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THE *TAHAWWUL AL-‘AQD* AS DINAMYC METHOD IN MAKING THE CONTRACTS IN ISLAMIC FINANCE INSTITUTION

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Abstrak

Tahawwul al-‘aqd merupakan istilah hukum Islam yang menunjukkan perubahan suatu akad sehingga terjadi hukum boleh dalam transaksi ekonomi. Kebolehan akad tersebut pada awalnya jika dilihat dari aspek normatif terdapat beberapa hal yang dianggap batal, namun karena terdapat aspek lain maka akad tersebut berubah menjadi sah. Metode penulisan dalam artikel ini adalah kepustakaan yang didukung oleh data lapangan dengan mengambil beberapa akad di bank syariah, asuransi, dan surat berharga syariah. Ditemukan metode atau *qâ’idah tahawwul al-‘aqd* banyak dipergunakan untuk mengakomodasi berbagai tuntutan akad yang dipraktekkan di lembaga keuangan syariah. Dapat dikatakan metode ini merupakan solusi yang dibutuhkan dalam merekayasa suatu akad sehingga dapat memenuhi kebutuhan pasar keuangan. Namun hal tersebut menjadi tanggung jawab DSN-MUI sebagai otoritas pembuat fatwa untuk selalu mengawal sehingga tidak terjadi ketidakseimbangan antara tujuan akad dikalahkan oleh tujuan pasar.
Kata Kunci: *tahawwul al-‘aqd;* metode, kontrak; lembaga keuangan Islam; DSN-MUI.

Abstract

Tahawwul al-'aqd is an Islamic legal term that indicates changes in a contract so that legal permissibility occurs in economic transactions. Initially, when viewed from a normative aspect, the contract's permissibility contained several things considered invalid, but because there were other aspects, the contract became valid. The writing method in this article is literature supported by field data by taking several contracts in Sharia banks, insurance, and Sharia securities. It was found that the method or *qâ'idah tahawwul al-'aqd* is widely used to accommodate various contract demands practiced in sharia financial institutions. It can be said that this method is the solution needed to engineer a contract to meet the needs of the financial market. However, it

is the responsibility of the DSN-MUI as the fatwa-making authority to constantly monitor it so that there is no imbalance between the objectives of the contract being defeated by the objectives of the market.

Keywords: tahawwul al-'aqd; methods; contracts; Islamic financial institutions; DSN-MUI.

Introduction

The meeting point of Islamic law in financial institution products is Sharia contract-based contracts that can be adapted to the systems and operations of financial institutions and are recognized by the international public.[1] This situation continues to develop, especially since the Organization of Islamic Cooperation launched the Islamic Development Bank (IDB) in Pakistan in 1975, which is clear evidence of this common ground.[2] The establishment of the IDB and Islamic banks in the world is a positive response to the assumption that the reality of Islamic law, which has developed since 14 centuries ago, is that its application in the social system is very difficult unless there is political involvement and intervention.[3]

Sharia contracts are applicable and attractive to the public because they promote risk-sharing models in financial institutions, especially in *mudârabah* contracts.[4] However, incidents among Muslims still occur, which are caused by Islamic financial institutions that are considered imperfect in carrying out contracts according to Sharia law, especially in Islamic banking, which is more dominant in spreading *murâbahah* rather than *mudârabah*.[5] In 1991, in Pakistan, the term "Quasi *Murâbahah*" emerged as a term indicating that *murâbahah* in Islamic banks was not purely implemented as contained in sharia law.[6]

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[1] Binta Tijjani Jibril et al., "Awareness and Perception of Customers on Islamic Banking Products and Services: A Meta-Synthesis," *Journal of Accounting Research Organization and Economics,* Vol. 4., No. 3, (2021): 234-247. www/http/jurnal.unsyiah.ac.id/JAROE.

[2] Muhammad Aqib Ali, "The Roots & Development of Islamic Banking in the World & in Pakistan," *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 7, Issue 1, (2015): 58-63. https://seajbel.com/wp-content/uploads/2015/09/KLIBEL7_Acc-33.pdf.

[3] Abdul Ghofur Ismail dan Ahmad Thohirin, "Finance and Growth: The Role of Islamic Contracts," Munich Personal RePEc Archive (MPRA), February 2009, 1-19. https://mpra.ub.uni-muenchen.de/13744/.

[4] Md. Habibur Rahman, "Mudarabah and its Applications in Islamic Finance: An Analysis," *Asian Journal osf Research in Banking and Finance* Vol. 8, No. 6, (2018): 33-46. DOI: 10.5958/2249-7323.2018.00042.1.

