

BUSINESS CONTRACT

IN CONTEMPORARY MUAMALAH MALIYAH

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A. Introduction

Contract or engagement/agreement is one of the object of the discussion in the study of *fiqh*, especially *fiqh muamalah*. *Fiqh muamalah* is a plural word that consists of the words *fiqh* and *muamalah*. Etymologically, *fiqh* means understand, know and execute¹. *Muamalah* is a law related to the actions of human beings and the rights of material such as purchase, lease, mortgage and others.² *Fiqh* as the result of understanding has a human intellectual characteristic according to its methodology and can be sure it will be affected by time, place and the level of each intellectuality. Contemporary, *fiqh muamalah* means the law of Islamic economy about the regulations of material relations or called *privat* law by the expert of positive law, where it discusses about human rights and the relations with one and another and is very relevant to develop and to apply as a product of sharia banking.

The object of *muamalah* in Islam is very wide, so al-Quran and as-Sunnah talk more about *muamalah* globally. It shows that Islam gives the opportunity to people to make an innovation in *muamalah* according to what they need as long as it doesn't go out from the principles that have already been decided.

A contract is an important and born from the needs of interaction, and interaction is a must in social that always develops as long as the development of society. Because of that, a contract cannot be separate from human life as a social creature that always lives side by side with another people to fulfill their needs. Everything cannot be reached without *ta'awun* (help each other), *tabaddul* (exchange) with another. *Tabaddul* has many forms and varieties and is controlled to something called a contract theory, to control the economic activity, basics of interaction, freedom of trade, exchange of goods and services and other activities. In running a business, a contract has an amazing role and in syariat Islam already confirms about contract in surah al-Maidah, QS. 5:1 which reads:

¹ Ali al-Khafif, *Ahkam al-Muamalat al-Syar'iyah* (Darul al-Fikri, tt), p. 4.

² *Ibid.*,

يَأْتِيهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ ۗ أَحَلَّتْ لَكُمْ بَهِيمَةَ الْأَنْعَامِ إِلَّا مَا يُتْلَىٰ عَلَيْكُمْ غَيْرَ
 مُحِلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ ۗ إِنَّ اللَّهَ تَحَكَّمٌ مَا يُرِيدُ ﴿١٠١﴾

It means: “O you who believe, fulfill that contracts. It’s allowed to you the cattle, unless that will be read to you. (Such a) with not allowed to hunt when you do a hajj. Verily Allah set laws according to what He pleases.”

Fuqaha shave make their own rule to each contract in their time. A scientist can conclude the general theory of contract from their rule, studies fuqahasabout the definition of contract, the pillars and requirments, also the laws that already they set for every contract.

Contract is the theory from the result of fuqahasis an engagement agreement in a transaction and become the willpower for the people to do it, the willpower can exist from one party such as benefaction, or it exist from two party such as buy and sell. Contract or engagement agreement can be define as a commitment with the values of sharia.

B. Definition of Contract and *Mitsaq*

The word of Akad/ Contract come from Arabic language that is *al-‘aqd*, etymologically, have many meaning such as, engagement, accumulate, agree, toughen and collecting between two things.³ Wahbah az-Zuhaili define that contract with the meaning of binding or tighten and toughen between a few party on something. The bond can be concrete or abstract either from one side or both sides.⁴

Etymologically, akad/contract is : engagement or agreement between two people by doing *ijab* and *qabul*.⁵ Furthermore the definition of akad/contract terminologically is a correlatin of utterrence from one of two people who do akad/ contract with another (second party) with *syara*’ where this effect on objects.⁶

The terminologically definition above have a meaning to binding two people who want to realize what is already committed. With the editorial and suppression on *syara*’ provision, akad/contract is: binding between *ijab* (a statement to make the engagement) and *qabul* (a statement to recieve the engagement) in term of *syariat* and affect to the object of engagement.⁷

Limitation using utterence “in term of *syariat*” is to expend from the definition akad/ contract with attachments in term without *syariat*, such as to terminate someone, the

³ Ali al-Khafif, *Ahkam al-Mu’amalat al-Syar’iyah*, (Dar-al Fikr al-‘Araby, tt), p. 169

