshipping practice. These two elements are the basis for assessing the truth (validity) of an act, including the entrances of muamalah contracts. The verse is in line with the al-Taubah Verse 105, "Say: Work; and God will surely see your work, and His Messenger, and the believers, and you will be returned to Him who knows the unseen and the visible, and He will tell you what you were doing." This verse states that Allah knows the unseen and the visible" which means that any deed consists of two elements: the inner element or intention that is unseen and the element of action or statement that is written (written contracts), followed by "then He will tell you what you were doing" which means that Allah will judge all deeds of human beings, including the contracts comprising these two elements.

The verses in the Qur'an are emphasized and clarified by¹¹ the hadith of the Prophet Muhammad SAW which was narrated from Umar R.A., "Umar bin Al-Khattab (May Allah be pleased with him), reported: The Messenger of Allah said, "The deeds are considered by the intentions, and a person will get the reward according to his intention. So whoever emigrated for Allah and His Messenger, his emigration will be for Allah and His Messenger; and whoever emigrated for worldly benefits or for a woman to marry, his emigration would be for what he emigrated for". (HR. Bukhari, Muslim, and four Hadith Expert Imams). The hadith refers to all charities, both ritual and social worship. Based on this hadith, jurists¹² make jurisprudence principle that "the intention in the contract¹² is priceless". The hadith is in line with the hadith narrated by Abu Hurairah Ra that "From Abu Hurairah Ra, he said: The Prophet said, "Verily Allah does not look at your looks and assets, but Allah looks at your heart and your deeds" (HR. Muslim).

Ibn Taimiyyah argues that the truth of a deed depends on the fulfillment of the esoteric and exoteric elements; both are obligatory. The fulfillment of the esoteric element is manifested in Sharia-based intention while the exoteric element is manifested in the Sharia-based deeds or statements. According to the agreement of all scholars, these deeds are obligatory for all (Ibn Taymiyyah, 5-6). According to Ibn Qayyim, esoteric intention is the basis, while the exoteric deed is the embodiment and completion of the esoteric intention. Intention is the spirit of the exoteric deeds. Therefore, it is more important to ensure the existence of intentions before judging the truth of the exoteric deeds (Ibn Qayyim al-Jauziyah, 1425 H; 511). Paying attention to the legal requirements of deeds on the Qur'an and the hadith as well as the agreement of the scholars, we will know that esoteric deeds are more obligatory than exoteric ones. Though formally correct, a person's exoteric deeds will not be accepted if the intention deviates. (Ibn Qayyim al-Jauziyah, 1425 H; 514).

Every contract entered into needs to take into account the explicit intentions and desires of

those entering into it although it is not required to find out the motive for doing the deed. For example, a grape seller is not obliged to find out and to make sure if the buyer will use the grape to produce wine (Abidin, 1966, p. 592). According to the Malikiyah ulama, contract actors are required to know the purpose of the contract. In a loan contract, for instance, if the creditor knows that an additional payment is given by debtor is due to the debt, the additional is not lawful because it is a usury (Sahnun bin Sa'id At-Tanukhi, 171).

According to the Hambali School of Law, all contracts must be assessed for their validity based on the motives of the parties. Ibn Qayyim stated the rule "It has been a inevitable rule of sharia that the intention and i'tikad shall be taken into account in the transfer of property and transactions (muamalah) as considered (assessed) as worshipping deeds. Goals, intentions, and i'tikad shall make something lawful and unlawful, invalid and imperfect, obedient or immoral (Syamsuddin Abi Abdillah, 96). This opinion pays more attention on the relationship between intention and contract because it is supported by several similar arguments, namely the hadith of the Prophet SAW narrated by Abu Hurairah Ra says that "Whoever takes someone else's property with the intention of returning it, Allah will help him to return it. And whoever takes someone else's property for him to spend (without the intention of returning it), then Allah will spend it. (HR. Bukhari 2387 and Ahmad 8967). Another hadith narrated by Ibn Majah says that "Whoever takes a debt, and he intends not to pay it back, he will meet Allah as a thief" (Narrated by Ibn Majah 2502 and said al-Albani).