[5] Jaidil Kamal, "Problematika Pada Perbankan Syari'ah (Kontrak Pembiayaan Murabahah)," *Jurnal An-Nahl* Vol. 9, No. 1, (2022): 18–27.

[6] Munawar Iqbal and Philip Molyneux, *Thirty Years of Islamic Banking: History, Performance, And Prospects,* (NY: Palgrave Macmillan, 2005), p. 126.

Many thinkers have also expressed criticism of contract practices in financial institutions in Indonesia. Purwanto found evidence that the majority of murabahah transactions are carried out through official delegation or power of attorney schemes (*wakâlah*) to customers, so there is potential for transactions to be similar to conventional banks.[7] Rahman and Humaira also found that sharia banks still predominantly use *murâbahah* contracts, which, if viewed from the *maqâsid-u-syarî'ah* aspect, these buying and selling transactions are still indicated only as *al-makhârij al-shar'î* (shariah solutions).[8]

Abdul-Khaliq sees the problem of *murâbahah* on the side outside the contract, namely that it contains a sales system for a commodity which includes the acquisition value plus a margin as profit so that there is a double burden on the customer,[9] Which in Azharuddin Lathif's language is called a double obligation to add value,[10] thus causing harm to consumers. In 2005, Akhyar Adnan also discovered that the dominance of murabahah products in Sharia banks had an impact on the imbalance in the role of Sharia banks in activities in the monetary or financial and real sectors.[11]

Of the many problems in the practice of contracts in financial institutions, the study in this article focuses on the multiple contracts practiced in Islamic financial institutions in carrying out contracts with contract binding, which is considered necessary to accommodate modern transactions not found in the classical Islamic era.[12] However, in this article, the analysis uses the *tahawwul al-'aqd* method.

Tahawwul al-and (change or transfer of contract) as a method of determining Islamic law in financial business institutions is not popularly compared to the *uqûd al-*

[7] Thesa Adi Purwanto, "Implementation of Murabahah Transaction in Sharia Bank Case Study in Indonesia," *Journal of Strategic and Global Studies,* Vol. 2, No. 1, (2019): 70-82. https://scholarhub.ui.ac.id/jsgs/vol2/iss1/7/.

[8] Muh. Fudhail Rahman and Aida Humaira, "Position and Role of Sharia Banks On Murâbahah Contract Implementation," *Madania* Vol. 23, No. 2, (2019): 213-222. https://repository.uinjkt.ac.id/dspace/bitstream/123456789/68829/1/Artikel.pdf.

[9] Shatha Abdul-Khaliq, "Comparison study of Murabaha and Istisnaa in Islamic banking in Jordan," *Journal of Contemporary Research in Business*, 5(9), (2014): 603–612. https://www.zuj.edu.jo/wp-content/staff-research/economic/dr.Thikraiat-Soufan/4.pdf.

[10] AH. Azharuddin Lathif, "Analisis yuridis pengenaan pajak pertambahan nilai (PPn) dalam pembiayaan murabahah di perbankan syariah [Juridical analysis of the imposition of value added tax (VAT) in *murabaha* financing in Islamic banking," *Dialog,* 32(1), (2009): 52–68. https://doi.org/10.47655/dialog.v32i1.125.

[11] Muhammad Akhyar Adnan, "Dari *Murabahah* Menuju *Musyarakah,* Upaya Mendorong Optimalisasi Sektor Riel", *JAAI* Vol. 9, No. 2, (2005): 159–169.

[12] Hasanudin et al., "Hybrid Contract in Islamic Financial Services", *Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah (Journal of Islamic Economics)* Vol. 14 (1), (2022): 111-128.

murakkabah method. However, in practice, the principles of *tahawwul al-'aqd* have been implemented in many contracts in the Islamic financial business.