⁴Wahbahaz-Zuhaili, *Fiqh Islam waAdillatuhu*,jilid 4, (Jakarta: GemaInsani, 2011), p. 420

⁵RafiqYunus al-Mishry, *Fiqh al-Muamalah al-Maliyyah*, (Damsyiq: Dar al-Qalam, 2005), p. 58

⁶Wahbah, *Fiqh Islam*, p. 420

⁷Nasrun Haroen, *Fiqh Muamalah*, (Jakarta: Gaya Media Pratama, 2000), p. 97

deal to do usury, fraud, steal, and other. All of it is forbid according to syara' so it doesn't effect to the object. So the limitation with utterence "causing effect to the object" is to expend the bonds between two utterences that have no effect at all, then "affect to the object of engagement" meaning is the transer of ownership from one party (people who do *ijab*) to the second party (people who said *qabul*).

The fiqh theologian have done a research about akad/ contract from general term dan specialterm. Generally, the definition of contract is equal with the definition of contract in language term according to theologian Syafi'iyah, Hanafiyah and Hanabilah there is everything is done by someone based on his own desires such as waqaf, divorce, exemption and everything that it's formation requires two people desires like buy and sell, representation and pawning. Another hand, from the special term that told by the fiqh theologian they are :

1. Engagement that set up with *ijab-qabul* based on syara' provision that affect to the object.
2. The attachment of utterence between people who make a contract in syara' term on visible angle and affect to the object.
3. Implementation of handover if the contract is buy and sell or something that show there is a handover accompanied with the power of law.
4. Engagement of *ijab qabul* justified by syara' that establish contentment of both sides.

Thus, the use of more detailed akad/ contract term to things that are more important and special to what has been set up and has provision. The agreement between two desires in achieving the desired commitment to the future has been known to be absolutely is like sale or transfer of account payable. And contract can be understand as the limit of agreement to achieving one purpose or specific intent.

Akad/ contract as interpreted as a form of commitment or agreement, then to the word "*mitsaq*" is also defined by commitment or agreement, but the agreement here is done as an expression for the subject of the contract not only in term of meeting the needs in the field of economics, but more than that, as stated by Allah in al-Quran in three places. *Firstly*, *mitsaq* is engagement or the marriege agreement. Where marriage is a bond inwardly and outwardly between a man and woman to live together. This bond is named by Allah "*mitsaqan ghaliza*" very solid agreement (QS An-Nisa, 4:21), which involves an agreement between the spouses. As His word reads :

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُمْ مِيثَاقًا غَلِيظًا ﴿١٦﴾

It means : “How are you going to take it back, but some of you has been associate (mixed) with each other as husband and wife. And they (the wives) have taken from you a strong agreement.”⁸

Agreements between spouses so solid, so that when they are separated in the world by the death, then they will still be incorporated by Allah in the afterlife after resurrection. As Allah says in surah Yasin QS. 36:56 :

هُمْ وَأَزْوَاجُهُمْ فِي ظِلَالٍ عَلَى الْأَرَائِكِ مُتَّكِنُونَ ﴿٥٦﴾

It means: “They and their wives are in the shade, reclining on couches.”⁹

Thereby Allah statement about the strong engagement and agreement between husband and wife, the insistence of them is not only because of them as husband and wife, even all their family members joining. This was revealed by Allah in surah al-Ra'd QS. 13:23 which reads as follows:

جَنَّتُ عَدْنٍ يَدْخُلُونَهَا وَمَنْ صَلَحَ مِنْ آبَائِهِمْ وَأَزْوَاجِهِمْ وَذُرِّيَّاتِهِمْ وَالْمَلَائِكَةُ يَدْخُلُونَ

عَلَيْهِمْ مِنْ كُلِّ بَابٍ ﴿٢٣﴾

⁸Depag RI, *al-Quran dan Terjemahnya*, (Bandung: Jumanatul ‘Ali, 2005), p. 82

⁹ I b i d. p. 445

It means : "(It is) 'Adn heaven which they enter into it together with their godly kids from their fathers, wives and their offspring, while angels enter to their place from all doors."¹⁰