Meanwhile, Abu Zahra divided the relationship between intention and contract into three categories: (1) for the intention in the heart in line with the contract, the scholars agree that this contract are valid and binding; (2) for a contract that is different from the intent and purpose of the doers and the intention and purpose of the contract are deliberately hidden, but there is no indicator that they have different intentions, then the contract is valid. But if the intention and purpose are prohibited by the Shari'a, then they are still sinners. And, (3) If the first party makes a different contract with certain intentions, while there is an indicator that the second party knows the intention of the first party, then the law follows the intention of the doers (Abu Zahra, 221). Shidqi Burnu concluded that if the intention deviates or is different from the contract, then the responsibility would still be demanded in the hereafter (Muhammad Shidqi Burnu, 131). Although the contract is exoterically legitimate, the culprit will remain sinning if his/her intention deviates from the provisions of the Law. Hanafiah and Shafi'iyah scholars called this as something valid but forbidden. For any difference between the intention and the wordings in the contract, the Malikiyah and Hanafiah jurists use the rule that "The basis for the contract validity is the intention and faith, instead of the wordings and sentences in the contract. "This rule is a further elaboration of the rule of al-umuru bi maqashidiha which is more general for covering a variety of deeds including muamalah maliyah.

In entering into a contract (offer/ijab and acceptance/qabul), the jurists require three valid conditions, namely: (1) *Wudhuh dilâlah al-ijâb wa al-qabûl*, meaning both parties shall show clear and definite intention; (2) *Tathâb al-qabûl wa al-ijâb*, meaning there must be the compatibility between the offer and the acceptance; (3) *Ittishâl al-qabûl wa al-ijâb*, meaning that offer and acceptance must be made directly or continuously when the contract is entered into in one assembly (Rusydî, Muhammad, 1986, p. 48). According to Salim, contract means conformity of an intention statement between one person and another (Salim, 2003, p. 33). The will in the heart which is called the intention must be stated in order to know whether or not it can be brought together to reach an agreement and, at the same time, be as the basis for selecting and determining the appropriate contract.

The consequences of neglecting the principle of intention

Al-Syathibi explained that something that seems permissible can become prohibited if it is interpreted by another law. Allah obliges and forbids something due to certain causes. For example, something that is initially haram is considered halal exoterically by donating some of properties to avoid the obligation to pay zakat. This is called as al-hilah (Abu Ishaq al-Shatibi, 1999; 202). For al-Syathibi, al-hilah as described above is something that is forbidden and should not be done. Many verses in the Qur'an and hadiths revealed as the

argument of the prohibition on al- hilah. One of the verses showing the prohibition is QS. Al-Baqarah: 229 which explains talaq which is done to torture women. In addition, many hadists concern with the prohibition of al- hilah. Another example is the prohibition to manipulate or separate assets to get rid of the obligation to pay zakat. Likewise, bribery, intermarriage (nikāh muhallil) and carcass fat in any form of engineering and eating the proceeds from its sale (al-Syātibi, 1999, pp. 387–388).

Contract modifications in the form of multiple contracts (murakkabah/mujtami'ah) have been widely applied in Islamic banking and have been endorsed by the National Sharia Council-Indonesian Ulema Council (DSN-MUI) (Maksum, 2014a). These contracts have very similar equivalents to that in conventional banking like bithâqat al-i'timân which is similar to credit cards, Ijarah Muntahiyah bi Tamlik which is similar to the House Ownership Credit (KPR). It is hard to find a contract model which is purely resulted from the construction of Islamic sciences, rules, and principles of Islamic economy. Often customers complained the use of such contract. According to research conducted by Atik Emilia Sula, for instance, customers complain that the imposition of margin in murabaha in practice has no different from loans from conventional banks. In addition, the musyarakah (profit sharing) contract is also no different from conventional loans because customers are still required to deposit fixed monthly profit sharing (Atik Emilia Sula, 2010). A research conducted by Nina Indah Febriana at Muamalat Bank, Tulungagung Sub-Branch Office, showed that customers believe that the bank still uses the interest system on their mudharabah savings contract (Indah Febriana, 2016). According to Maksum, contract adjustment (takyîf al- fikih) is a contract development method used by DSN. The contract models offered by Islamic financial institutions are matched with the contracts provided in classical jurisprudence. Such matching process often uses a combination of several contracts due to the complexity of transactions in Sharia Financial Institutions (Maksum, 2014b).