The practice of *tahawwul al-'aqd* is motivated by two aspects. First, the principles or legal basis for contracts that form the basis of practice do not answer financial institutions' business transaction needs. Second, economic transaction factors must continue to run in Islamic financial institutions and require various product developments.[13]

Method

This literature study adopts a qualitative research approach based on a content study of contracts in Islamic sharia law, namely tahawwul al-'aqd. The primary data sources referred to are *Dirâsat al Tamhidiyat fî Tahawwul al-'Uqûd fî al-Fiqh wa al-Qanûn Dirâsat Muqarat Muwazabat* (by Abdul Hamid Mahmud al-Ba'li), *al-Fiqh al-Islâmî wa Adillatuh* (by Wahbah al-Zuhailî), al-Madkhal al-Fiqh al-'Amm (Mustafâ Ahmad al-Zarqâ'), and *'Aqd al-Mudârabah: Dirâsat fî al-Iqtisâd al-Islâmî* (Ibrâhîm Fadl al- Dâbû). The data research accuracy was vital and based on field data from several Islamic banks, insurance, and securities products. From the field data, sample contracts were taken, which were used as the basis for the discussion, namely *wadî'ah yad al-damânah, ijârah Muntaiya bittamlik, al-bay' ma'a al-isti'jâr,* and *mudârabah-mushtarakah.*

The data analysis technique refers to Sugiyono's data analysis theory, which covers the stages of data collection, data reduction, data presentation, and concluding.[14]

Findings and Discussion

1. Concept of *Ta<u>h</u>awwul al-'Aqd*

Combining contracts in sharia financial institutions in Indonesia is more popular with the term *uqûd al-murakkabah* or hybrid contract.[15] Many contract combinations in

[13] Results of observations made by the author at sharia financial institutions and various literature.

[14] Sugiyono, *Metode Penelitian Pendidikan: Pendekatan Kuantitatif, Kualitatif* (Bandung: Alfabeta, 2015).

[15] Scholars have different opinions regarding hybrid contract law based on literature studies. Some scholars believe hybrid contracts are prohibited based on the hadith of the Prophet Muhammad SAW narrated by Imam al-Tirmidhi, al-Nasai, and Abu Dawud. They stated that the Prophet SAW forbade two contracts in one transaction. Some scholars think that not all hybrid contracts are haram because the above hadith only prohibits part of hybrid contracts, namely hybrid contracts that occur reciprocally (mutaqâbilah). Look at Dede Abdul Fatah et al., "Akad Murokab on the DSN-MUI Fatwa and its Effect on Islamic Bank Funding Products," *Al-Iqtishad: Jurnal Ilmu Ekonomi Syariah (Journal of Islamic Economics)* Vol. 14 (1), (2022): 155-172. DOI: 10.15408/aiq.v14i1.25620.

financial institutions use the term hybrid contract in various product variants.[16] However, academically, this method was popularized by Hasanudin, Lecturer at UIN Syarif Hidayatullah Jakarta, in his dissertation entitled "The Concept and *Dhawabith* of Multi Contracts in the DSN-MUI Fatwa", and his article "The Multi Contracts in Contemporary Sharia Transactions in Sharia Financial Institutions in Indonesia: Concepts and Conditions (Dhawabith) in the Fiqh Perspective".[17]

Mihajat explains that *'uqûd al-murakkabah* means two or more contracts used in one transaction.[18] Maksum combines contracts with the terms multi-contracts *('uqûd muta'addidah),* and multiple contracts or hybrid contracts *('uqûd mujtami'ah)* as a combination of contracts categorized as single contracts.[19]

Theoretically, the nomenclature of *'uqûd al-murakkabah* is not too difficult to implement. This method usually combines two named contracts *('aqd al-musammâ')* into one contract with unchanged nomenclature.[20] Contohnya akad *murâbahah bil-wakâlah* dalam produk pembiayaan bank syariah untuk jual beli barang konsumtif merupakan gabungan dari akad *murâbahah* dan *wakâlah,* dengan nama akad masing-masing tidak mengalami perubahan pada saat digabung menjadi satu.[21]

If examined more deeply, theoretically, all combinations of several contracts in one contract, if one or both of the contracts change, then this is called the *taẖawwul al-'aqd* method, not *'uqûd al-murakkabah* or hybrid contract, which have been written about by many scholars.

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[16] Muhammad Firmansyah, "Implementation of Contract Hybrid Concept in Multi Services Products (Application of the Warranty Bank Products/Kafalah in Syariah Banks)," *International Journal of Nusantara Islam,* Vol. 04 No 02 (2016): 85-96 DOI: https://dx.doi.org/10.15575/ijni.v4i2.1253; Dimas Kenn Syahrir and Erika Amelia, "Implementation of Hybrid Contracts in the Gold Pawn Practice in Sharia Pawnshops," *Jurnal Iqtisad: Reconstruction of Justice and Welfare for Indonesia,* Vol. 10, No. 2 (2023): 131-148. DOI: 10.31942/iq.v10i2.8333/, ISSN: 2303-3223/2621-640X.