Secondly, word *mitsaq* describe Allah agreement with His prophets, where the prophets did firm agreement to convey the religion to the nation respectively. This can be understood in surah al-Ahzab QS. 33: 7, which reads:

وَإِذْ أَخَذْنَا مِنَ النَّبِيِّينَ مِيثَاقَهُمْ وَمِنْكَ وَمِنْ نُوحٍ وَإِبْرَاهِيمَ وَمُوسَىٰ وَعِيسَىٰ ابْنِ مَرْيَمَ

وَأَخَذْنَا مِنْهُم مِّيثَاقًا غَلِيظًا

It means : "And (remember) when We took a covenant from the Prophets and from you (alone) of Nuh, Ibrahim, Musa and Isa son of Maryam, and we take from the man unwavering agreement."¹¹

And third, word *mitsaq* give an idea of Allah agreement with His people in the context of carrying out religious messages (QSA n-Nisa 4: 154).

وَرَفَعْنَا فَوْقَهُمُ الطُّورَ بِمِيثَاقِهِمْ وَقُلْنَا لَهُمُ ادْخُلُوا الْبَابَ سُجَّدًا وَقُلْنَا لَهُمْ لَا تَعْدُوا فِي

السَّبْتِ وَأَخَذْنَا مِنْهُم مِّيثَاقًا غَلِيظًا

It means: "And had we lift it up to their (head) mount Thursina to (accept) agreement (which has been our takee of) them. And we told them : " Enter the gate while

¹⁰ I b I d. p. 253

¹¹ I b i d. p. 420

you kneel ”, and we tell (also)to them : “ Do not brake the regulation about Saturday “,and we take from them a solid agreement.”¹²

That is the explanation of mitsaq by Allah that can be understand through his words, and from each verse have a different subject. This suggests that it is so important and very special attention from Allah to the people who do the contract, in the sense that people who perform contract in accordance with the syara’ will always get special attention fromAllah.

C. The Principles and The Term of Contract

The theologian differed in determining the pillars and the terms of the contract. Hanafiyah found that onlyone contract pillars, namely *shigha tal-'aqd* (*ijab* and *qabul*), while those who do contract and the object ofthe contract are the terms of the contract, because they found that pillaris the essence which is in the contract itself.¹³While the most opinion (jumhur) theologian found that there are three pillars of the contract, namely:

1. Aqid (People Who Do Contract)

Aqid are parties who do the transaction, orthe person who has rights and who will be entitled, as in the case of buying and selling them is the seller and the buyer. As a prerequisite, the fiqh theologian provides requirements or criteria that must be met by *aqid* among others:

a. Expert.

Both have the skills and propertocarry out the transaction. Normally they would Expert if they have been at his legal ageor mumayyiz and rational. Rational here is not crazyso they be ableto understand what normal people said. While mumayyiz here meansbeing able to distinguish between good and bad; between hazardousand non-hazardous; and between harmful and beneficial.

b. Territory

Territory can be regardedas a right and authority of someone who getsthe legality syar'i to conduct a transactions on a particular object. It means that the person is theoriginal owner, guardian or representative of an object of the transaction, so that it

¹² I b i d. p. 103

¹³ Nasrun Haroen, *Fiqh Muamalah*, p. 99

has the right and authority to make a transactions. And most importantly, people who do contract must be free from pressure so they feel free to express their choice freely.

2. Ma'qud 'Alaih (Object of Transaction)

Ma'qud 'alaih or object of transaction, must meet these following requirements:

- a. The transaction object must exist when the contract or the contract is being performed.
- b. Object of the transaction must be *mal mutaqawwim* (wealth that allowed syara' to trade) and fully owned by their owners.
- c. The transaction object can be handed over when the contract, or it is possible in the future.
- d. Transaction object is clear and real.
- e. Object of the transaction must be pure, not exposed to impure things and not unclean goods.