There is an impression that practitioners do not have the courage to introduce and to apply the construction of sharia contract designs comprehensively in accordance with the Islamic basic laws and mechanisms. Although basically muamalah jurisprudence is permissible to be developed by adopting transaction models already existing in the society, the substances of Islamic economy must be maintained. The prohibition of Hilah, usury, gharar, and maisir is the principle teachings of Islam which must be first materialized before engineering a contract so that the four prohibitions can be avoided. The developments of contract models have been formally oriented towards formal justification. The formality legalization can be clearly seen from their references to existing conventional contract models. In fact, the scientific substance of Islamic economy has been sufficient to design and to construct Islamic comprehensive contract design models.

According to Mulawarman, there are positivistic neoliberal-oriented "priorities" among Islamic banking that have not been able to provide alternatives which achieve the real sector and take side with the poor and people's economy. In fact, referring muamalah Jurisprudence – the developed contract agreements in relation to profit sharing such as mudharabah, musharaka, muzara'ah, musaqah, and mukhabarah has purely given Islam positioning that represents abstinence from doing hilah ribawi (Mulawarman, 2019). Relevant efforts and approaches are needed to optimize Islamic sciences such as principle jurisprudence and muamalah jurisprudence in overcoming economic problems. Islamic banking should not be trapped in the conventional economic mindset (Mulawarman, 2019).

Muamalah Jurisprudence as Solution for Sharia Bank Financing Contract Design

It must be admitted, that Islamic banking is very vulnerable to mistakes that are sharia in nature. Demands for targets, better profit rates, and performance appraisals at each branch of Islamic bank that are still predominantly based on financial performance will encourage opportunistic practitioners to violate sharia provisions. This will be increasingly vulnerable to sharia banks with a low level of sharia supervision. Unsurprisingly, there are still many violations of sharia aspects committed by Islamic banking institutions, especially banks that convert to sharia or open sharia business units. Therefore, members of the National Sharia Board and Sharia Supervisory Board must have integral scientific qualifications, namely

muamalah jurisprudence and modern Islamic finance science (Madjid, 2011).

All Islamic scholars agree that Principles of Islamic Jurisprudence (Ushul Fiqh) occupies a very important position in sharia sciences. Imam Asy-Syatibi (w.790 H) (in *Al-Muwafaqat*) said that studying Principles of Islamic Jurisprudence is something that is dharuri (very important and absolutely necessary) because through it the content and meaning of each of sharia arguments (Al- Quran and hadith) as well as how to apply them can be recognized. According to Al-Amidy in the book *Al-Ihkam Ushulil fi Ahkam*, those who fail to master Principles of Islamic Jurisprudence will get their knowledge doubtful because there is no way of knowing the law of God except through Principles of Islamic Jurisprudence (Madjid, 2011). In the study of the Principles of Islamic Jurisprudence all muamalah problems can be resolved by using established methods acceptable to the Islamic scholars. The results of ijtihad using this method are further described in more detail and practically in muamalah jurisprudence. Basically, new transaction models can not be applied before its sharia principles are based tested by methods in Principles of Islamic Jurisprudence and muamalah Jurisprudence.