[17] The article of Hasanudian can be accessed at (http://www.ekonomisyariah.org/download/artikel/Makalah%20IAEI_Multi_Akad_Hasanudin.pdf).

[18] Muhammad Iman Sastra Mihajat, "Hybrid Contract in Islamic Banking and Finance: A Proposed Shariah Principles and Parameters for Product Development," *EJBM-Special Issue: Islamic Management and Business* Vol 7, No.16 (Special Issue), (2015): 89-99.

[19] Muhammad Maksum, "Model-model Kontrak Dalam Produk Keuangan," *Journal of Al-'Adalah,* Vol. 12, No.1 (2014): 49-62.

[20] A named contract ('aqd al-musammâ') is a named contract, or a contract that is regulated explicitly in fiqh and given a specific name. Al-Zarqâ' identified 25 contracts, which include bilateral (two parties) and unilateral (one party) contracts such as *wasiyat* (wills) and *hibah* (grants). Mustafâ Ahmad al-Zarqâ', *al-Madkhal al-Fiqh al-'Amm* (Damaskus: Dâr al-Fikr, 1967-1968), I: 291.

[21] Fitri Nurul Fauziah et al., "Analisis Implementasi Akad Hybrid Contract Murabahah bil Wakalah di Bank BJB Syariah Kc Bogor Jabar," *el-Mal: Jurnal Kajian Ekonomi dan Bisnis Islam,* Vol 4 No 2 (2021) 149-160. DOI: 1047467/elmal.v4i2.532.

Conceptually, *taẖawwul al-'aqd* consists of *taẖawwul* meaning replacement *(tabdîl)*, change (*taghayyur)*, or transfer *(intiqâl)*, and disappearance *(zawâl)*. Meanwhile, 'aqd means binding *(ribtun)*, concluding *(dammun)*, and determining *(abramun)*.[22]

Hasanudin and Mubarok interpret *taẖawwul al-'aqd* as changing a contract from a formal (written) contract to another unwritten contract because the written contract does not fulfill the terms and conditions or is not by one's position/authenticity.[23]

Based on the operational definitions of *taẖawwul al-'aqd* and *'uqûd al-murakkabah* and practices in Islamic banks, there is a fundamental difference, namely that in *'uqûd al-murakkabah* all contract names combined in one product do not change. Meanwhile, in *tahawwul al-and*, the names of the contracts that are connected will experience changes in nomenclature and even other terms that are not included in the name of the contract mentioned in Islamic sharia.

In the al-Hindisat al-Mâliyah al-Islâmiyah explained:

تحول العقد عبارة عن تغيير في وصف العقد من شأنه أن يرتب له جميع آثاره بالرغم من البطلان الذي لحقه عندما كان على وصفه الأصلي.[24]

The explanation above can be interpreted as *tahawwul al-and* is an explanation of changes like the contract from its position to be justified in all its legal aspects by eliminating some of those that cancel the contract and those that bind it to conditions similar to the nature of the original contract.

Thus, *tahawwul al-'aqd* means a contract as a written bond is determined through changes in the nature and position of the contract. This change is because if the original contract is implemented as it is, aspects will be found that can cancel the transaction.

2. The Legal Foundation of *Taẖawwul al-'Aqd*

The legal foundation of *taẖawwul al-'aqd* is based on legal rules. Ibrâhîm al-Rasyîd wrote 9 *qâ'idah*, but because in principle the 9 *qâ'idah* have the same meaning, namely changes to the contract in terms of the nature, name, or purpose of the contract, in this article, only 2 *qâ'idah* are written, namely:

[22] Wahbah al-Zuẖailî, *al-Fiqh al-Islâmî wa Adillatuh* (Damaskus: Dâr al-Fikr, 1405 H/1985 M), IV:81, al-Zarqâ', *al-Madkhal*, I:291.

[23] Maulana Hasanudin and Jaih Mubarok, *Perkembangan Akad Musyarakah* (Jakarta: Prenada Group, 2012), p. 216.

[24] Al-Hindisat al-Mâliyah al-Islâmiyah, *Tahwilul al-Aqd wa al-Inqilâbihi Fi al-Fiqh al-Islâmî* (http://www.kantakji.com/financial-engineering), diakses tanggal 1 Maret 2024.

- العبرة فى العقود للمقصود والمعانى لا للألفاظ والمبانى

Guidelines in (business) contracts are based on goals and substance, not formal language.

- العبرة بالمقاصد والمسميات لا بالظواهر والتسميات

The legal guidance (in business contracts) is on the meaning of the object and substance named, not just paying attention to the appearance and nomenclature of the contract.[25]

The two rules mentioned above provide a fundamental principle of contracts that can be implemented in terms of their purpose and substance without having to be fixated on a contract's naming (nomenclature).