3. Shihat, that is Ijab and Qabul

Ijab qabul is an expression which indicates the willing ness or agreement of two parties to a contract or agreement. The definition of *ijab* according to theologian Hanafiyah is the determination of certain acts that show the contentment that is spoken by the first person, whether submitting or receiving, while *qabul* are those who say after the person who uttered *ijab*, which indicates contentment on the first greeting. According to theologian beside Hanafiyah, *ijab* is a statement that comes out of the person who handed over the item, well said by the first or second, while *qabul* is a statement of the person who receives.¹⁴ From the two definitions above can be concluded that the contract of *ijab qabul* is an expression between the two parties to a transaction or a contract on a matter that the agreement there will be a transfer of rights between the two parties.

Uttered by the tongue is one way in which to hold a contract, but there are also other ways you can describe the will of contract. The theologian of fiqh explains some ways to go in the contract, namely: *First*, utterance or word that is the natural and fundamental way to reveal hidden desires, it can be done with all utterance which shows the mutual pleasure and in accordance with local custom or, as the main core in each contract is contentment.

¹⁴ *Ibid.* p. 103

Second, do a contract with an action or give each other (contract with mu'athah), that is to contract with an equally perform acts that indicate the presence of mutual pleasure without the saying *ijab* or *qabul*. *Third*, hold a contract with the cues, cue sometimes from people who can talk to or mute. *Fourth*, the contract with the writing that the contract lawfully done by writings between the two parties were equally unable to speak, in a ceremony or both of the person is absent and with any language understood by both people who do a contract, provided that the text is clear (meaning obvious shape after the writing) and formal (meaning written in the usual manner well known in the community by naming one sent and signature of the person who sent).¹⁵

Ijab qabul, there are several requirements that must be met, *fiqh* theologian write it as follows:

- a. There is a clarity intention between both parties.
- b. Compatibility between *ijab* and *qabul*.
- c. A meeting between *ijab* and *qabul* (sequential and connect).
- d. The existence of a ceremony contract and an agreement between the two sides did not show rejection and cancellation from both parties.

D. Akad/ Contract in Fiqh Muamalah

Muamalah as a form of transactions made by humans contain some form of engagement that result to the object of transactions. One type of contract can be seen in the contract of *bay al-wafa'*, where there seems to be agreement that it is applied in the purchase, *Ijara* and *rahn*. *Bai' al-wafa'* appeared in the mid-fifth century Hijriyah in Central Asia (Bukhara and Balkh). Specificity of buying and selling was designed by the mujtahid of his time in order to avoid the practice of usury in lending and borrowing are often made public at the time. Substantially *bay 'al-wafa'* differs from *Ijara* (lease), because *Ijara* (lease) is a transaction for the benefit of ownership of an item during particular time in the presence of a reward. Where as in the contract *bay 'al-wafa'*, if the time the agreement ends, each party committed deliver goods and money as the object of sale and purchase agreement. Likewise that the *bay 'al-wafa'* differs from *ar-rahn* (collateral

¹⁵Wahbah az-Zuhaili, *Fiqh Islam wa Adillatuhu*, jilid 4, p. 431-437.

/collateral/guarantee), as *ar-Rahn* is the owner of goods that serve as collateral and cannot be used by the creditor.

Al-Qur'an and as-Sunnah as the source of law used as a guide for mankind to interact, the teaching divides into two, there are the teaching of *aqeedah* and the teaching of *sharia*, and *sharia* consists of worship and *muamalah*.¹⁶

Related to worship (relationship of human with Allah), a prophet is very cautious in giving an explanation, therefore prophet explained in detail and "*tauqif*" there is following the instructions of prophet according as it is, while the field *muamalah* not *tauqif* prophet explanation, just be global and submit details of its implementation to humans by way of *ijtihad*, this indicates that the problem of *muamalah* not bound to time, place and social conditions. About this Sayyid Sabiq say; the problem of *Aqeedah* (belief) and worship is not changed because the changes of time and place, because it given a detailed disclosure perfectly, and explained with complete texts¹⁷. Therefore, no one is justified increase or decrease it. And something changed and the change due to the changing times and places. Such as, a variety of civilian welfare, as well as political problems and war, the disclosure of which is found in outline (*mujmal*) in accordance with the interests of human beings throughout the ages, and therefore the authorities are guided in an effort to establish the truth and justice.¹⁸