It has been common practice that banks use the standard contract, i.e. a written contract which has been unilaterally standardized by creditors/ the banks with the exoneration clause. Standardized contracts would not be suitable when they are used in the cooperation agreements that apply the sharia principles because they should not be determined unilaterally so that the division of profit sharing should be clearly agreed upon negotiation, instead of providing agreement or disagreement choices (Na'im, 2017). The terms of the agreement in the transaction should be designed and implemented by both parties freely in accountable manners (Nurfaizal, 2013). Even if the draft of the agreement was made by either party, but it remains open to adjustment upon requests by the other party. Therefore, Islamic banking needs to use a standard agreement which can meet Islamic principles and established principles of muamalah jurisprudence. For example, in mudaraba financing, the contracts shall be reciprocal as both parties are obliged to fulfill reciprocal achievements so as to create a balance of the contract between the two parties (Na'im, 2017).

According to Umar Vadillo, sharia banking is no more than a motivation to maintain the position that Islam all over the world can not be separated from the global capitalist financial system because, without realizing, Muslims through Islamic banking products have actually Islamized capitalism, instead of providing alternative solutions to them (Madjid, 2011). Abdullah Saeed revealed his research proving that Islamic banking practices are unable to remove interests from transactions applied in various guises and names. There is no good reason to believe that Islamic economists have developed a financing method that is free of interest (Madjid, 2011). This statement is only part of the many pessimistic expressions in assessing the contracts used by Islamic banks. The assessment was due to the absence of the purity and independence of their contracts from the formulation of the concept to the application.

DISCUSSION

Intention as determinant substance of contract

A sharia-based agreement is an agreement resulted from the nomenclature of Islamic law. Therefore, the agreement designs must definitely refer to the norms coming from Islamic authoritative legal sources, namely the Qur'an and the Hadiths of the Prophet Muhammad SAW (Lukman Santoso, 2017). The importance of intention as a basis for contract design can be traced to the Qur'an, al-Bayyinah verse 5 and al-Taubah verse 105, in line with the hadiths of the Prophet, as narrated by Bukhari and Muslim from Ibn Umar. Based on the legal sources, Ibn Taymiyyah and Ibn Qayyim emphasized that every deed, including contract, shall be based on intention which is clearly recognized by the parties in the agreement. The intention that is conveyed explicitly shall used as the basis for determining the contract and assessing its validity (Abidin, 1966, p. 592). According to Muhammad Shidqi, any contract with unclear intention is essentially invalid though formally it appears

that the terms and conditions are fulfilled (Burnu, 2001, p. 131). This is in line with the jurisprudential rule that "the basis for assessing a contract is its purpose and intention, not its wordings and sentence structures."

The freedom to choose a contract will ultimately come to determination of a contract design in line with the inner intention. Thus, the principle of intention is the final manifestation of the principle of freedom of contract. If the design of a contract to enter (23) is not in line with the intention (the will of the heart), the contract does not fulfill the principle of freedom of contract so that, in jurisprudence, the substance of the contract is not validly achieved.

Hilah, imitation and Islamization of contract formality

Many examples from the Al-Quran and the hadith of the Prophet SAW show that a contract is formally correct, but Allah SWT forbids it, due hilah committed to the sharia/Islamic provisions (Asy-Syathibi, 1999). The potential for hilah is getting bigger due to the loose use of the principle of "freedom of contract" and the rule of "original law of muamalah is permissible", resulted in pragmatic imitation of conventional contracts. In fact, the freedom of will in relation to contract designs is the freedom of the parties to determine contract models to be used based on their intentions (Budiharto & Sismarwoto, 2020) and the rule of "original law of muamalah is permissible" shall be okay as long as it does not ignore the substance of the contract rules including the intention (Nuril Misbach et al., 2019).

Under certain circumstances there can be abuse of conditions to limit free will in determining a contract design. One of the conditions that can be abused is the existence of economic power (economish overwicht) on either party, which will disturb the balance between the two parties so that the intention/free will as one of the conditions for a valid agreement is not fulfilled (Arifin, 2021). In fact, the Principles of Islamic Jurisprudence has formulated the principle that it is obligatory to take sharia prohibitions into account and to formulate them as the limits that cannot be violated in economic freedom.