3. The Transformation of *Ta<u>h</u>awwul al-'Aqd* as Method

Some evidence that *tahawwul al-'aqd* is a transformation of methods in developing contracts or contracts in sharia financial institutions can be seen in the following contracts which are contracts in sharia banks, insurance and national sharia securities as fellow;

a. *Wadî'ah yad al-<u>d</u>amânah*

Initially *wadî'ah is of yad amânah* where the caretaker must secure the property by not using the properties blending or pooling the properties (cash) under his care, and not charging any expenses for safe authority.[26] To conform with banking practices, *wadî'ah yad al-damânah* was born, which has become the mainstay of funding products.

Wadî'ah yad al-damânah is a combination of *wadî'ah* custody and guarantee *(<u>d</u>aman)*, so that there is a change in characteristics; The goods entrusted may be used, and the recipient of the entrustment is obliged to provide the proceeds of their use to the trustee.[27]

Changing the contract's name also changes the contract's characteristics, where the Sharia bank custodian has the right to use the deposited assets to generate profits. He

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[25] 'Alî Ibrâ<u>h</u>îm al-Rasyîd, *al-Ta<u>h</u>awwul fî al-Asyyâ' wa al-Ta<u>s</u>arrufat wa al-Uqûd wa A<u>s</u>aruhu fî al-<u>H</u>ukmi al-Syar'î* (Kairo: Universitas Kairo, 2001), *Thesis* magister, p. 15. Hasanudin and Mubarok, *Perkembangan*, p. 217.

[26] Meshkat Mahbub and Anisul Mannan Shammo, "Meshkat Mahbub1, Anisul Mannan Shammo," *IOSR Journal of Business and Management (IOSR-JBM)*, Vol. 18, Issue 6 (2016): 39-45. DOI: 10.9790/487X-1806043945.

[27] Murniati Ruslan, "Islamic Perspectives on the Implementation of Wadiah Products at Islamic Banks in Indonesia," *Journal of Economics, Management and Trade* 27(9), (2021): 38-46.

is fully responsible if the goods are damaged because he obtains several benefits from using these assets.[28]

Looking at the aspects, mechanisms, and benefits obtained in *wadî'ah yad al-damânah* is a method of *tahawwul al-'aqd*, because;

1) General bank transactions need to carry out the intermediary function, namely collecting third-party funds (DPK) in the form of savings. For this need, Islamic banks require contracts in accordance with general mechanisms plus eliminating the element of usury.
2) The traditional contract or contract called the closest to a savings transaction is *wadî'ah* or a deposit contract based on the nature of trust (mutual trust) between the depositor and the person entrusted.

However, the original wadî'ah contract, called *wadî'ah* yad al-amânah as a deposit agreement for goods that do not produce a profit, is unsuitable for savings products in Sharia banks. Because with savings, the bank is allowed to use the funds and will provide rewards (in conventional banks, it is called interest on savings)

As a result of the conformity of Islamic law and economic aspects, *wadî'ah yad al-damânah* was born, which implies that banks have full rights over the use of deposited funds. Still, banks are charged with providing *a̱taya* (voluntary giving).

Zahr al-Dîn from the Islamic Business Researchers Center explained that voluntary giving includes gifts or grants, which in fiqh have contracts.[29]

b. *Ijârah muntahiya bittamlik*

In financing in Sharia banks, refer to Law no. 21 of 2008 concerning Sharia Banking (article 1 paragraph 25), which covers 5 aspects:

1) Profit sharing transactions in the form of *mudârabah* and *mushârakah*;
2) Rental transactions in the form of *ijârah* or hire purchase in the form of *ijârah Muntaiya bittamlik*;
3) Sale and purchase transactions in the form of *murâbahah*, *salam* and *istisnâ'* receivables;

[28] Issa Qaed Mansour Qaed, "The Concept of Wadiah and its application in Islamic Banking", *Quest Journals Journal of Research in Humanities and Social Science* Vol. 2, Issue 11 (2014): 70-74. https://www.questjournals.org/jrhss/papers/vol2-issue11/I2117074.pdf.

[29] Zahr al-Dîn, "Kayfa Tanâfis al-Maṣârif al-Islâmiyah Fî Tanwî' 'Âwaidihâ", *Islamic Business Researchers Center (online)*, (http://www.kantakji.com/accounting).