At the time of the priests *mujtahid*, fostering legal speak according to the language of his people, this is what causes the law in the field of *muamalah* live-in the diversity of opinion that is equally recognized, and the results of *ijtihad* experts were standardized into teaching standards, maintained by followers later became the forerunner to the different madhhabs. *Muamalah* issue that comes from the al-Qur'an and the as-Sunnah with a very broad scope of discussion due to the shape and type of the *muamalah*. Will surely develop

¹⁶ Mahmud Syaltout, *al-Islami 'Aqidah wa Syari'ah* (Kuwait: Dar al-Qalam, 1966)

¹⁷ See H. Nasrun Haroen, *Fiqh Muamalah* (Jakarta: Gaya Media Pratama, 2000), p. ix.

¹⁸ Sayyid Sabiq, *Fiqh Sunnah* (Beirut: Dar al-Kital al-Arabi, jilid I, 1987), p. 10.

⁶ *ibid*

in accordance with the times/time, place and social conditions. Therefore, the problem *muamalah* very closely linked to the social changes that occurred in the middle of society.

Disclosure of *muamalah* problem accordance with the principles and character to move *dynamically* and *flexibly*, so that experts in the field of social sciences said that social changes is any change in social institutions in a society that affects social systems, including the values, attitudes and patterns of behavior among groups in society.¹⁹

Muamalah creation and development is left to the experts in the field of it. Then, the fields like this is called by *ushul fiqh* experts with *ta'adduliyat* issues are issues that could be rationalized or *ma'qul al-ma'na* issues are issues that can be entered into the logic. The most important *muamalah* issues is the substance of the meaning and objectives to be achieved containing a set of principles and rules of *syara'* for the purpose of the benefit of mankind and avoid the evil.

Human welfare that is both individual and groups of people is determined by the environment and future development. Society is always changing, because no one ever stops people at a certain point in its development. The societal changes can affect social values, social norms, patterns, organizational behavior, the composition of social institutions, the existing layers in society, power and authority, social interactions, and so forth.

Social changes that need attention and consideration is that is positive. In this case, according to the 'Izzuddin ibn' Abdas-Salam, a prominent Shafi'i school of *fiqh* of welfare states that if there is, then that is intended by the law of Allah.²⁰ If the indicators found there in benefit of the law of Allah, and in any way benefit that can be achieved then rose in sharia ordinances.

To anticipate the negative values are conceived and brought by the social changes in this *muamalah* issue of Islamic law put forward various principles and rules reused as a

¹⁹Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum* (Jakarta: Rajawali Press, 1988), p. 89. See H. Nasrun Haroen, *Fiqh Muamalah*, p. XVI.

²⁰Izzuddinibn 'Abd as-Salam, *Qawa'id al-Ahkam Fi Mashalih al-Anam*(Beirut: Dar al-Kutub al-Ilmiyah, tt), p. 120. See H. Nasrun Haroen, *Fiqh Muamalah*, p. XVIII.

benchmark for the validity of a form *muamalah* created by social change. The shape of *muamalah* based on human creations and created in accordance with these social changes, can be seen in the form of *bay 'al-wafa'*, namely buying and selling, which was held two sides are accompanied by are quirement that the goods sold can be bought back by the seller if the agreed deadline has arrived. Sale and purchase such a community created and approved by the Hanafi in order not rampant usury among the public when it is, because the rich do not want to lend money to people in need voluntarily(*al-qardal-hasan*) without getting a reward. And excess property owners will also get a benefit from this transaction, because they are earning money. Thus there was mutual help between the two sides with a certain period of time. Buying and selling *bay 'al-wafa'* according to the Hanafi is not the one including the banned prophet though conditional, because the *bay 'al-wafa'* through sale and purchase contract in which the buyer can have the goods and at the same time use it, this is done in order to avoid public carry out a transaction that contains usury.

Reality on the field can be seen from the transaction taxation rubber plantation in North Labuhan Batu District, utilizing paddy soil and taxes coconut groves in the district of Madinaas well as sell liens agricultural land (paddy) in Deli Serdang North Sumatra Province, where the transaction is common and has long been practiced in community. The trick sometimes occur in justice and mutual treasure stakes his brother with vanity, of course, it is not desirable and should receive special attention from the Islamic banking institutions, with a sense that Islamic banking institutions need to develop products with the form or manner *bay 'al-wafa'*.