Actually, muamalah jurists have laid down foundations of Islamic economy the substance of which has never changed. What can be changed is the technical operation. If applied comprehensively, it can give birth to a contract design that is free from imitation or formalization. However, currently relevant efforts and approaches are still needed to optimize Islamic sciences such as Principles of Islamic Jurisprudence and muamalah jurisprudence to overcome economic problems (Mulawarman, 2019). It is necessary to have a common attitude to realize the importance of breaking away from conventional formalistic patterns and to formulate substantial, methodological concepts.

Actualization of the substance of Islamic economic contracts through deductive methods

In accordance with the Principles of Islamic Jurisprudence and muamalah jurisprudence, the development model of sharia economic contract designs applies deductive reasoning, actualization, or implementing the normative substance of Islamic economics into operational economic practices. Technical implementation is developed to actualize the normative substance of Islamic economy. Conventional contracts cannot be adopted until their substances are assessed so that the conventional nuances in sharia economy can at least be reduced (Madjid, 2011).

The textual arguments which contain prohibitions on business and principles of muamalah jurisprudence must be studied comprehensively and explained clearly to be used as operational technical guidelines to find a pure sharia contract design. The development of contracts that will be implemented in Islamic financial institutions can be carried out without imitation so that public trust can be maintained.

The balance between rights and obligations and the equality in profit and risk sharing can be manifested in the Islamic economic practices which have been implemented traditionally. Therefore, it is necessary to maintain its substances in pure and independent manners in



the muamalah jurisprudence. The operational technicalities and their supporting facilities can be developed from science and technology to be used in Islamic financial institutions. The purity and independence of contracts entered into by Islamic banks will clarify the identity and characteristics of the Islamic economy and, in turn, provide a solution to the long debate about the sharia natures of Islamic bank products.

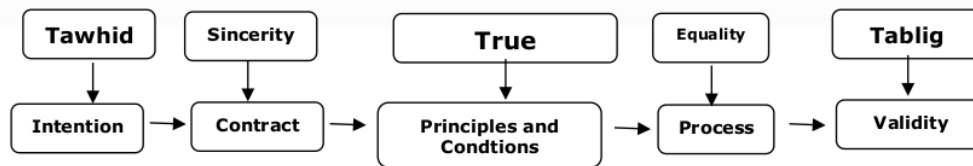
CONCLUSION

It turns out that the formulation of the contract design concepts used by Islamic banks is not substantially different from those used by conventional banks. This is actually due to the fact that, so far, the method used in contract development method is inductive reasoning, which puts forward aspects of business profits and pragmatic needs. There has been no attention to introduce a new contract design that has never been implemented in conventional economy, namely a contract design resulted from the Principle of Islamic Jurisprudence and muamalah jurisprudence methods which apply deductive reasoning, constructed from comprehensive and independent normative substances.

Business theories that have been discussed by previous Islamic economists can only develop Islamic bank contracts from one mindset, namely inductive. This mindset leads to the Islamization of formality which tends to ignore the substantial norms of Islamic economic law, resulting in a lot of criticism. Actually, this inductive mindset needs to be balanced with a deductive mindset in the study of muamalah jurisprudence-based sharia economic development so that muamalah prudential norms can be maintained and make the identity and characteristics of the Islamic economy clear. This method will in turn cope with and restore pessimism and skepticism of many.

The method used in this study will provide understanding for sharia economic practitioners that the current development of Islamic banking contracts has been trapped in the induction mainstream and loose formality Islamization, resulted in a lame development. Therefore, it needs to be balanced with muamalah jurisprudence-based deductive method. In this case, the principle of "intention determines the choice of the contract to be used, the choice of contract determines the pillars and the conditions that apply, the pillars and the conditions determines the implementation process of the contract, and the implementation process of the contracts determines legality of the contract" must be adhered to in the mindset used in designing a sharia economic contract.

The mindset in making a design of financing contract in Islamic banks based on the principles and norms of muamalah jurisprudence can be described as follows:



However, this method has not been widely studied and applied in formulating contract product concepts used by Islamic financial institutions, especially Islamic banking. Therefore, it needs to be socialized and formulated into a standardized method.

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