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4) Lending and borrowing transactions in *qard* receivables; and
5) Service rental transactions in the form of *ijârah* for multi-service transactions.

When linked to certain products, these five aspects of financing have undergone many changes in determining the contract. Some contracts cannot stand alone (independent), but require other contract to carry out transactions.

Joint contracts were born, such as *murâbahah bil wakâlah,* to finance the sale and purchase of consumer goods and *murâbahah wal ijârah* to finance Home Procurement Credit.

Meanwhile, at point b there is *ijârah muntaiya bittamlik*. Zuhailî said it is explained that basically, *ijârah* is only rent, and it becomes debatable if there is a principle of ownership that is directly attached to the *ijârah* contract, especially according to Hanâfiyah and Mâlikiyah.[30] However, according to Hanâfiyah and Mâlikiyah, it is explained that the permissibility of ijârah with ownership aspects for musta'jir requires that there is no element of haste *(ta'jîl)*.[31]

Ijârah muntaiya bittamlik is a financing product contract at a Sharia bank for renting goods with ownership.[32] Several articles explain that this contract is a hybrid contract,[33] even though it is *tahawwul al-'aqd*.

It is a change from the basic *ijârah* (lease) contract developed by Sharia banks to respond to customers who want ownership of goods (movable or immovable) using the rental payment *(ujrah)* method, not the buying and selling method. It becomes a *tahawwul al-and* method because adding "*muntaiya bittamlik*" is not a contract nomenclature but a method of adapting Sharia law to achieve financial, economic products.

c. *al-Bay' ma'a al-isti'jâr*

The al-Bay' ma'a al-isti'jâr agreement in National Sharia Securities is an example of the tahawwul al-'aqd method in the securities sector as a development of the contract

[30] al-Zuhailî, *al-Fiqh,* IV:760.
[31] al-Zuhailî, *al-Fiqh,* IV:760.
[32] Sa'ad bin Nâsir al-Syasrî, *'Aqd al-Ijâr al-Muntahiya Bittamlîk* (Riyâd: Dâr al-Habîb, 1421 H), Fatwa DSN-MUI No. 27/DSN-MUI/III/2002, Syam dkk. (Eds.), *Himpunan,* Vol. 1, p. 160.
[33] Look at Darti Busni et al., "Hybrid Contracts in Leasing and Ijarah Muntahiya Bit Tamlik in Indonesia Sharia Financial Institutions," *EkBis: Jurnal Ekonomi dan Bisnis*, 6(1), (2022): 59-73. https://doi.org/10.14421/EkBis.2022.6.1.1505.

contained in Law no. 19 of 2008 concerning National Sharia Securities, where in article 3 it is written that several SBSN contracts can be in the form of:

1) SBSN *Ijârah*, which is issued based on the *Ijârah* Agreement;
2) SBSN *Mudârabah*, which is issued based on the *Mudârabah* Agreement;
3) SBSN *Musyârakah*, which is issued based on the *Musyârakah* Agreement;
4) SBSN *Istisnâ'* is issued based on the *Istisnâ'* Agreement;
5) SBSN is issued based on other contracts as long as they do not conflict with Sharia principles; and
6) SBSN is issued based on a combination of two or more contracts as referred to in letters a to e.

Of the several contracts mentioned above, in practice, the contract most widely used is the *tahawwul al-and* method as in letter f and is based on the DSN-MUI Fatwa on SBSN, namely the *al-Bayt ma'a al-isti' contract jâr* (sale and lease back).

Regarding the *al-bay' ma'a al-isti'jâr* transaction, the investor is the sukuk buyer for certain goods determined in the agreement. Investors will get rental income for the goods they buy rather than getting coupons as with bonds. At the end of the contract the government or issuer (sukuk issuer) will repurchase it according to the selling value at the beginning of the transaction.

al-Bay' ma'a al-isti'jâr (sale and lease back) is a change to a sale and purchase agreement *(al-bay')* by adding properties to other contracts. Where al-*isti'jâr* is the nature of the ijârah contract.

The *al-bay' ma'a al-isti'jâr* agreement is practiced in National Sharia Securities (SBSN) transactions by DSN-MUI Fatwa No. 72/DSN-MUI/VI/2008 concerning National Sharia Securities *Ijarâh Sale and Lease Back*.[34]

SBSN or *sukuk* is a development of SUN (Government Debt Securities) or conventional bonds that use the debt-receivable and coupon method (a type of interest). However, SBSN still uses the duplicate accounts receivable and coupon transaction methods. In that case, the contract analogy applied to SBSN will be challenging to put into practice because coupons are a ribawi principle, and the *tahawwul al-and* method is in the sentence *"ma'am al-isti'jâr"* as a development of the all-day agreement.