The term of piracy garden in society at North Labuhanbatu, North Sumatera province, in practice occurs where a landowner to borrow some money to someone with a guarantee of a parcel of his garden to the lender with the agreement that as long as the loan is not paid or refunded by the owner of the garden, the recipient assurance garden should take the outcome of the garden, as long as the loan money has not been returned, during which the crops are entirely for the right lender.

To anticipate the negative values are conceived and brought about by the social changes in this *muamalah* issue of Islamic law put forward various principles and rules are

used as a benchmark for the validity of a form *muamalah* created by social change. The practice of taxation garden made public in North Labuhanbatu is a form *muamalah* based human creations and created in accordance with social change, as the contract *bay 'al-wafa'* that are buying and selling, which was held two sides are accompanied by terms or agreements that the goods sold it can be bought back by the seller if the agreed deadline has arrived. Practices can be found in the middle of the community as a similar pattern to the *bay 'al-wafa'* is, people use the term taxation, sell liens and hold the mortgage, and the term hold pawn used by the people of West Sumatra called "Hold Pawn".

The development of socio-economic life of the community with a variety of interactions in which community members would require guidelines that can welcome these developments properly so that the purpose of life in accordance with the purpose of Sharia. The purpose of human life symmetry with the point of Sharia, namely *mashalihul'ibad* (benefit). *Maslahat* means spared from misery, hardship, evil.

Based on the above objectives Sharia, the Sharia as the Guiding become a necessity. Sharia should have covered all aspects of life. However, because the life of the growing demands for interpretation, assessment and excavation of the new law (*ijtihad*) is always required. For that purpose the mastery of sciences related to *ijtihad* becomes a necessity among *al-'ilmal-usulal-fiqh* and *qawa'idal-fiqhiyah*. If Usul Fiqh a methodology for generating the law of the source and detailed arguments, then *qawa'id fiqhiyah* (legal maxim) the general principles in establishing the laws that are special. The importance of these two sciences is described by scholars as follows.

21 من راعى الأصول كان حقيقاً بالوصول ومن راعى القواعد كان خليقاً بإدراك المقاصد

It means: "Whoever maintains Ushul, he was entitled to the intent and the people who maintain qawa'id is worth it achieve its goals."

Based on the above it can be concluded that exposure *muamalah* as the law derived from al-Quran and as-Sunnah serves to regulate the relationship of man to man in life and

²¹T.M. Hasbi Ash Shiddieqy, *Pengantar Hukum Islam II* (Jakarta: Penerbit Bulan Bintang, 1981), p. 97.

life. Disclosure to the problems *muamalah* according to the principles and character, move dynamically and flexibly with a view to the benefit of mankind and prevent evil.

Bai'al-wafa' is one form of buying and selling in a special form that emerged in the mid-fifth century Hijriyah in Central Asia (Bukhara and Balkh). Specificity of buying and selling was designed by the mujtahid of his time in order to avoid the practice of usury in lending and borrowing are often made public at the time. Where, most of the rich do not want to lend money if there is no reward they receive at the time of repayment. Similarly, among the borrower is notable to repay the debt due to the rewards should be given the same when they return the loan amount. While the rewards or additions that occurred in lending and borrowing agreement is something that is forbidden and including usury.

E. Conclusion

Akad/contract as a the originated by the *fuqaha'* is an engagement agreement in a transaction and be a determination for someone to do so, whether such a determination emerged from one party such as endowments, as well as those emerging from the two parties, such as buying and selling. Contractor engagement agreement can be interpreted as a commitment that is framed by the values of Sharia.

The fiqh theologian argue that any form of contract there should be objective and will have legal consequences, namely the achievement of the targets will be achieved from the outset of the contract implemented, such as the transfer of ownership from the seller to the buyer and the contract was binding on the parties concern, not be canceled unless caused things are justified Personality', as there are defects in the object of the contract or agreement was not appropriate and does not meet the terms and conditions of the contract requirement.

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