[34] Syam et al. (Eds.), *Himpunan*, Vol. 2, p. 198.

d. *Mudârabah-musytarakah*

Musytarakah is a contract combining *mudârabah* and *musyârakah.* Then *musyârakah* is combined with other contracts with the nomenclature *mudârabah-musytarakah,* which is applied in sharia banks,[35] insurance,[36] and other institutions according to transaction needs.

Mudârabah-musytarakah is caused by changes in the basic principles of the primary contract (*mudârabah*), so changes to other contracts are needed to accommodate the purpose of the transaction being carried out.

In Islamic banks or insurance, as financial institutions both have core capital. However, both institutions also receive capital (from banks in the form of savings and deposits, from insurance in the form of premiums) in transactions where if they only use a *mudârabah* contract, some principles can cancel the contract. Because in the basic tenets of *mudârabah* there is a separation between the functions of investors (capital owners, *sâhib/rabb al-mâl*) and managers *('âmil, mudârib).*[37] So, banks or insurance financial institutions can't function as pure managers without core capital to carry out the objectives of the mudârabah contract. On the other hand, if you use a syirkah/musharakah contract, it is also applicable for transaction purposes.

With the *tahawwul al-'aqd* method or changes to the function, substance and purpose of the contract without changing the function, substance and primary contract *(mudârabah), mudârabah-musytarakah* is born, where the manager *('âmil, mudârib)* in this case the bank and sharia insurance is also a capital owner/investor.

Mudârabah-musytarakah is also applied to bank or insurance transactions as investors who partner with other financial institutions such as cooperatives, where the cooperative is also the manager and owner of the capital.

3. Analisis Methode *Ta<u>h</u>awwul al-'Aqd*

a. Aspects of Contract Nomenclature

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[35] *Mu<u>d</u>ârabah-musytarakah* refered to Fatwa DSN-MUI No. 50/DSN-MUI/III/2006.

[36] Fatwa DSN-MUI No. 51/DSN-MUI/III/2006 concerning *mu<u>d</u>ârabah-musytarakah* in Insurance.

[37] Full explanation about *mu<u>d</u>ârabah* Look at: Ibrâhîm Fa<u>d</u>l al-Dâbû, *'Aqd al-Mu<u>d</u>ârabah: Dirâsat fî al-Iqti<u>s</u>âd al-Islâmî* ('Amman: Dâr 'Amar, 1997), p. 30.

In muamalah fiqh the nomenclature of contracts is divided into *named ('aqd al-musammâ')* and unnamed *('aqd gair al-musammâ')* contracts.[38] In Islamic shari'ah, the nomenclature of contracts is divided into named contracts *('aqd al-musammâ')* and not named contracts. In fact, each contract is applied according to its function and purpose, and is independent. This means that if it is a *mudârabah* contract, there is a difference in the role of the subject between the investor and the fund manager, in *wadî'ah* there is no *aṯaya* or grant aspect, in *ijârah* there is no *mutaniya bittamlik* because the principle of ownership has become the principle of buying and selling as in *murâbahah* contracts.

However, with the development of modern transactions in financial institutions, the method of developing contracts is the tahawwul al-'aqd method, namely the method of changes either in changing names (nomenclature), merging between contracts, or in naming new contracts that are not mentioned in al-uqud al-'aqd. musammah has become an unavoidable aspect.

Thus, Islamic law initially became the main source (subject) in the development of sharia financial institutions (object), with the development of tahawwul al-'aqd having implications for Islamic law, it also became an object medium that could not be free from criticism so that it was applicable.

According to Abdullah Saeed, this implication is a debate in Islamic finance between making Islamic law an independent assimilator, unaffected by aspects of business practice, or as an accommodator so that there are many compromises regarding contracts in accordance with the practical objectives of Islamic finance business.[39]

b. The role of the National Sharia Council

The development of tahawwul al-'aqd is a contemporary phenomenon that must be addressed as a challenge to Islamic law in financial institutions. In principle, in the author's analysis, in Indonesia there is an institution that can be said to be an institution that authoritatively has full authority in designing and controlling the tahawwul al-'aqd method, namely the National Sharia Council-Indonesian Ulema Council (DSN-MUI).[40]

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[38] Look at: al-Zarqa', *al-Madkhal,* I:538.

[39] Look at: writing about accommodative and assimilative from Abdullah Saeed, "Capitalizing on the Current Status of the Interpretation of Fundamental Shariah Principles Applicable to Islamic Investment Funds", *Paper* presented at Islamic Funds Conference, Kuala Lumpur, 23-24 Juni 1997.

[40] The legality of DSN-MUI was decided through National Sharia Council Decree No: 01 of 2000 concerning Basic Guidelines for the Indonesian Ulema Council (PD DSN-MUI) regarding the basic guidelines and Household Guidelines for the Indonesian Ulema Council for the period 1995-2000, and the Decree of the Leadership Council of the Ulama Council Indonesia No: Kep-754/MUI/II/99 concerning the

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The formation of DSN-MUI was motivated by exploring the application of sharia values in economic activities in general and specifically in the financial sector, such as banking, insurance, pawnshops, capital markets, mutual funds, etc.[41]

Regarding the legal science framework, DSN-MUI is an institution tasked with maintaining and harmonizing muamalah values with business practices (lawmaking domain). Thus, the strength of DSN-MUI is not only internal to the MUI institution but also external to financial institutions that apply Sharia principles and transactions.[42] Moreover, DSN members consist of ulama, practitioners, and experts in fields related to economics and *mu'amalah sharia*.[43]

Only in 2008 was the fatwa issued by DSN-MUI formally not only a reference but also attached to the existence of the fatwa maker (the institution), namely DSN-MUI as an authoritative institution recognized by law.

In Article 1 (paragraph 12) of Law No. 21 of 2008 concerning Banking was written:

> *"Sharia principles are principles of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia."*

The article above makes explicit the sound of the principles of Islamic law, which is based on the fatwa of the competent institution, which is the institutional authority of the DSN-MUI, which is more potent in legislation that has not been contained in previous legislation (UU No. 10 of 1998 concerning Banking, or Law no. 23 of 1999 and Law No. 3 of 2004 concerning Bank Indonesia).

Thus, the DSN-MUI institution has a significant role, and its independence is very much needed in developing Islamic legal products in the LKS system, especially in contracts that use the *tahawwul al-'aqd* method.

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formation of the National Sharia Council, the National Sharia Council was formed. Ahyar A. Gayo, et.el., *Laporan Akhir Penelitian Hukum Tentang Kedudukan Fatwa MUI Dalam Upaya Mendorong Pelaksanaan Ekonomi Syariah* (Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI, 2011), pp. 43-44.

[41] M. Syafi'i Antonio, *Bank Syariah; Teori dan Praktek* (Jakarta: Gema Insani Press, 1999), p. 285.

[42] Rahmat Ilyas, "Peran Dewan Pengawas Syariah Dalam Perbankan Syariah," *JPS (Jurnal Perbankan Syariah)* Vol.2, No.1 (2021): 42-53. DOI: https://doi.org/10.46367/jps.v2i1.295.

[43] DSN-MUI Decree No. 01 of 2000 concerning Basic Guidelines for the Sharia Supervisory Board-Indonesian Ulema Council.

DSN-MUI, in making fatwas using the *tahawwul al-'aqd* method, aims to develop Islamic law applicable in modern financial business transactions, not solely because Islamic law must constantly adapt to business demands.

However, in development, the DSN-MUI Fatwa is only a reference in developing contracts for financial institution products. Meanwhile, the structure of the DSN-MUI institution in practical financial institutions represented by the Sharia Supervisory Board (DPS) could be more optimal in controlling institutions in implementing Sharia compliance.

Conclusion

Several analyses of contracts in Islamic financial institutions using the *tahawwul al-'aqd* method, the contracts can be divided into several typologies: 1) The contract still uses the primary contract nomenclature, only adding another name according to the purpose of the transaction and the legal impacts that occur. As *in wadî'ah yad al-damânah, ijârah mutaniya bittamlik* in sharia banking contracts; 2) The contract uses primary contract nomenclature by adding functions from other contracts, like *al-bay' wa al-isti'jâr* in sukuk transactions; and 3) The contract uses primary contract nomenclature by combining other contracts, where the combined contract is a change or engineering contract, like *mudârabah-musytarakah*.

The results show that *qa'idah tahawwul al-'aqd* is widely used to fulfil various requirements of contracts used by Islamic financial institutions. It can be considered as a necessary solution to engineer a contract so that it can fulfil the requirements of the financial market. Thus, basically *uqûd al-murakkabah* like *murâbahah bil wakâlah* is also basically part of the *tahawwul al-'aqd* method.

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